

**IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)**

2022/CCZ/0018

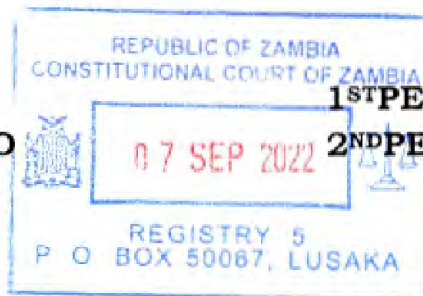
**IN THE MATTER OF: ARTICLES 72(4) OF THE
CONSTITUTION OF ZAMBIA CHAPTER
1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: THE ELECTORAL PROCESS ACT
NUMBER 35 OF 2016
AND**

**IN THE MATTER OF: THE DECISION OF THE ELECTORAL
COMMISSION OF ZAMBIA DATED 24TH
AUGUST, 2022**

BETWEEN:

**JOSEPH MALANJI
BOWMAN CHILOSHI LUSAMBO**



1STPETITIONER

2NDPETITIONER

AND

THE ATTORNEY GENERAL

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

**Coram: Munalula, DPC, Mulonda, Mulenga, Chisunka, Mulongoti
JCC, 6th September, 2022 and 7th September, 2022**

**For the Applicants: Mr. T. Ngulube with F.M. S. Chipompela
and Mrs. R. M. Nkonde of Messrs Tutwa S.
Ngulube and Co.**

**Mr. M. Zulu with Mr. J. Zimba and Mr. T.
Tembo of Messrs Makebi Zulu Advocates**

Mr. J. Chirwa of Messrs Ferd Jere and Co.

For the 1st Respondent: Mr. M. D. Kabesha SC, Attorney General with Mr. M. Muchende SC, Solicitor General, Mr. J. Simachela Chief State Advocate, Mr. M. Inambao Ass. Snr. State Advocate, Ms. N. Choongo Ass. Snr State Advocate and Mr. J. Chirwa State Advocate

For the 2nd Respondent: Ms. T. Phiri with Mr. M. Bwalya - In House Counsel

ABRIDGED JUDGMENT

Mulonda JC, delivered the Judgment of the Majority

Cases Referred to:

1. **Chisimba Kambwili v Attorney General 2019/CCZ/009**
2. **Law Association of Zambia v Attorney General 2022/CCZ/0051**
3. **Jonas Zimba v Attorney General 2022/CCZ/007**
4. **Kwibisa Ngwira v NAPSA 2019/CCZ/17**
5. **Isaac Mwanza v Attorney General 2021/CCZ/0045**
6. **Charles Mukanda v Attorney General 2021/CCZ/0019**

Legislation Referred to:

1. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
2. **Constitutional Court Rules S.I No. 37 of 2016**

INTRODUCTION

- [1] On 25th August, 2022, the 1st and 2nd Applicants filed into this Court an Originating Summons seeking the determination and interpretation of the following four questions:

- 1. Whether the decision of the Electoral Commission of Zambia dated the 24th August 2022 is illegal, null and void;**
- 2. Whether the Applicants are eligible to contest the 15th September, 2022 by-elections;**
- 3. Whether fresh nominations should be conducted to allow the Applicants participate in the by-elections.**
- 4. What is meant by causing a vacancy in the National Assembly as stated in Article 72 of the Constitution.**

- [2] The Originating Summons was accompanied by an affidavit sworn by the first Applicant which is on record and a list of authorities and skeleton arguments in support.

BACKGROUND

- [3] By a media statement dated 24th August, 2022 the Electoral Commission of Zambia (the 2nd Respondent) issued a communique to aspiring nominees in the upcoming by-election slated for 15th September, 2022 that they will not accept nominations from candidates who caused a vacancy in the National Assembly. The said nominations were slated for 25th August, 2022. Following this communication, the 1st and 2nd Applicants filed on 24th August, 2022 a petition impugning the statement by the 2nd Respondent as unconstitutional and illegal.
- [4] At the hearing on 6th September, 2022 the 1st and 2nd Applicants relied on their Heads of Argument filed on 2nd

September, 2022 in support of the Originating Summons brought pursuant to Order IV rule 2 of the Constitutional Court Rules. According to the 1st and 2nd Applicants, there moving this Court was necessitated by a media statement issued by the 2nd Respondent dated 24th August, 2022 to the effect that all persons whose seats were nullified would not be allowed to contest the Parliamentary by-elections scheduled for the 15th September, 2022 on account of our decisions and within the context of Article 72(4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution). That since the impugned decision of the 2nd Respondent contravened the Constitution this matter is a proper case for our consideration and determination.

- [5] The Applicants argue that the 2nd Respondent usurped this Court's mandate by overstepping its boundary when it interpreted Article 72(4) of the Constitution, contrary to our decision and guidance in the case of **Chishimba Kambwili v Attorney General**¹.
- [6] The 1st and 2nd Applicants through their Counsel went on to submit that the 2nd Respondent failed to distinguish between a nullification and a disqualification. That this Court in the case

of **LAZ v Attorney General**² distinguished the two and that the 2nd Respondent should have been guided by our decision in that matter. A question was posed in submissions as to whether a nullification amounted to a disqualification with an answer in the negative. It was argued that any disqualification ought to be specific through an Order of the Court disqualifying a person whose seat has been nullified.

The 1st Respondent's Arguments

- [7] In responding to the 1st and 2nd Applicants submissions, the learned Attorney General Mr. Kabesha, SC handled the first hinge of their response namely, the mode of commencement by way of Originating Summons while the Solicitor General handled the second hinge to do with the interpretation of Article 72(4). It was the Attorney General's submission that questions (1), (2) and (3) of the Originating Summons were not proper questions for an Originating Summons and as such this Court had no jurisdiction to entertain them in light of our recent decision in the case of **Jonas Zimba v Attorney General**³. It was the 1st Respondent's submission that only question (4) on what is meant by causing a vacancy in the National Assembly could pass the test for an Originating Summons question. It was

further submitted that mode of commencement of an action affects the jurisdiction of the Court and in this regard, we were reminded of our own decision in the case of **Kabisa Ngwira v NAPSA**⁴. The Attorney General concluded by stating that this was a matter suitable for expunging questions (1), (2) and (3) and only determine question (4).

- [8] In arguing the second limb of the 1st Respondent's case, Mr. Muchende SC, Solicitor General, submitted that the provisions of Article 72(4) of the Constitution were not to be treated in isolation of other provisions of the Constitution. He went on to argue that the true import of Article 72(2) was the debate in the **LAZ v Attorney General**² matter and this is where the debate is even in *casu*. He submitted that Article 72(2)(h) does not require the Constitutional Court to expressly state that a member has been disqualified but makes reference to the resultant effect of the decision of the Court in effectively rendering a member ineligible to continue holding office of Member of Parliament. The Solicitor General went on to state that Article 72(2)(b) and (h) is a metamorphosis by which a Member becomes ineligible as a result of the decision of the Court and not as a result of the express decree of the Court. It

was further submitted that the word disqualified as used in the **LAZ²** case was problematic and that the Court had an opportunity before it to revisit that decision. It was the 1st Respondent's contention that the meaning of the word disqualified has to change.

The 2nd Respondent's Arguments

- [9] The 2nd Respondent in augmenting its filed affidavit in opposition and skeleton arguments submitted that it had issue with the mode of commencement deployed by the 1st and 2nd Applicants as a perusal of the Originating Summons and accompanying affidavit point to questions challenging the nominations of the Applicants. It was the 2nd Respondent's submission that the mode of commencement is prescribed by statute and that with regard to challenging issues to do with nominations, Article 52(4) is instructive to the effect that such matters are to be commenced by election petition. This is further supported by Regulation 19(7) of the Electoral Process General Regulation SI No. 63 of 2016. It was Ms. Phiri's submission that the issues that have been raised in the Originating Summons should have come through an election petition.

ANALYSIS AND DECISION

- [10] In determining this matter, it is imperative that we begin by dealing with the 1st Respondent's challenge that the matter has been commenced by a wrong mode of commencement as this raises a jurisdiction issue. The 1st Respondent referred us to our previous decisions in **Isaac Mwanza v Attorney General**⁴ and **Charles Mukanda v Attorney General**⁵ where we dismissed matters on account of having been brought by a wrong mode of commencement.
- [11] In our recent decision in **Jonas Zimba v Attorney General**³ which has been referred to by both parties we distinguished the jurisdictional issues raised in the **Isaac Mwanza**⁴ case.
- [12] We found that not all the questions were contentious so as to breach the requirements for interpretation to occur under Article 128(1)(c). We dealt with questions that were properly before us on the merits and those that were not properly before us we did not consider.
- [13] In the case before us the Applicants have raised questions for determination and interpretation of Article 72 of the Constitution. They have also sought a remedy for us to declare as illegal, null and void the decision of the 2nd Respondent dated

24th August, 2022. In light of our decision in **Jonas Zimba v Attorney General**³, we will proceed to deal with only that question that is solely for the interpretation of the Constitution and will not consider matters, which in our view, are contentious and require to be brought by way of Petition. The questions raised in (1), (2) and (3) cannot be dealt with on their merits as they are not properly before us and are accordingly dismissed.

[14] Accordingly, we are of the view that question (4) is the only question that is properly before us as it solely seeks for interpretation of the term *causing a vacancy* in light of Article 72.

[15] Our starting point in interpreting Article 72 is considering the provisions of Article 70(1) and (2) which provides for who is eligible to contest as a Member of Parliament and who is disqualified from being elected as a member of Parliament.

[16] Article 72 provides for when the office of a Member of Parliament becomes vacant. Article 72(2) and (4) dealing with vacancy in the National Assembly 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) acts contrary to a prescribed code of conduct;

(d) resigns from the political party which sponsored the member for election to the National Assembly;

(e) is expelled from the political party which sponsored the member for election to the National Assembly;

(f) ceases to be a citizen;

(g) having been elected to the National Assembly, as an independent candidate, joins a political party;

(h) is disqualified as a result of a decision of the Constitutional Court; or

(i) dies.

(4) A person who causes a vacancy in the National Assembly due to the reasons specified under clause (2) (a), (b), (c), (d), (g) and (h) shall not, during the term of that Parliament—

(a) be eligible to contest an election; or

(b) hold public office.

- [17] It is evident that Article 72(2) outlines the instances in which the office of Member of Parliament becomes vacant. Article 72(4) places a caveat on who can be allowed to contest an election following a vacancy created in clause (2). Perusal of the Technical Committee Report on the Draft Constitution 2013 at page 385 reveals that the rationale of this provision was that Members of Parliament should not cross the floor in order to prevent unnecessary by-elections, wastage of resources and to strengthen democracy. It is silent on the issue

of a vacancy arising from a nullification of an election by the Courts.

[18] In our view this means that while such a candidate may be eligible in accordance with Article 70(1), if a person falls under the instances highlighted in Article 72(4) they will not qualify to contest the election.

[19] We had occasion to discuss the import of Article 72(2) regarding a vacancy in the National Assembly as a result of a nullification and a disqualification in light of Article 72(2)(h) in the case of **Law Association of Zambia v Attorney General**² wherein we interpreted the terms nullify and disqualify as follows:

The two words “nullify and “disqualify” cannot be used interchangeably as they mean different things. Black’s Law Dictionary defines nullify to mean “to make void: to render invalid”. It further defines disqualification to mean inter alia: “the act of making in eligible; the factor condition of being in eligible”. It further defines it as the “punishment that maybe imposed after an official has been impeached and removed from office, precluding the official from holding another office or enjoying any benefits of having held office”. Therefore, the disqualification which is covered under Article 72(2)(h) is distinct from the nullification of an election by the High Court following the determination of an election petition or subsequently by the Constitutional Court on appeal. Further, when Article 72(2)(h) is read together with Article 70(2) and Article 72(4) the implications on disqualification are materially different from nullification of an election.

In sum, Article 72(2)(h) provides for one instance where a vacancy occurs in the National Assembly through a disqualification of a Member of Parliament by a decision of this Court as distinct from a decision of this Court on appeal pursuant to Article 73(3) read with Article 128(1)(d) of the Constitution. It is evident from the foregoing that while

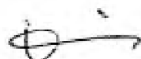
Article 72(2) of the Constitution provides for instances when the office of Member of Parliament becomes vacant, it does not provide for a vacancy triggered by the nullification of an election by the High Court where there is no appeal. It also does not provide for the occurrence of a vacancy in the National Assembly following a decision of this Court to up hold the nullification of an election by the High Court or by the reversal of a decision of the High Court not to nullify the election of a Member of Parliament, as the case maybe. The argument therefore that section 108 (4) addresses the lacuna is untenable in view of Articles 57, 73 (3) and 128 (1) (d) of the Constitution. (Emphasis added)

- [20] In that case, we recognized that there was a lacuna in Article 72(2) with respect to a vacancy occurring following the nullification of an election by the High Court where there is no appeal and nullification by the Constitutional Court where there is an appeal. We however made it clear and we restate our position that Article 72(2)(h) refers to a vacancy created in the National Assembly through a disqualification of a Member of Parliament by a decision of this Court and does not extend to a decision nullifying an election.
- [21] Article 72(4) does not apply to all the instances outlined in Article 72(2). It clearly specifies which situations cause a vacancy that would disqualify a person from contesting an election or holding public office and nullification of an election by either the High Court or the Constitutional Court is not one of them.

[22] In conclusion we find that Article 72(4) has specified which categories of persons cannot contest an election and these are specified in Article 72(2)(a), (b), (c), (d), (g) and (h). These persons do not include those members whose seats fell vacant by virtue of a nullification of an election.



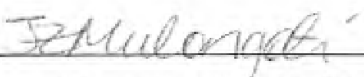
P. MULONDA
CONSTITUTIONAL COURT JUDGE



M. S. MULENGA
CONSTITUTIONAL COURT JUDGE



M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE



J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE

Munalula DPC dissenting:

Case referred to:

1. Law Association of Zambia v Attorney General 2021/CCZ/0051

[23] I wish to begin by agreeing with the Majority that the originating Summons before us is amenable to interpretation in relation to question 4. I shall therefore consider only the said question in my opinion. Question 4 reads:

What is meant by causing a vacancy in the National Assembly as stated in Article 72 of the Constitution.

[24] I begin my interpretation of Article 72 in the same way I approach any interpretation or determination proceedings; that is, anchored by the need to fulfil my mandate which is to protect the Constitution and the integrity of the institutions it creates.

[25] With this in mind, I have carefully read Article 72 in light of Articles 8, 267, 70 and 73. Relevant portions of Article 72 read:

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) acts contrary to a prescribed code of conduct; (d) resigns from the political party which sponsored the member for election to the National Assembly; (e) is expelled from the political party which sponsored the member for election to the National Assembly; (f) ceases to be a citizen; (g) having been elected to the National

Assembly, as an independent candidate, joins a political party; (h) is disqualified as a result of a decision of the Constitutional Court; or (i) dies.

(3) The office of a nominated Member of Parliament becomes vacant if the member— (a) resigns by notice, in writing, to the speaker; (b) is disqualified under Article 70; (c) acts contrary to a prescribed code of conduct; (d) ceases to be a citizen; (e) dies; or (f) has the member's nomination revoked by the President.

(4) A person who causes a vacancy in the National Assembly due to the reasons specified under clause (2) (a), (b), (c), (d), (g) and (h) shall not, during the term of that Parliament— (a) be eligible to contest an election; *(emphasis added)*

[26] I am of the firm view that the plain meaning of causing a vacancy as stated in Article 72 is that where a Member of Parliament causes a vacancy in circumstances in which he or she has been found to be at fault, he or she is prohibited during the term of that Parliament from contesting an election to fill the vacancy.

[26] I take judicial notice that this is not only the expressed intention of Parliament as shown by the plain language of Article 72 but also the expressed intention of the framers of the Constitution as shown in the Final Draft Report of the Technical Committee Drafting the Zambian Constitution (TCDZC).

[27] That being so, an interpretation which concludes that a person who caused a vacancy does not trigger the application of clause (4) neither protects the Constitution nor fulfils the will of the drafters

of the Constitution, who are the People of Zambia. Rather, it renders Article 72 redundant.

[28] I say so, because the question must be asked, if Article 72 in essence does not apply where a vacancy is created by a nullification then what does it apply to? If the answer is that it applies to nothing then an absurdity arises because a person who has caused a vacancy is at liberty to vie for the same seat which he or she has vacated dishonourably, despite the existence of the mandatory provisions of Article 72.

[29] This Court's decision in **Law Association of Zambia v Attorney General**¹ has been touted as the basis for contending that this Court has already held that Article 72 does not apply to a case of nullification following an election petition. In the said case, this Court came to the conclusion that there is a lacuna in Article 72 (2) (h) in relation to a nullification of an election. The Court was clear in paragraph 83 that Article 72 (2) (h) provides for only one instance where a vacancy occurs in the National Assembly.

[30] In my full judgment I will demonstrate further, how the distinction drawn between disqualification and nullification in Article 72 (2) (h), in the **Law Association of Zambia v Attorney**

General¹ Judgment, is not intended to undermine clause (4). Suffice to state for now that attempts to claim that paragraphs 82 to 84 of the said Judgment have pre-determined the present interpretation of Article 72 cannot hold water as there was no foundation laid in **Law Association of Zambia v Attorney General**¹ for such a determination to take place. The interpretation in *casu* is therefore an opportunity to clarify this as opposed to giving it life.

[31] I am fortified in so saying by other instances, laid out in Article 72 (2) (a), (b), (c), (d) and (g) that trigger clause (4) when a vacancy is created. The said instances, are adequate to fill the lacuna identified in **Law Association of Zambia v Attorney General**¹ and ensure that the purpose of Article 72 is realised. Therefore a lacuna in article 72 (2) (h) does not warrant this Court doing nothing, or indeed providing an interpretation which renders clause (4) redundant.

[32] I say so alive to the need to avoid determining any difficulty in constitutional provisions through a restrictive, legalistic mode of interpretation that undermines the true purpose of the constitutional provisions in issue. That is not how constitutional

provisions ought to be interpreted but in a broad and generous fashion.

[33] It is therefore my conclusion that the meaning of causing a vacancy in the National Assembly as stated by Article 72 is that it bars a person who has caused the vacancy in specified circumstances, from contesting an election to fill the vacancy.



M.M.MUNALULA JSD

DEPUTY PRESIDENT CONSTITUTIONAL COURT