IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 4/2019

BETWEEN:

HAKAINDE HICHILEMA — APPELLANT

AND

THE ATTORNEY GENERAL — RESPONDENT

CORAM: MAMBILIMA, CJ; MUSONDA, DCJ; WOOD, MALILA AND MUTUNA, JJS;
On 15TH July, 2020, 11th August, 2020 and 18th June, 2021.

For the Appellants	:	Mr. R. Simeza, SC; Mr. J. P. Sangwa, SC and Mr. L. Mwamba, all of Simeza Sangwa and Associates.
For the Respondent	:	Mr. L. Kalaluka S.C., Attorney General and Mr. F.K. Mwale, Principal State Advocate, both of Attorney General's Chambers.

J U D G M E N T

MAMBILIMA, CJ, delivered the Judgment of the Court.

CASES REFERRED TO:

1. SOUTH DAKOTA V NORTH CARDINA (1940) USA 268 5D448 at page 465
2. ATTORNEY GENERAL V DOW (1994) B BCLR
3. HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA V. THE ATTORNEY GENERAL SCZ APPEAL NO. 25 OF 2017 [UNREPORTED]
4. MBAZIMA AND OTHERS JOINT LIQUIDATORS OF ZIMCO LIMITED (IN LIQUIDATION) V VERA (2001) ZR 43

5. THE PEOPLE V. THE DIRECTOR OF PUBLIC PROSECUTIONS (EX-PARTE RAJAN MAHTANI (DR)), SCZ SELECTED JUDGMENT No. 21 OF 2019
6. MATCH CORPORATION LIMITED V. DEVELOPMENT BANK OF ZAMBIA AND THE ATTORNEY GENERAL (1999) Z.R. 13
7. RICHARD NSOFU MANDONA V TOTAL AVIATION AND EXPORT LIMITED AND 3 OTHERS, SCZ APPEAL No. 82/2009
8. MURRAY AND ROBERT CONSTRUCTION LIMITED AND KADDOURA V LUSAKA PREMIER HEALTH LIMITED AND INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED, APPEAL NO. 141/2016
9. BP ZAMBIA PLC V INTERLAND MOTORS LIMITED (2001) ZR 37
10. LIUWA V ATTORNEY GENERAL, SCZ JUDGMENT NO. 38 OF 2014
11. ANDERSON KAMBELA MAZOKA, LT GENERAL CHRISTON SIFAPI TEMBO, GODFREY KENNETH MIYANDA V. LEVY PATRICK MWANAWASA, THE ELECTORAL COMMISSION OF ZAMBIA, THE ATTORNEY GENERA (2005)Z.R. 138 (S.C.) at page 147
12. ATTORNEY GENERAL AND MOVEMENT FOR MULTI-PARTY DEMOCRACY V LEWANIKA AND 4 OTHERS (1993-19940) ZR 164
13. MINISTER OF HOME AFFAIRS V FISHER AND ANOTHER (1979) 3 ALL ER 21 at page 25
14. HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA V EDGAR CHAGWA LUNGU, INONGE WINA, ELECTORAL COMMISSION OF ZAMBIA AND ATTORNEY GENERAL, 2016/CC/0031
15. NOEL SIAMOONDO AND OTHERS V. THE ELECTORAL COMMISSION OF ZAMBIA, 2016/CC/0009
16. RE: CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA (1996) ZACC 26
17. ELIAS KUNDIONA V. THE PEOPLE (1993-1994) Z.R. 59
18. THE SOUTH INDIA CORPORATION (P) LTD V. THE SECRETARY, BOARD OF REVENUE, TRIVANDRUM AND ANOTHER (1964) AIR 207
19. CHANDAVARKAR S.R. RAO V. ASHALATA S. GURAM (1986) 4 SCC 447
20. WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED (1982) ZR 172
21. MARSH V CHAMBERS 463 MS at 796

<u>LEGISLATION REFERRED TO:</u>

i) THE CONSTITUTION OF ZAMBIA, AS AMENDED BY ACT NO. 2 OF 2016.
ii) THE COURT OF APPEAL ACT, NO. 7 OF 2016.
iii) THE RULES OF THE SUPREME COURT OF ENGLAND (WHITE BOOK), 1999 EDITION

WORKS REFERRED TO:

(a) BURROWS, ROLAND, K.C., INTERPRETATION OF DOCUMENTS (1943) LONDON: BUTTERWORTH CO. (PUBLISHER) LTD Page 90
(b) BLACK'S LAW DICTIONARY
(c) N.S. BINDRA'S INTERPRETATION OF STATUS, 9TH EDITION BY MARKANDEY KATJU AND S.K. KAUSHIK pages 25 and 1168
(d) THEORIS OF CONSTITUTIONAL INTERPRETATION page 17: htts digital common law. Yale eds

1.0 INTRODUCTION

1.1 This is an appeal from a Ruling of the High Court, delivered by Chitabo J, on 23rd November, 2018 summarily dismissing the Appellant's petition following preliminary issues that were raised by the Respondent.

2.0 BACKGROUND

2.1 The facts preceding this appeal are as follows: On 6th September, 2016 the Appellant and one, Geoffrey Bwalya Mwamba, who was the second Appellant but has since been removed from this Appeal, filed a petition in the High Court against the Respondent. For convenience only, we shall, in this Judgment, refer to the two as the Appellants. In the petition before the High Court filed on 6th September, 2016 the Appellants claimed that the Constitutional Court violated their right to a fair hearing as guaranteed by Article 18(9) of the

CONSTITUTION[1]. The said Article 18 (9) of the **CONSTITUTION** stipulates that:

> **"Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

2.2 Through their petition before the High Court, the Appellants sought various interim and substantive reliefs. As against the Constitutional Court, (which was the seventh Respondent in the lower Court) the Appellants prayed for interim relief asking the High Court to issue a Conservatory Order staying the decision of that Court, delivered on 5th September, 2016 pending the hearing and determination of the petition.

They also sought another Conservatory Order to prevent the Chief Justice and the Deputy Chief Justice or any person or authority whatsoever, from swearing the First and Second Respondents into the offices of President and Vice-President of Zambia respectively, pursuant to the provisions of Article 105 of the Constitution of Zambia, until the determination of their Petition.

2.3 The Appellants sought the following substantive remedies:

> **(a) An Order that Sections 101(2) and 103(2) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, to the extent to which they have been construed by the Seventh Respondent to literally mean that the Seventh Respondent "shall hear an election petition relating to the President-elect within fourteen (14) days of the filing of the Petition" are ultra-vires Article 18 (9) of the Constitution hence null and void.**
>
> **(b) An Order that the decision of the Seventh Respondent to the effect that the Petitioners had until 24:00 hours on 2nd September 2016, to prosecute their petition before the Seventh Respondent under Cause No. 2016/CC/31 is and was ultra-vires Article 18 (9) of the Constitution of Zambia hence null and void.**
>
> **(c) AN Order that the Ruling of the Seventh Respondent made on 5th September 2016, dismissing the Petitioners' Petition under Cause No. 2016/CC/31 for want of prosecution is ultra-vires Article 18 (9) of the Constitution of Zambia therefore null and void.**
>
> **(d) An Order directing the Seventh Respondent to hear and determine the Petitioners' Petition independently, fairly and within a reasonable time in line with the provisions of Article 18 (9) of the Constitution of Zambia.**
>
> **(e) An Order that the Respondents herein bear the costs of and occasioned in this Petition."**

2.4 It is common cause that the Appellants' petition in the High Court arose from the dismissal of their election petition by the Constitutional Court, in which they had contested the election of Dr. Edgar Chagwa Lungu as President of the Republic of Zambia, following the presidential election which took place on 11th August, 2016.

2.5 In that election, the Appellant had contested as a presidential candidate, sponsored by the United Party for National

Development (UPND), while Geoffrey Bwalya Mwamba was his running mate. The outcome of the 11th August, 2016 election was disputed by the Appellants, prompting them to move the Constitutional Court by way of a Petition, challenging the outcome of the said elections.

2.6 The Petition before the Constitutional Court was not heard within the period of 14 days as prescribed under the **CONSTITUTION**. On 5th September, 2016, the Constitutional Court delivered a ruling, dismissing the Appellants' petition, for want of prosecution. The Court's reason for dismissing the petition was simply that the Appellants had failed to prosecute their petition within 14 days, as required by Article 101(5) of the **CONSTITUTION**. The said Article 101 (5) of the **CONSTITUTION** provides as follows:

> **"The Constitutional Court shall hear an election petition filed in accordance with clause (4) within fourteen days of the filing of the petition."**

2.6 The Constitutional Court's decision to dismiss the Appellants' petition is what prompted the Appellants to move the High Court by petition under Article 28 of the **CONSTITUTION**. They claimed that their right to a fair hearing within a

reasonable time, as guaranteed under Article 18 (9) of the **CONSTITUTION,** had been violated by the Constitutional Court.

3.0 PETITION BEFORE THE HIGH COURT

3.1 The Appellants' petition which was launched in the High Court on 6th September, 2016 detailed what transpired during the hearing of the presidential election petition in the Constitutional Court. But before the Petition could be heard and determined on merit, the Attorney General (who was the fourth Respondent in the Court below), raised preliminary issues.

4.0 RESPONDENT'S PRELIMINARY ISSUES AGAINST THE PETITION

4.1 Through a Notice of Motion filed on 7th December, 2016 the Respondent raised the following preliminary issues:-

(1) In view of the original and final jurisdiction of the Constitutional Court in interpreting the Constitution and dealing with the election of President and Vice-President, whether the High Court can interpret otherwise than in accordance with the interpretation of the Constitutional Court in respect of the time frame within which the Presidential election petition may be heard;

(2) Whether the determination of the Presidential election petition is a civil right so as to bring it within the scope of Article 18(9) of the Constitution; and

(3) Whether the High Court can inquire into a question of fair hearing when the Presidential election in issue herein was never heard on account of the negligence and inertia of the Appellants as can be seen from the majority judgment and the two dissenting judgments.

4.2 The Appellants filed an affidavit in opposition to the preliminary issues raised by the Attorney-General. In their affidavit in opposition, the Appellants insisted that the proceedings before the Constitutional Court were marred with procedural irregularities and inconsistencies on the part of the Court. That this rendered the entire proceedings to be in violation of their right to a fair hearing as enshrined in the Bill of Rights contained in Part III of the **CONSTITUTION**. Among the said irregularities cited, was the manner in which the Constitutional Court allegedly reversed its own orders to the detriment of the Appellants.

4.3 The Appellants explained that during the proceedings in the Constitutional Court on 2nd September, 2016 the parties exercised their right to be heard on several preliminary applications. That in one such application, the Appellants sought an Order from the Court, to refer to the High Court, the question as to ***whether its proceedings were in violation of***

their rights. The Court refused that application and thereafter, the Appellants sought guidance on the question as to ***whether the timeframe given for hearing the petition was in violation of Article 18(9) of the CONSTITUTION***.

4.4 The Appellants stated that both applications were dismissed by the Court. That in refusing the said applications, the Constitutional Court ruled that the jurisdiction to deal with issues to do with the Bill of Rights, including Article 18(9) of the **CONSTITUTION**, lies with the High Court.

4.5 With regard to the timeframe within which the parties were to present their respective cases, the Appellants stated that since the Constitutional Court had reversed its own rulings on numerous occasions in an unprecedented fashion, and contrary to its duty to act judicially, the Appellants were not afforded a fair hearing. That litigation in this jurisdiction is a court-driven process, and advocates are duty-bound to conduct cases in accordance with the directions and rulings of the court. That, consequently, where the Court gives contradicting directions, blame should not be laid on the Advocates.

5. SUBMISSION BY THE APPELLANTS AND THE RESPONDENT ON THE PRELIMINARY ISSUES

5.1 In his submissions in support of the first ground of the preliminary issue raised in the lower Court, the Solicitor General submitted that the jurisdiction to interpret the Constitution is vested in the Constitutional Court and the only jurisdiction reserved for the High Court is with regard to the enforcement of the Bill of Rights.

5.2 He argued that the first substantive relief sought by the Appellants was essentially inviting the High Court to interpret Articles 101 (5) and 103 (2) of the **CONSTITUTION**, which jurisdiction can only be exercised by the Constitutional Court. He argued further that since the Constitutional Court had dismissed the Appellant's petition, the High Court had no jurisdiction to entertain a matter which the Constitutional Court had already settled. That by inviting the High Court to grant the first substantive relief, the Appellants were on a path of forum shopping and abusing the court process, as they sought to re-litigate issues which had already been determined.

5.3 On the second preliminary issue, the learned Solicitor General submitted that this matter did not emanate from the determination of the existence of any civil right or obligation so as to bring it within the scope of Article 18(9) of the **CONSTITUTION**, but rather, from the Ruling of the Constitutional Court dismissing the Appellants' election petition. In this vein, he argued that there can never be a constitutional provision which abrogates another constitutional provision and discounted assertions by the Appellants that Article 18(9) of the **CONSTITUTION** is superior to the other provisions of the **CONSTITUTION**.

5.4 With respect to the third preliminary issue, the learned Solicitor General contended that the Appellants could not argue that they were not accorded a fair hearing when the circumstances that led to the expiry of the prescribed time were self-inflicted. That the High Court was not privy to those circumstances and was therefore, not well-placed to determine the fairness of the proceedings in the Constitutional Court.

5.5 In his submissions opposing the first ground of the preliminary issue, Mr. Sangwa, SC, on behalf of the

Appellants, submitted that the High Court has power to determine if the Constitutional Court acted *ultra vires* the provisions of Article 18(9) of the **CONSTITUTION**. He argued that the Appellants were not asking to re-open the case in the Constitutional Court as that Court was *functus officio* and its decision was a *fait accompli*. While stating that the High Court had no jurisdiction to re-hear the matter that was before the Constitutional Court, State Counsel contended that the Appellants' petition was hinged on the Bill of Rights; in that they sought a declaration from the High Court as to ***whether the Constitutional Court had treated them fairly***. According to Counsel, Article 128 was made subject to Article 28 and by this fact, Article 28 was superior to Article 128.

5.6 In response to the second preliminary issue, Mr. Sangwa, SC, argued that the issue before the High Court was not the determination of a presidential election petition, which is a civil right, but rather, the right of the President-elect to ascend to the office of the President. It was his contention that the Appellants' rights needed to be vindicated by being afforded a fair hearing within a reasonable time.

5.7 Mr. Sangwa, SC, maintained that the Bill of Rights is superior to other provisions of the **CONSTITUTION**. To buttress this position, he relied on Article 267 of the **CONSTITUTION**, which requires the Constitution to be interpreted in accordance with the Bill of Rights. In this vein, he argued that the interpretation of other Constitutional provisions should, therefore, be in harmony with the Bill of Rights.

6.0 DECISION OF THE HIGH COURT

6.1 After considering the preliminary issues raised and the submissions of the parties, the High Court allowed the Respondent's preliminary issues and dismissed the petition. The Judge held that he 'had no cloak of authority to substitute the prescribed period of 14 days' time frame within which a presidential election petition had to be heard and determined. He noted that in this case, the Constitutional Court had already made a determination and dismissed the petition for want of prosecution, after finding that the 14 days set for the determination of the petition under Article 101 (5) of the **CONSTITUTION** had lapsed.

6.2 The Judge opined that some of the remedies sought by the Appellants were akin to judicial review. He was of the view that the remedy of judicial review cannot lie against a superior court; that this remedy only lies against inferior courts, tribunals, quasi or semi-quasi bodies or persons exercising public functions, or such bodies as are legally amenable to the judicial review process.

6.3 The learned Judge also accepted the submission of the Solicitor General that the petition before him amounted to forum shopping and an abuse of the court process, as it sought to re-litigate what had already been determined by the Constitutional Court. Relying on the doctrine of *stare decisis*, the Judge held that he was bound by the decision of the Constitutional Court. He was of the view that by their petition, the Appellants were abusing the court process and launching a multiplicity of actions. He, therefore, allowed the first preliminary issue.

6.4 The Court also allowed the second preliminary issue. The Judge, however, disagreed with the Respondent that the petition before it did not emanate from the determination of

the existence of a civil right or obligation. The Judge took the view that the right to challenge a presidential election petition result, or to verify whether a president-elect was duly elected is a civil and fundamental right, enshrined in the **CONSTITUTION**.

6.5 According to the Judge, the main issue in this case, was whether *"the Constitutional Court, having dismissed the Appellants' petition, they could 'now cross over to' launch a petition in the High Court to address their dissatisfaction with the outcome of the election petition."* He stated that the period of 14 days within which a presidential election petition should be determined is not prescribed by **'mere rules, but by the Constitution itself in Articles 101 (5) and 103 (3)',** and the Constitutional Court had already pronounced itself on the compliance by the Appellants with the said provisions. According to the Judge, the Appellants knew or ought to have known the electoral and constitutional impositions regarding the timeframes prior to, during and after the elections.

6.7 The learned Judge also dismissed the Appellants' submissions that Article **[18(9)]** of the **CONSTITUTION** is superior to the

other provisions of the **CONSTITUTION**. He took the view that the Constitution must be read wholistically to ensure that no singular provision swallows or vanquishes other provisions. To this effect, he endorsed and relied on the sentiments of Justice White, of the Supreme Court of the United States of America in the case of **SOUTH DAKOTA V NORTH CAROLINA**[1] when he said:-

> **"I take it an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all others and not to be considered alone, but that all provisions bearing upon a particular subject are to be brought into view and to be interpreted as to effect the great purpose of the instrument."**

He also visited the Botswana case of **ATTORNEY-GENERAL V DOW**[2] in which the Court observed that:

> **"The very nature of a constitution requires that a broad and general approach be adopted in the interpretation of its provision that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution."**

6.8 Turning to the third preliminary issue, the High Court reiterated that it had no jurisdiction to subject a superior Court to a process of judicial review. It held that the Constitutional Court applied the law on the period in which a presidential election petition ought to be determined, and

interpreted Articles 101(5) and 103(3) in line with its mandate to interpret the **CONSTITUTION**. That although the High Court is vested with power to interpret the Bill of Rights, there was nothing to interpret as the Constitutional Court already interpreted the provisions relating to the period in which a presidential election petition must be determined.

6.9 The Court ultimately decided that the reliefs sought by the Appellants were beyond the jurisdiction of the High Court; that the High Court cannot determine the fairness of the proceedings before the Constitutional Court; or the period for concluding a presidential election petition; and, also that it cannot give directions to a superior court.

6.10 The lower Court went further and held that courts will not make declarations which are academic and incapable of being complied with. The Judge was of the view that any pronouncements which the Court might make in this case would be academic in that they will not affect the validity of the Constitutional Court's judgment of 5th September, 2016. He accordingly, upheld the third preliminary issue.

6.11 Having upheld all the preliminary issues raised by the Attorney-General, the High Court dismissed the Appellants' petition.

7.0 THE APPEAL BEFORE THIS COURT

7.1 Dissatisfied with the Ruling of the Court below, the Appellants have now escalated the matter to this Court, advancing two grounds of appeal formulated as follows:

1. **The Court below misdirected itself on points of law by deciding all the issues raised by the Respondent in the Notice of Motion dated 7th December 2016, in favour of the Respondent; and**

2. **The Court below erred in law in its Ruling of 23rd November 2018, by going beyond the scope of the issues raised by the Respondent in the Notice of Motion to raise preliminary issues.**

7.2 Before the appeal could be heard, the Respondent raised a preliminary issue; which is that, **'the whole appeal should fail for being before the wrong forum.'**

8.0 THE RESPONDENT'S PRELIMINARY ISSUE

8.1 In support of the preliminary issue, the Attorney General, Mr. Kalaluka, SC, filed written heads of argument which he augmented with oral submissions. In his view, this appeal is before a wrong forum and hence, this Court lacks jurisdiction to hear it. He argued that the appeal, which is from the

decision of the High Court dismissing the Appellant's petition on preliminary issues, ought to have been brought before the Court of Appeal. To support his contention, the Attorney-General first invoked the provisions of Article 131 (1) (a) of the **CONSTITUTION** and Section 4 (1) of the **COURT OF APPEAL ACT**[ii].

8.2 Article 131 (1) (a) of the **CONSTITUTION** provides as follows:

> **"131 (1) The Court of Appeal has jurisdiction to hear appeals from –**
> **(a) the High Court; ..." and,**

Section 4 (1) of the **COURT OF APPEAL ACT** states that:

> **"(1) The Court has jurisdiction to hear appeals from judgments of –**
> **(a) the High Court; and**
> **(b) a quasi-judicial body, except a local government elections tribunal."**

8.3 The learned Attorney General argued that in determining the application to raise preliminary issues which was filed before it, the High Court did not delve into the merits of the petition which had been filed by the Appellants pursuant to Article 28 of the **CONSTITUTION**. He stated that, that application merely raised preliminary issues under Order 14A Rule 1 and Order 33 Rule 33 of the **WHITE BOOK**[iii]. That this appeal, is

an attempt to challenge the decision of the Court below to uphold the preliminary issues and dismiss the petition at a preliminary stage. He spiritedly argued that an appeal in such circumstances, ought to lie to the Court of Appeal.

8.4 Secondly, and most importantly, the Attorney General relied on a precedent, which is a decision of this Court, embodied in an Order made on 7th August, 2018 at Kabwe (to which we shall sometimes refer to as the Kabwe Order), in the case of **HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA V. THE ATTORNEY GENERAL[3].** The Order states as follows:

> **"WHEREAS By virtue of the creation of the Court of Appeal vide the Constitution amendment Act No. 2 of 2016 all appeals against decisions made by the High Court lie to the Court of Appeal, save for substantive decisions made on questions regarding the rights of individuals under Articles 13 to 28 of the Constitution inclusive;**
> **WHEREAS the appellants herein commenced a petition in the High Court pursuant to Articles 18 and 28 of the Constitution and the said petition is still pending before that Court; and**
> **WHEREAS the appellants have appealed to this Court against an interlocutory decision of the High Court which does not involve the final determination of their petition.**
> **NOW THEREFORE this Court lacks the jurisdiction to entertain this appeal as the same ought to have been filed in the Court of Appeal.**
> **CONSEQUENTLY, this appeal stands dismissed, with costs to the respondent."**

8.5 Mr. Kalaluka, SC., explained that the Kabwe Order was granted after he had raised a similar preliminary issue as the one before this Court in the case of **HAKAINDE HICHILEMA, GEOFREY MWAMBA V ATTORNEY GENERAL**[3]. He posited that the cardinal issue, when determining whether an appeal lies to the Supreme Court or the Court of Appeal, is the effect of a particular order made by the High Court.

8.6 Relying on the Kabwe Order, Mr. Kalaluka, SC, contended that since the Ruling of the lower Court was not on the substantive questions regarding the rights of the Appellants under Part III of the Constitution, this Court lacks jurisdiction and an appeal from such a decision ought to lie to the Court of Appeal. On the issue of lack of jurisdiction, the Attorney-General found solace in our decision in the case of **MBAZIMA AND OTHERS (JOINT LIQUIDATORS OF ZIMCO LIMITED) (IN LIQUIDATION) V VERA**[4]**.** This was a matter involving land commenced in the Industrial Relations Court. With regard to the issue of the jurisdiction of the

Industrial Relations Court to adjudicate on land matters, we said:

> **"Quite clearly Section 85 (2) and 108 of the Industrial and Labour Relations Act, show that the jurisdiction of the Industrial Relations Court is limited to settling of labour disputes falling under the Act. It is an alternative forum to the High Court only in cases of labour disputes. The IRC has limited but exclusive jurisdiction in such labour disputes as provided in Section 85 (2) and 108 of the Industrial and Labour Relations Act, Cap 269. In our view, in those proceedings before the Industrial Relations Court and even the present proceedings before us, the respondents were and are impugning the certificate of title issued to Miss Charity Kowa... The IRC has no jurisdiction in conveyancing matters. Such issues can only be dealt with by the High Court."**

8.7 State Counsel then echoed his earlier submission that the only time that an appeal will lie to the Supreme Court from a decision of the High Court under Article 28 of the **CONSTITUTION,** is when the High Court has made a determination on the substantive rights of the parties in the action. He argued that in line with the Kabwe Order, an interlocutory appeal, as is the case herein, should lie to the Court of Appeal. Taken in its proper context, the Attorney General's argument is that any interlocutory order made by the High Court under Article 28 of the Constitution is appealable to the Court of Appeal and not this Court.

8.8 To further support his contention, Mr. Kalaluka, SC, referred us to the actual provisions of Article 28(1) and 2(b) of the **CONSTITUTION**. They state that:

> **"28 (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-**
>
> **(a) hear and determine any such application;**
>
> **(b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2); and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.**
>
> **2. (a) .....**
>
> **(b) Any person aggrieved by any determination of the High Court under this Article may appeal there from to the Supreme Court."**

8.9 He argued that the import of the words **'any determination'** used in Article 28 (2) (b) of the Constitution relate to a substantive determination. That the directions, orders or writs referred in paragraph (1)(b) of Article 28 are for the purposes of enforcing or securing the enforcement of the rights under the Bill of Rights and that it is only after a substantive determination of the same by the High Court under Article 28

of the **CONSTITUTION**, that an appeal will lie to the Supreme Court.

8.10 To sum it all, Mr. Kalaluka, SC, reiterated that any orders issued by the High Court which have the effect of securing the enforcement of rights, or even where the High Court finds that there has not been any violations of such rights, such decisions are appealable to the Supreme Court; while those decisions that are interlocutory and have no such effect, on the rights being asserted are appealable to the Court of Appeal. He argued that the proviso to Article 28 (2) (b) of the Constitution supports his contention that where there has been no substantive determination of the rights, an appeal shall not lie to Supreme Court. The said proviso states that:-

> **"provided that an appeal shall not lie from a determination of the High Court dismissing an application on the ground that it is frivolous and vexatious."**

9. THE APPELLANTS' RESPONSE TO THE PRELIMINARY ISSUE

9.1 In opposing the preliminary issue, Mr. Sangwa, SC, submitted that the Constitution is one document and as such, all its provisions ought to be interpreted together. He submitted that the Bill of Rights is entrenched and it was not amended by Act

No. 2 of 2016 which amended the **CONSTITUTION**. That, that being the case, the manner in which matters were determined prior to the amendment of the **CONSTITUTION** in 2016 ought to continue, as the **CONSTITUTION** can only be amended expressly and not by implication.

9.2 Counsel added that the jurisdiction of the Supreme Court under Article 28 of the **CONSTITUTION** cannot be conferred on the Court of Appeal, as that court (Court of Appeal) was not in the contemplation of Article 28, since the Bill of Rights remained unaffected by the 2016 amendments to the **CONSTITUTION**. He argued, consequently, that as long as the High Court is moved pursuant to Article 28 of the **CONSTITUTION**, there are only two Courts in contemplation, namely the High Court and the Supreme Court.

9.3 Mr. Sangwa, SC, further submitted that the Kabwe Order, granted by this Court on which the Attorney-General has relied is wrong at law. He stated that we did not give any reasons for our decision; let alone allow the parties to make submissions before making the Order. He implored us to revisit it.

9.4 It was Counsel's further contention that even when the High Court dismisses a petition under Article 28(2)(b) of the Constitution for being frivolous and vexatious, an appeal will still lie to the Supreme Court on that point, despite the High Court not having delved into the merits of the case. He pointed out that Article 28 (2) (b) of the **CONSTITUTION** does not contain any qualifier, as to whether an issue being determined is substantive or interlocutory. It just provides that a person aggrieved with any determination of the High Court may appeal to the Supreme Court.

10. ATTORNEY GENERAL'S RESPONSE TO THE APPELLANT'S SUBMISSIONS

10.1 In reply to the issues raised by Mr, Sangwa, SC, the Learned Attorney General argued that provisions of the Constitution ought to be read with the necessary modifications, to understand the context in which they apply. To support this submission, he relied on Article 267(1) and (3)(d) of the **CONSTITUTION**. Article 267(1)of the Constitution requires that the Constitution should be interpreted in accordance with the Bill of Rights, and in a manner that, among others,

promotes its purposes, values and principles. According to the Attorney-General, under this provision, the Constitution can be amended by implication. Article 267(3)(d), to which the Attorney-General also referred, states as follows:-

> **267 (3) A provision of this Constitution shall be construed according to the doctrine that the law is continuously in force and accordingly—**
>
> **....**
>
> **(d) a reference in a provision applying that provision to another provision shall be read with any modification necessary to make it applicable in the circumstances and any reference to the modified provision shall apply as modified.**

10.2 Mr. Kalaluka, SC, submitted that Article 267(3)(d) applies to the whole **CONSTITUTION**; including the entrenched provisions. He argued that the entrenchment of the provisions in the Bill of Rights only affects the manner in which they can be amended. He contended that since appeals from substantive determinations by the High Court to the Supreme Court are expressly provided for under Article 28 of the **CONSTITUTION**, it follows that the absence of an express provision on interlocutory appeals means that such appeals may properly lie to the Court of Appeal. He anchored his

submission on Article 267(3)(d) of the **CONSTITUTION** (reproduced in the preceding paragraph).

10.3 Mr. Kalaluka, SC, concluded by maintaining that under Article 28 of the constitution, appeals from decisions on substantive rights of the parties must lie to the Supreme Court, while interlocutory appeals lie to the Court of Appeal, as provided for under Article131 of the **CONSTITUTION**. He stated that since the Appellants' grounds of appeal show that they are not aggrieved by any substantive determination by the High Court; their appeal, in the circumstances, ought to have been lodged in the Court of Appeal.

11. DECISION OF THIS COURT ON THE PRELIINARY ISSUE

11.1 We have considered the preliminary issue raised by the Respondent and the attendant arguments in support and in opposition to the preliminary issue. The kernel of the preliminary issue raised by the Respondent is that this Court does not have the requisite jurisdiction to entertain this appeal because it emanates from the determination of the High Court on an interlocutory application made before it. The Attorney

General has argued that on that premise, this appeal ought to lie to the Court of Appeal. To support this position, the learned Attorney General principally relied on the Kabwe Order which we made in the case of **HAKAINDE HICHILEMA, GEOFFREY BWALYA MWAMBA V THE ATTORNEY GENERAL[3].** He forcefully argued that we do not have the jurisdiction to hear and determine this appeal.

11.2 The Attorney-General, in his arguments, also referred to Article 267 of the **CONSTITUTION.** This is the Article which, among others, calls for the interpretation of the Constitution in accordance with the Bill of Rights "and in a manner that-

(a) promotes its purposes, values and principles;
(b) permits the development of the law; and
(c) contributes to good governance"

In his view, the manner in which this Article is worded allows the amendment of the Constitution by implication and the fact that the Bill of Rights is entrenched only affects the manner and procedure of its amendment.

11.3 On the other hand, the learned Counsel for the Appellant has vehemently argued that an appeal from the High Court on any determination, whether procedural or substantive must lie to

the Supreme Court. To this effect, State Counsel Sangwa opposed the preliminary issue raised by the Respondent, arguing in the main, that the Bill of Rights has remained unchanged as it was not amended in the 2016 constitutional amendments which created the Constitutional Court and the Court of Appeal. He contended, consequently, that the Constitution, in its current form does not have the Court of Appeal or the Constitutional Court in its contemplation insofar as determination of matters arising under the Bill of Rights are concerned.

11.4 In Counsel's view, it does not matter, under Article 28 of the Constitution, whether an appeal arises from an interlocutory decision or a final determination of the High Court because all appeals lie to the Supreme Court. According to Counsel, holding otherwise will mean that the Bill of Rights has been 'affected' and essentially amended by the 2016 constitutional amendment.

11.5 On the suggestion by the Attorney-General, that the bill of rights could be amended by implication in view of the provisions of Article 267 of the Constitution, Mr. Sangwa, SC.,

argued that any amendment to the Constitution, particularly the Bill of Rights must be express. Counsel thus urged us to revisit the Order which we made in Kabwe, in the case of **HAKAINDE HICHILEMA, GEOFFREY BWALYA MWAMBA V THE ATTORNEY GENERAL**[3] as it allegedly represents bad law.

11.6 We have considered the ingenious arguments by learned State Counsel on the contrasting sides. The cardinal issue raised by the preliminary issue is whether appeals from interlocutory/procedural determinations of the High Court under Article 28 of the **CONSTITUTION** lie to this Court or the Court of Appeal. It also raises the issue as to whether the Bill of Rights could be said to have been impliedly amended or affected by the 2016 constitutional amendments through Article 267.

11.7 We are alive to the fact that the marginal notes beside Article 28 of the **CONSTITUTION** state that the Article deals with ***enforcement of protective provisions***. Mr. Kalaluka, SC, has vehemently argued that under this Article, the role of the High Court is merely to enforce or secure the enforcement of the Bill

of Rights. Be that a it may, our view, regardless of what the marginal notes may state, is that the true content of any enactment should be deciphered from the actual words used in the text of the provision. The learned author, Roland Burrows in his book, **INTERPRETATION OF DOCUMENTS**[a], shares this view. With regard to the status of marginal notes, he stated that:

> **They are thus on a different footing to Marginal Notes which are not regarded as parts of the statute, but where, as in many local Acts and in some general Acts, a section is by the statute itself identified by reference to the marginal note, it is impossible to ignore it. Even then too much importance must not be attributed to a marginal note.**

11.8 We are of the view that Article 28 of the **CONSTITUTION** is self-explanatory. After setting out the power of the Court under Article 28 (1) (a) and (b), it goes further to set out what else the High Court can do when hearing and determining an application regarding any violation or threatened violation of a person's rights or when determining a question on referral. This is embodied in the following words of Article 28 (1) (b): The Court:-

> "...**which may, make such order, issue such writs and give such directions as it may consider appropriate <u>for the purpose</u>**

> **of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.** (Underlining ours)

11.9 Such 'orders' or 'directions' could emanate from interlocutory applications; more so that the Court can also deal with the 'threatened violations' of a person's right in which case the right may need to be guarded. From the words used, it is not farfetched to conclude that the provision also bestows power or jurisdiction on the High Court to make further orders and or give directions during the course of proceedings.

11.10 The learned authors of **BLACK'S LAW DICTIONARY** define the term "enforce" as "**to give force or effect to a law**" while enforcement is defined as the "**the act or process of compelling compliance with a law, mandate, command, decree or agreement**."

11.11 It is our considered view, therefore, that in the process of giving effect to the rights of a person under Article 28 of the Constitution, the High Court has the power to make any orders or directions whether or not they are substantive in nature. The appeal process following such a determination is

provided for under Article 28 (2) (b) of the **CONSTITUTION** which stipulates that:

> **Any person aggrieved by <u>any determination of the High Court under this Article</u> may appeal therefrom to the Supreme Court: ...** (emphasis ours)

11.12 This provision uses plain language. It is not ambiguous. Recourse to the Supreme Court on appeal is the right of any person '..aggrieved by <u>any determination</u> of the High Court'. There is no qualification as to the nature of the 'determination' against which a person may appeal, be it interlocutory or substantive.

11.13 We are alive to the fact that with the advent of the 2016 amended Constitution, this Court only has appellate jurisdiction, under Article 125(2)(a) of the **CONSTITUTION,** to hear appeals from the decisions of the Court of Appeal. While under Article 28 (in the Bill of Rights), it can also hear appeals from the High Court. However, in the case of **HAKAINDE HICHILEMA, GEOFFREY BWALYA MWAMBA V. THE ATTORNEY GENERAL**[1] we granted the Kabwe Order, whose effect was that appeals arising from interlocutory matters and not touching on substantive

issues under Article 28 of the Constitution should lie to the Court of Appeal.

11.14 In terms of Article 125(3) of the Constitution, this Court is bound by its decisions. It may, albeit rarely only reverse them in the interest of justice and development of jurisprudence. The said Article 125(3) states as follows:

> **The Supreme Court is bound by its decisions, except in the interest of justice and development of jurisprudence.**

11.15 We have previously pronounced ourselves on this issue. In the case of **MATCH CORPORATION LIMITED V. DEVELOPMENT BANK OF ZAMBIA AND ATTORNEY GENERAL**[6], we stated as follows:

> **The Supreme Court being the final court in Zambia adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first whether in its view the previous case was wrongly decided and secondly if so whether there is a sufficiently good reason to decline to follow it.**

11.16 As we have stated in paragraph 11.12 above, the language of Article 28(2)(b) of the Constitution is plain and clear. A person aggrieved by any determination of the High Court under Article 28 can appeal to the Supreme Court regardless of whether it is on interlocutory or substantive issues. To

this effect, therefore, the Order which we made in Kabwe is legally untenable. We also note that before we rendered the said Order, the parties did not have an opportunity to address us on the point in contention, and this they have now done. We are of this firm view that the preliminary issue which was raised in Kabwe, in Appeal No 25 of 2017 between the same parties in casu, was wrongly decided. Against this backdrop, it is our view that it is in the interest of justice and the development of the law that we revisit the said decision. We accordingly quash the Order. The preliminary issue raised by the Attorney-General consequently fails. We will now proceed to consider the main appeal.

12. HEARING OF THE APPEAL

12.1 We first heard this appeal on 15th July, 2020 and adjourned it for judgment. However, as a result of the issues which arose during the hearing of the appeal, including the preliminary issue which was anchored on the Kabwe Order, we relisted it for hearing on 11th August, 2020 albeit, with an extended Bench. In addition, and arising from the discourse during the first hearing of the appeal on 15th July, 2020, we formulated

the following questions to guide the submissions of the parties:-

> "1. **Does Article 28 vest exclusive jurisdiction in the High Court for the determination of any issue arising under the Bill of Rights?**
>
> 2. **What is the nature of the powers and jurisdiction enjoyed by the High Court in respect of the Bill of Rights? How are these powers to be exercised?**
>
> 3. **To what extent, if any, does Article 128 (1) (b) of the Constitution enjoin the Constitutional Court to determine matters or issues under the Bill of Rights?**
>
> 4. **If the answer to 3 above is that it does, then what is the extent of these powers? Are they in addition to, complimentary or distinct from those vested in the High Court under Article 28?**
>
> 5. **Is the Bill of Rights (Part III) of the Constitution superior to the other provisions of the Constitution?**
>
> 6. **What is the effect of Article 128 of the Constitution (as amended) which makes the jurisdiction of the Constitutional Court, "*subject*" to Article 28 of the Constitution? In other words, is the use of the word "*subject*" in the Constitution intended to subordinate the Article under reference to Article 28 of the Constitution?**"

12.2 Counsel on both sides ably responded to these questions in their oral submissions on 11th August, 2021 and we have attempted to summarize the salient points in this judgment. Counsel had also earlier filed their written heads of argument on the grounds of appeal.

13. APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL

13.1 On behalf of the Appellants, Mr. Sangwa, SC, relied on the filed written arguments. As indicated above, he augmented the said arguments with oral submissions which also touched on the questions posed by the Court.

13.2 The first ground of appeal is that the lower court misdirected itself on points of law by deciding all the issues raised by the Respondent in the Notice of Motion in his (Respondent's) favour. The learned Counsel for the Appellants contended that the decision of the High Court Judge was a misapprehension of the matter that was before him. That the Appellants did not move the lower Court for an interpretation of Articles 101(5) and 103(2) of the **CONSTITUTION**. Rather, that the Appellants moved the High Court with a prayer that it should exercise its mandate under Article 28 of the **CONSTITUTION**, to secure the Appellants' right to a fair hearing as enshrined under Article 18 (9) of the **CONSTITUTION**. We have reproduced the relevant provisions of Article 28(1) and (2) in paragraph 8.8 above.

13.3 State Counsel Sangwa submitted that the High Court does not have jurisdiction to preside over matters relating to the interpretation of Articles 101, 105 and 267 of the **CONSTITUTION**. That the remedies sought by the Appellants were all centred on Article 18 (9) of the **CONSTITUTION**, which, in his view, the Constitutional Court allegedly infringed. He went on to argue that Article 18 (9) of the **CONSTITUTION** offers a guarantee that a Court or other adjudicating authority shall be impartial and independent in determining the existence or extent of any civil right or obligation. That it is also a guarantee that such a tribunal deciding the civil wrong shall give a fair hearing to the applicant within reasonable time.

13.4 According to Mr. Sangwa, SC, the issue to be determined was ***whether the manner in which the Constitutional Court dealt with the election petition was in accordance with Article 18 (9) of the CONSTITUTION***.

13.5 He contended that the holding of the Court below, that it had no jurisdiction to entertain the petition was a misapprehension of its constitutional obligation under Article

28 (1) of the **CONSTITUTION**. To buttress this point, Mr. Sangwa, SC, referred to our decision in the case of **RICHARD NSOFU MANDONA V TOTAL AVIATION AND EXPORT LIMITED AND 3 OTHERS**[7] where we stated that:

> **Granted that matters dealing with the Bill of Rights are constitutionally still very much within the jurisdictional ambit of the High Court to determine at first instance, with an appeal on any such matters determined by the High Court lying to the Supreme Court under Article 28 (1) (b), we are in no doubt that this Court has jurisdiction to determine any issue raised touching on the bill of rights in the Constitution provided, of course, it comes to us by way of appeal from the High Court. This is so, notwithstanding the provisions of Article 28(1) of the Constitution**
>
> **Where, however, a matter arises whose substance is primarily interpretation of a provision of the Constitution, this Court would be obliged to refer such matter to the Constitutional Court in terms of Article 28(1) to which we have alluded. This does not in any case mean that before this Court, we shall close our records of appeal and rise until the Constitutional Court determines any such arguments.**
>
> **Making observations on obvious constitutional provisions as we determine disputes of a non-constitutional nature is not, in our view, necessarily averse to the letter and spirit of the Constitution nor would it encroach or usurp the jurisdiction of the Constitutional Court. This Court, as any other superior court for that matter, is made up of judges of note, capable in their own way of understanding and interpreting the Constitution.**
>
> **However, even if we do not have the jurisdiction to interpret the Constitution in regard to the of bill of rights and generally to refer to the Constitution when dealing with matters of a non-Constitution nature, we do not have original jurisdiction to do so.**
>
> **An allegation that a provision of the bill of rights has been violated is redressable through a petition in the High Court. It**

> **is not in the province of this Court to deal with issues arising from the bill of rights at first instance through motions such as this one before us.**

13.6 It was further argued that the issue before the lower Court hinged on the jurisdiction of the High Court under Article 28 of the **CONSTITUTION**. Counsel maintained that the Appellants did not invite the Court below to interfere with the findings of the Constitutional Court or the manner in which it dealt with the petition; but to determine whether the actions of the Constitutional Court were in accordance with the provisions of Article 18(9) of the **CONSTITUTION**. His view was that it is only the High Court that has the jurisdiction to determine whether or not the provisions of the Bill of Rights have been violated.

13.7 With regard to the second ground of appeal, the Appellants' arguments were two-fold. The first aspect was with regard to the issue of multiplicity of actions.

13.8 As to what amounts to a multiplicity of actions, Counsel referred to our decision in the case **BP ZAMBIA PLC V INTERLAND MOTORS LIMITED**[7], where we said:

> **For our part, we are satisfied that, as a general rule, it will be regarded as an abuse of the process if the same parties**

support his argument further, the learned Counsel referred to our decision in the case of **MURRAY AND ROBERT CONSTRUCTION LIMITED AND KADDOURA V LUSAKA PREMIER HEALTH LIMITED AND INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA LIMITED**[8] where we stated as follows:

> **The record of appeal clearly shows that the application for determination by the trial Judge was an ex-parte summons for leave to issue a writ of possession to facilitate the sale of Stand No. 1292, Chelstone, Lusaka. However, instead of confining himself to this specific application, the trial judge went beyond his jurisdiction by making decisions on matters that had not been canvassed by the parties, under the guise of 'inherent jurisdiction'. We must emphasise here that the so-called 'inherent jurisdiction' of a trial judge must not be exercised willy-nilly but with caution and judiciously. If in his judgment, the trial judge was of the view that there was some irregularity in the manner the default judgment was obtained and that there was an abuse of the court process, he ought to have requested the parties, particularly the appellants who had filed the application he was considering, to address him on the issue he had in mind but had not been presented by any of the parties, before making the orders he made.**

13.12 The second limb of Counsel's argument was that even if the issue of multiplicity of actions had arisen, the facts of this matter could not support the finding of the lower Court, that the filing of this petition amounted to a multiplicity of actions in that there was no basis on which the Court below could have found that the petition was dealing with issues which had been

addressed. According to Counsel, even if the issue had been raised, it was incapable of being determined by the Constitutional Court as that Court lacks the jurisdiction over the Bill of Rights.

13.13 In his oral submissions, Mr. Sangwa, SC, echoed his earlier submission that Article 28 of the **CONSTITUTION** bestows upon the High Court exclusive jurisdiction to determine issues arising out of the Bill of Rights and appeals therefrom, lie only to this Court. He stated that under the Constitution, the High Court has two sources of jurisdiction; namely, under Articles 28 and Article 134. Article 134 of the Constitution stipulates as follows:-

> **The High Court has, subject to Article 128 —**
> **(a) unlimited and original jurisdiction in civil and criminal matters;**
> **(b) appellate and supervisory jurisdiction, as prescribed; and**
> **(c) jurisdiction to review decisions, as prescribed.**

Counsel stated that Article 128, to which Article 134 has been subjected, provides for the jurisdiction of the Constitutional Court. He submitted that it is only the matters under the jurisdiction of the High Court under Article 134, whose appeals lie to the Court of Appeal.

13.14 Counsel submitted that the High Court can also be moved under Article 28 of the **CONSTITUTION** when a person's rights have been or are likely to be violated. That the High Court, under this Article, can also be moved by way of a referral under paragraph (2); and that appeals against the decisions of the High Court under this Article lie to the Supreme Court.

13.15 Mr. Sangwa, SC, submitted that decisions of the High Court under Article 28 of the **CONSTITUTION** are binding on all Courts, including the Constitutional Court, with the exception of the Supreme Court. In his view, if the Constitutional Court is not bound by the decisions of the High Court and this Court on Constitutional matters arising under the Bill of Rights, then no other Court will bind it.

13.16 Counsel further submitted that Article 128, which provides for the jurisdiction of the Constitutional Court, is subject to Article 28. He reasoned that since the High Court has exclusive jurisdiction to hear matters arising under Article 28 of the **CONSTITUTION**, the Constitutional Court has no power to interpret the Bill of Rights, as this is the preserve of the High Court; and further; that the enforcement of the Bill

of Rights is part of the jurisdiction of the High Court under Article 28 of the **CONSTITUTION**.

13.17 Counsel thus contended that in the exercise of its jurisdiction to interpret the other provisions of the **CONSTITUTION**, the Constitutional Court does not have power to undermine or water down the provisions of Article 28 of the **CONSTITUTION**. He contended further, that in relation to the powers of the High Court under Article 28 of the **CONSTITUTION** *vis-à-vis* those of the Constitutional Court, the issue of superior and inferior Court does not arise because the High Court draws its authority from the entrenched provisions of the Constitution itself, which provisions were not affected by the 2016 constitutional amendments.

13.18 It was State Counsel Sangwa's further contention that the provisions of Article 28(1) of the Constitution do not contemplate that another action may be commenced in another Court relating to the Bill of Rights, when it stipulates that "***without prejudice to any other action with respect to the same matter which is lawfully available***". In his view, this

provision has, in its contemplation, any other action at common law, such as an action in tort.

13.19 Counsel further submitted that the enforcement of the Bill of Rights under Article 28 of the **CONSTITUTION** includes the interpretation of the Bill of Rights. He contended that allowing the Constitutional Court to interpret the Bill of Rights would amount to amending the Constitution by implication, since all the powers of the Constitutional Court are subject to Article 28. That the powers of the High Court to enforce and secure the enforcement of the Bill of Rights are very broad, making the High Court to be the ***"protector and the enforcer of the Bill of Rights"***. According to Counsel, this power cannot be shared. He argued that allowing the Constitutional Court to interpret the Bill of Rights would essentially, in his words, be '***giving it power through the back-door***' as opposed to an express amendment of articles in the Bill of Rights.

13.20 On Article 267 (3) of the **CONSTITUTION,** Counsel submitted that it gives general guidance on the interpretation of the rest of the **CONSTITUTION**. In its operative part, it states that:-

> **"3. A provision of this Constitution shall be construed according to the doctrine that the law is continuously in force...."**

However, Counsel was quick to point out that when it comes to the Bill of Rights, Article 267 (1) of the **CONSTITUTION** states that the rest of the Constitution should be interpreted in line with the provisions of the Bill of Rights. He stated that this, in a way, gives effect to the principles embodied in the Bill of Rights and ensures that it is not undermined. The said Article 267(1) states as follows:-

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

Counsel argued that when Article 18, contained in the Bill of Rights states that a party to any matter should be given a fair hearing, that provision is binding on the Constitutional Court.

13.21 Mr. Sangwa, SC, has urged this Court to clearly outline the jurisdiction of the High Court and the Constitutional Court in constitutional matters; more so in view of Article 28 of the Constitution which allows a party to move both the High Court

and the Constitutional Court on the same facts when they are not seeking the same reliefs.

13.22 Mr. Simeza SC, added that with regard to the interpretation of the Bill of Rights, the Constitutional Court has, itself, stated that it cannot interpret the provisions of the Bill of Rights.

14. RESPONDENT'S ARGUMENTS AGAINST THE APPEAL

14.1 The learned Attorney General, Mr. Kalaluka, SC, relied on the filed heads of argument, which were augmented by oral submissions. Reacting to the arguments by the Appellants under the first ground of appeal, it was his view that had the Court below proceeded to hear and determine the petition before it, it would have put itself in a position of reviewing the decision of the Constitutional Court in Cause No. 2016/CC/31. He stated that neither this Court nor the High Court, has the power to review decisions of the Constitutional Court.

14.2 The Attorney General submitted that in this case, the Appellants essentially moved the lower Court to interpret the provisions of Articles 1, 101, 103, 105 and 267 of the **CONSTITUTION,** and to review the decision of the

Constitutional Court in Cause No. 2016/CC/31. In his view, the Court below could not determine whether the Constitutional Court had infringed the Appellants' rights, under Article 18 without going against the holding of the Constitutional Court in Cause No. 2016/CC/31.

14.3 To support his contention, the Attorney General submitted that the true intention of the Appellants in approaching the lower Court is revealed in their submission, that **"The Presidential election petition was the genesis of the contravention by the Constitutional Court of Article 18 of the Constitution which gave birth to the proceedings before the High Court."** Deducing from this submission, the Attorney-General contended that the Appellants wanted the High Court to investigate whether the Constitutional Court had contravened Article 18 of the Constitution. He argued that in so doing, the Court below was being called upon to interpret the provisions of Articles 1, 101, 103, 105 and 267 of the **CONSTITUTION** and arrive at a different conclusion from that of the Constitutional Court.

14.4 In response to the second ground of appeal, the learned Attorney General argued that the lower Court was on firm ground and did not go beyond the scope of the issues raised by the Respondent in the 'notice to raise preliminary issues', and when it held that the Appellants were on a trajectory of abusing the process of the Court by multiplicity of actions. He argued that the issues of multiplicity of actions and abuse of court process clearly arose in the High Court through the skeleton arguments filed by the Respondent in support of the notice to raise preliminary issues, appearing at pages 17, 33, 95 and 96 of the record of appeal. According to the Attorney-General, it can clearly be discerned from the said pages that the issue of multiplicity of actions was raised by the Respondent in the lower Court.

14.5 Mr. Kalaluka, SC., argued that failure by the Appellant to address these issues should not be blamed on the Respondent or the lower Court. He submitted that the case of **MURRAY AND ROBERT CONSTRUCTION LIMITED AND KADDOURA V LUSAKA PREMIER HEALTH LIMITED AND INDUSTRIAL DEVELOPMENT CORPORATION OF SOUTH AFRICA**

LIMITED[8] cited by the Appellants in aid of their contention in this regard is inapplicable in this case because, according to the Attorney-General, the Judge, in the **MURRAY** case went outside his jurisdiction, to interrogate the way a default judgment was obtained while in this case, the issue of multiplicity of actions was raised by the Respondent in the High Court and the Court was, therefore, obliged to address it.

14.6 While conceding that the notice of motion to raise preliminary issues may not be classified as a pleading, Mr. Kalaluka, SC, relied on our decision in the case of **ANDERSON KAMBELA MAZOKA, LT GENERAL CHRISTON SIFAPI TEMBO, GODFREY KENNETH MIYANDA V. LEVY PATRICK MWANAWASA, THE ELECTORAL COMMISSION OF ZAMBIA, THE ATTORNEY GENERAL**[11] to support his contention that although the questions in the Notice of Motion did not directly deal with the issue of multiplicity of actions, the Respondent's skeleton arguments dealt with the issue in detail. In the **ANDERSON MAZOKA** case, we stated that:-

> **In a case where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the**

issue will depend on the weight the Court will attach to the evidence of un-pleaded issues.

14.7 With regard to the issue as to whether there was indeed a multiplicity of actions in this case by the filing of the petition by the Appellant in the High Court, we were referred to the decision of the Constitutional Court in the case of **HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA V EDGAR CHAGWA LUNGU, INONGE WINA, ELECTORAL COMMISSION OF ZAMBIA AND ATTORNEY GENERAL**[12] as to what constitutes a multiplicity of actions. In that case Mulenga, JC, stated as follows:

> **Abuse of court process is a term used when there is improper use of the court machinery. In other words, where there is no bonafide or proper use of the Court such as where a party institutes an action knowing fully well that there is no merit but does it to vex or oppress another party. This includes issues of re-litigating a matter, spurious claims and hopeless proceedings.**
>
> **In this case, I note that there have been a multiplicity of actions by the Applicants against the Respondents in this Court, the High Court and the Supreme Court on the issue if swearing in of the 1st and 2nd Respondents. This conduct is akin to forum shopping which is frowned upon by the courts and also amounts to abuse of court process.**
>
> **When the matter Applicant's question in the Originating Summons is considered, it is apparent that it is an attempt to appeal against the final decision of this Court of 5th September, 2016 or as put by the Respondent, a veiled attempt to re-litigate the matter.**

> **The Applicant's action is indeed a veiled attempt to re-litigate the matter and comes within the ambit of abuse of court process. The question also shows that it is a hopeless proceeding doomed for failure, making it an abuse of court process. This action is thus liable for dismissal. Parties must bring *bonafide* and deserving cases to court and not those aimed at wasting the Court's time and precious resources. The Originating Summons herein is hereby set aside for irregularity and abuse of court process with costs.**

14.8 The learned Attorney General contended that after the 2016 elections, the Appellants commenced several matters in different Courts following the dismissal of their election petition by the Constitutional Court. That the Appellants' aim was to ensure that the current President and Vice President do not assume office after the 2016 elections. That it is the Appellants' conduct of commencing several actions with the same intended outcome that amounts to multiplicity of actions, forum shopping and an abuse of Court process. He urged us to dismiss the appeal with costs.

14.9 In his oral submissions, which also interrogated the questions posed by the Court, the learned Attorney General stated that at one point, all were agreed that the Constitutional Court should steer clear of the Bill of Rights. That, however, upon further research and perusal of the relevant provisions of the

Constitution, it has been realized that the Constitutional Court cannot completely stay away from the Bill of Rights. He contended that Article 28 of the **CONSTITUTION**, does not bestow exclusive jurisdiction upon the High Court for the determination of issues arising under the Bill of Rights because it allows a party to commence any other lawful action in respect of the same matter. He added that Courts have routinely enforced the provisions of the Bill of Rights when they, for example, acknowledge the presumption of innocence or when they allow an accused person to examine a witness.

14.10 It was the Attorney-General's further submission that the authority of the Constitutional Court to interpret the entire Constitution is not taken away by Article 28. That the application of Article 28 is without prejudice to any other available action as provided by law. In his view, the phrase '***subject to***' under Article 128 of the **CONSTITUTION**, entails that the provision must be read together with Article 28 of the **CONSTITUTION** and it does not necessarily mean that one provision is superior to the other, although it may have a limiting effect on the other. According to Mr. Kalaluka, SC,

the words 'subject to' puts one on notice to say *'...please be careful, don't just read me and understand me on my own, there is big brother somewhere else.'* He submitted that the enforcement and securing of rights under the Bill of Rights is the only power exclusive to the High Court.

14.11 To advance his argument further, the learned Attorney General referred us to Article 1 (5) of the **CONSTITUTION** which states that:

> **A matter relating to this Constitution shall be heard by the Constitutional Court.**

He contended that this Article is very clear on the jurisdiction of the Constitutional Court; which is that the Court has mandate and power to interpret the whole Constitution without any qualification. To buttress this point, he referred us to the case of **NOEL SIAMOONDO AND OTHERS V. THE ELECTORAL COMMISSION OF ZAMBIA**[13], where, according to the learned Attorney General, the Constitutional Court did interpret Article 21 of the **CONSTITUTION** which falls under the Bill of Rights.

14.12 Mr. Kalaluka, SC, argued further that Article 28 (2) (a) of the **CONSTITUTION** recognizes the concept of judicial precedence when it recognizes that referral of matters to the High Court may only be made by a Subordinate Court to the High Court when a constitutional issue arises. He pointed out that there is no corresponding provision which compels a higher Court to refer a matter to the High Court when a constitutional issue arises. He reasoned that if a question on the point of interpretation has been adjudicated upon by a higher court, the High Court is bound by that decision. He echoed his earlier submission that the jurisdiction of the High Court is merely to enforce or secure the enforcement of rights under the Bill of Rights and that in fact, Article 28, allows for other lawful means of dealing with a matter.

14.13 Mr. Kalaluka, SC, further elucidated that the only limitation on the Constitutional Court with regard to constitutional matters, is to the extent that it does not deal with enforcement or securing the enforcement of rights under the Bill of Rights. He reiterated that the Bill of Rights is not superior to other provisions of the Constitution; that the mere fact of it being

entrenched does make its provisions to be superior to other provisions of the Constitution, but merely points to the fact that its amendment will require a special procedure. He added that Article 267 of the **CONSTITUTION** enjoins the Courts to interpret the **CONSTITUTION** in line with the principles laid down in that Article.

14.14 The Attorney-General contended that a higher Court cannot refer a matter to the High Court; that consequently, even where an issue of interpretation has been adjudicated upon by a higher court, the High Court is bound by that decision.

14.15 Mr. Mwale, Principal State Advocate, adopted the Attorney-General's submissions. He stated that while Article 128 is subject to Article 28, the said Article 28 merely refers to enforcement and securing enforcement of the Bill of Rights. It is invoked by a person who believes that his/her rights contained in the Bill of Rights are being or are likely to be 'contravened' in relation to him.

14.16 In trying to persuade us that the Constitutional Court has power to interpret the whole Constitution, Mr. Mwale referred us to the actual words used in Article 128(1)(a) and (b). Article

128(1)(a) and (b) talks of the Constitutional Court having jurisdiction to 'interpret the Constitution' and to hear any 'matter relating to a violation or contravention' of the Constitution. He argued that while Article 28 also uses the word 'contravention', it does not use the word 'interpret'; meaning that the powers of the Constitutional Court under Article 128 and the High Court under Article 28 are distinct. While accepting that to enforce the rights in the Bill of Rights, the High Court will inevitably have to interpret the provisions granting those rights, it was his contention that the right forum for a person seeking only an interpretation of the provisions of the Bill of Rights, would be the Constitutional Court.

15. DECISION OF THIS COURT ON THE APPEAL

15.1 We have carefully considered the arguments advanced by both parties in this appeal. We have also considered the oral submissions of Counsel and the novel issues which have been raised in this appeal. It is common cause that the constitutional amendments of 2016 left the Bill of Rights untouched. It is also common cause that the Bill of Rights is

entrenched in that it can only be altered with the approval of the majority of the electorate through a plebiscite. It is common knowledge that there were proposed amendments to the Bill of Rights which were floated to the citizenry through a referendum during the 2016 presidential and general elections. The proposed amendments could not be affected because they fell short of the necessary threshold required by law to effect the changes, resulting in the current constitutional order.

15.2 We will first deal with an interesting issue raised by Mr. Kalaluka, SC. He has argued that entrenchment of the Bill of Rights merely relates to the manner in which that portion of the **CONSTITUTION** may be amended. Relying on the provisions of Article 267 of the Constitution, he hinted that the Constitution, including the Bill of Rights, can be amended by implication because the said Article 267, by stating that the provisions of the constitution *'shall be construed according to the doctrine that the law is continuously in force...'* envisages that the provisions of the **CONSTITUTION** shall be interpreted with the development of the law in mind. On the other hand,

Mr. Sangwa, SC, forcefully argued that the Constitution, particularly the Bill of Rights must be amended by express provisions and not by implication.

15.3 The Bill of Rights is a special enactment. Its provisions pronounce on the rights and fundamental liberties of the people. It must, therefore, be revered. The very existence of a democratic society is anchored on such rights and freedoms and it is for that reason that the framers of the Constitution entrenched its provisions. Unlike other provisions of the Constitution, the provisions of the Bill of Rights cannot be amended willy-nilly but through the consent of the majority of the people through a referendum. This special protection has also been extended to the amendment of the Article providing for the holding of a referendum. Article 79(3) states, in the relevant parts, that:-

> **'A bill for alteration of Part III of this Constitution or <u>of this Article</u> shall not be passed unless....it has been put to a National referendum....**

15.4 The Constitutional Court of South Africa had occasion to pronounce itself on the entrenchment of the Bill of Rights. In

the case of **RE: CERTIFICATION OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA**[16], it had this to say:-

> **We regard to the notion of entrenchment "in the Constitution" as requiring a more stringent protection than that which is accorded to the ordinary provisions of the NT [the Constitution of the Republic of South Africa, 1996] ... In using the word "entrenched", the drafters of CP II required that the provisions of the Bill of Rights, given their vital nature and purpose, be safeguarded by special amendment procedures against easy abridgement...CP does not require that the Bill of Rights should be immune from amendment or practically unamendable. What it requires is some "entrenching" mechanism...**

15.5 We find it difficult to accept that the provisions of the Bill of Rights, having been entrenched through a special amendment procedure, can be amended by implication as suggested by the learned Attorney-General. If that were the case, then the protection of rights and freedoms in the Bill of Rights would be diluted and left to the whims and caprices of those sitting in judgment. This would render the protection granted in Article 79 of the **CONSTITUTION,** ineffective. In our view, the provisions of Article 267 of the Constitution, if anything, underscore the importance of the values enshrined in the provisions contained in the Bill of Rights in that there is a requirement, when interpreting other provisions of the Constitution, to uphold those values.

15.6 Turning to the first ground of appeal, the Appellants contend that the Court below misdirected itself by deciding all the issues raised by the Respondent in the Notice of Motion of 7th December 2016 in favour of the Respondent. The learned Attorney-General has raised issue with the manner in which this ground of appeal has been formulated. He contends that this ground offends Rule 58(2) of the Supreme Court Rules which requires that the **'..grounds of objection to the judgment appealed against, shall specify the points of law or fact which are alleged to have been wrongly decided...'** He argues that there is no law which stops the Court from deciding all issues raised in favour of one party.

15.7 Mr. Sangwa, SC disputed that the first ground of appeal does not comply with the rules of the Court. He submitted that where there is non-compliance with the rules of the Court, a party can move the Court on the anomaly before taking any step in the proceedings. And that if they do not do so; then they would be deemed to have waived their right to complain. In his own words, he stated:- **"..three issues were raised in the lower Court and all these were answered in the**

affirmative by the lower Court and it (is) that affirmative answer to support those three questions that is the basis of the first ground of appeal.(sic) According to Counsel, there was a misapprehension of the law and the said misapprehensions have been outlined in the arguments.

15.8 In our view, the provisions of Rule 58 are very clear. A ground of appeal must specify the points of law or fact alleged to have been wrongly decided. The first ground of appeal, in the manner in which it was framed, does not state the points of law or fact alleged to have been wrongly decided. It merely states that the lower Court was wrong to decide all the issues in favour of the Respondent. According to Mr. Sangwa, SC, the misapprehension of the law upon which this ground is premised was outlined in the arguments.

15.9 The import of Rule 58 is that the points of law or fact alleged to have been wrongly decided must be set forth in the ground of appeal itself and not the heads of argument. On this premise, it is clear that the Appellant fell short of meeting or fulfilling this requirement and, as the Attorney General

pointed out, there is no law which stops a Court from deciding all issues in favour of one party.

15.10 However, as it has been argued by Mr. Sangwa, SC, the Attorney-General never raised any objection to the manner in which the first ground of appeal has been formulated in his heads of argument. The only preliminary issue which he raised was with regard to the jurisdiction of this Court to hear this appeal, after which he then went on to advance his arguments on the grounds of appeal as outlined in the Memorandum of Appeal. In the circumstances, we will exercise our discretion to allow the ground of appeal to stand, notwithstanding the deficiencies which have been pointed out.

15.11 In support of the first ground of appeal, M. Sangwa, SC, submitted that the Appellants did not move the High Court to interpret Articles 101(5) and 103(32) of the **CONSTITUTION** as these are within the jurisdiction of the Constitutional Court; but that they approached the Court to exercise its jurisdiction under Article 28 of the **CONSTITUTION**, to secure the enforcement of Article 18(9) of the Constitution on the premise

that the Constitutional Court infringed their guaranteed right to a fair hearing.

15.12 We agree with the learned Counsel for the Appellant that Article 18(9) of the **CONSTITUTION** guarantees the right to a fair hearing within a reasonable time, before an independent and impartial court established by law. The said Article 18(9) states as follows:-

> **Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.** (underlining ours)

15.13 Under the current constitutional order, the High Court is the court that is clothed with original jurisdiction under Article 28(1) of the **CONSTITUTION,** to determine all matters pertaining to the enforcement of the protective provision of the Bill of Rights, while appeals on any such determination by the High Court lie to this Court. The said Article states:-

> **28 (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-**

> **(a) hear and determine any such application;**
> **(b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2); and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.**

15.14 Arising from the submission of the Attorney General on the jurisdiction of the High Court under Article 28(1), we formulated questions directed to the parties on the nature of the powers and jurisdiction of the High Court in respect of the Bill of Rights. One such question was whether Article 28(1) of the Constitution vests exclusive jurisdiction in the High Court for the determination of any issue arising under the Bill of Rights.

15.15 The Attorney General stated that in earlier decisions, this Court and the Constitutional Court, had both opined that the interpretation and enforcement of the Bill of Rights was a preserve of the High Court. The Attorney-General confessed that he held the same view, but after critically examining the provisions of the relevant provisions of Article 28, he was now of the view that the jurisdiction of the Constitutional Court is to interpret the whole Constitution. That Article 28(1) should

only be invoked when one is seeking to enforce the rights and freedoms enshrined in the Bill of Rights. Mr. Sangwa, SC, on the other hand, holds a different view; which is that the enforcement and interpretation of the entire Bill of Rights is a preserve of the High Court, while the Constitutional Court interprets the rest of the Constitution.

15.16 We have considered the submission of Counsel on this issue. The Constitution of Zambia is the 'ground norm' of the Republic. In Article 1(1) of Part 1, it declares itself as **'...the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.'**

15.17 We take judicial notice that the Bill of Rights, in its current form, was not affected by the constitutional amendments of 2016 due to the failure of the referendum conducted in August, 2016. This has resulted in a murky situation, whereby we now find ourselves in the unenviable situation of having to interpret and reconcile the various provisions of the

Constitution with those touching on the jurisdiction of the High Court as provided in Article 28(1) of the Constitution.

15.18 The primary rule of interpretation focuses on the plain and unambiguous language of an enactment. This rule, which is sometimes referred to as the literal rule, has, over the years been modified. In the case of **ANDERSON KAMBELA MAZOKA AND OTHERS V LEVY PATRICK MWANAWASA AND OTHERS**[11], we did refer to the words of Lord Denning in the case of **NORTHMAN V BARNET COUNCIL (1978)1 ALL ER 1243**[1] in which he stated:

> **"In all cases now in the interpretation of Statutes we adopt such a construction as will provide the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of the statute give rise to an absurd and unjust situation the Judges can and should use their good sense to remedy it by reading words in if necessary so as to do what Parliament would have done, had they had the situation in mind"**

15.19 We echoed the words of Lord Denning in our earlier decision in the case of **ATTORNEY GENERAL AND THE MOVEMENT FOR MULTI PARTY DEMOCRACY V LEWANIKA AND 4 OTHERS**[12]**.** We stated that:-

> **"The 'golden' rule is a modification of the literal rule. Acts of Parliament ought to be construed according to the intention expressed in the Acts themselves. If the words of the Statute**

> **are precise and unambiguous, then no more can be necessary than to expand those words in their ordinary and natural sense. Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, Judges can and should use their good sense to remedy it – by reading words in it if necessary – so as to do what Parliament would have done had they had the situation in mind."**

15.20 In the Lewanika case, to remedy what we found to have been a discriminatory provision of the Constitution against an independent Member of Parliament who resigns from one political party to join another party, we employed a purposive approach. We did not only read words into the Constitution, but amended it by actually adding the words 'vice versa' at the end of the provision in question.

15.21 This approach, which, in fact, was a 'direct legislation' by the Court, was received with mixed feelings. Writing in the Journal of African Law (Vol.40 No. 1996 pages 115 to 118) Dr. Peter Slinn of the London School of Oriental and African Studies wrote:-

> **"This decision is open to criticism. One has some sympathy with the view of the trial Judge, who was not prepared to find that the intention of the legislature was to include a situation where a member merely resigned from a political party without joining another. Asking the Court to read these words into Article 71(2)(c) is asking the Court to directly legislate by including that which was omitted."**

15.22 Perhaps the approach by our Court in the Lewanika case was an extreme case of judicial activism, which should not ordinarily be adopted. Ideally, courts should keep to their lane of interpreting the law and leave the task of passing and amending the law to the legislature. The fear of those vehemently opposed to 'direct legislation' by courts is that unelected judges would usurp power from elected representatives, who alone, have the mandate to make and amend laws.

15.23 While the ordinary rules of interpretation apply when considering the meaning of the provisions of a Constitution, courts should not lose sight of the fact that the Constitution, being the supreme law of the land, requires a unique and more intrusive approach during interpretation. N.S. Bindra, in his book; **INTERPRETATION OF STATUTES**[c] alluded to this approach when he stated:-

> **"There are certain general rules which are guides for the interpretation of all statutes, or rather all written documents, whether they be in nature of acts of private parties, Acts of legislatures or even constitutions. But by reason of the special nature of a constitution as being the fundamental law, there are certain special rules for interpretation of a constitution, just as there are some special rules for interpreting laws having a particular object, such as final penal**

or emergency laws, which would not be applicable to other statutes.

15.24 Elucidating on the unique nature of a Constitution, the same author stated that:-

> **"The constitution is the very framework of the body policy: its life and soul; it is the fountain-head of all its authority, the main string of all strength and power. The executive, the legislature and the judiciary are all its creation, and derive its sustenance from it. It is unlike other statutes, which can be at any time altered. Therefore, the language of the constitution should be interpreted as if it were a living organism capable of growth and development if interpreted in the broad and liberal spirit, and not in a narrow and pedantive sense. ...While the Constitution is the direct mandate of the people themselves, the statute is the expression of the will of the legislature only, though the legislature is also the representative of the people. A Constitution is, but a higher form of statutory law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable."**

15.25 We could not agree more. In fact, the supremacy of our Constitution is expressly stated in Article 1 of the Constitution. It would appear, however, that when it comes to ascertaining the meaning of the constitutional provisions, this author is swaying away from looking at the will of the legislature and tilting towards ascertaining the will of the people, ostensibly on the basis that a Constitution is a direct mandate of the people, while a statute is a creature of the legislature.

15.26 This view appears to have been adopted by American courts when interpreting the provisions of the Constitution. They focus on the *intention of the Framers of the Constitution* as opposed to precedent enshrined in the principle of *stare decisis*. One scholar, Robert Post in his article on **THEORIES OF CONSTITUTIONAL INTERPRETATION**[d] highlights the case of **MARSH V CHAMBER**[21]**,** in which the majority of the judges in that case exalted the need to take into account the intention of the Framers of the Constitution as opposed to relying on precedent. He stated:-

> **"The premise of the majority's opinion is thus that the meaning of the Constitution is better ascertained through strong evidence of the intent of the Framers than through fidelity to past precedent and doctrine. The reason is apparently that the intent of the Framers best embodies those 'principles' which the 'people' desired to instantiate in their Constitution. In the eyes of the majority, therefore, it is more important that the Constitution be interpreted in a manner which accurately expresses these principles than that it be interpreted in a manner which remains faithful to the principles of stare decisis."**

15.27 Indeed, one cannot disregard the *intention of the Framers'* approach, given that the authority of most Constitutions directly derive from the people. However, where the provisions of the Constitution have already been litigated

upon, subsequent cases on the same provisions will have to yield to the earlier interpretation.

15.28 Most Constitutions contain provisions which pronounce on human rights enjoyed by every person. Violations or threatened infringements of these rights are litigated in Courts. The precise content and parameters of these rights is ascertained by Courts with the aid of the canons of interpretation and the unique nature of the document embodying the rights.

15.29 The growing jurisprudence on human rights now shows that most courts have adopted a 'generous and purposive interpretation' of human rights provisions. Lord Wilberforce, seemingly supporting this approach in the case of **MINISTER OF HOME AFFAIRS AND ANOTHER V FISHER AND ANOTHER**[13] called for **"...a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give individuals the full measure of fundamental freedoms referred to."** We have, in this jurisdiction, adopted this approach.

15.30 Arising from the provisions of Article 28 of the Constitution and employing a generous and purposive interpretation, can it be said that the High Court enjoys exclusive jurisdiction on the entire Bill of Rights to the exclusion of the Constitutional Court or indeed, any other court? From the submission of Counsel, two aspects of this issue have come to the fore; the interpretation and enforcement of the Bill of Rights.

15.31 Article 128(1)(a) and (b) of the Constitution which confers jurisdiction on the Constitutional Court states:-

> **"1. Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-**
> **(a) a matter relating to the interpretation of this Constitution**
> **(b) a matter relating to a violation or contravention of this Constitution**

The use of the word 'subject' is a pointer to the fact that the Constitutional Court, when executing its mandate under Article 128, must give deference to what is provided for in Article 28.

15.32 When a provision of the Constitution or any other enactment is made **'subject to'** another provision, it entails that such provision shall yield to the other provision to which it is made subject. The Indian Supreme Court, in the case of **THE**

SOUTH INDIA CORPORATION (P) LTD V. THE SECRETARY, BOARD OF REVENUE, TRIVANDRUM AND ANOTHER[18]

agreed with this view. It held:

> **The expression 'subject to' conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject.**

It reaffirmed this position in the later case of **CHANDAVARKAR S.R. RAO V. ASHALATA S. GURAM**[19] when it stated:

> **It is well settled that the expression 'notwithstanding' is in contradistinction to the phrase 'subject to,' the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made.**

15.33 It is not in dispute that Article 128 has been made subject to Article 28 of the **CONSTITUTION**. Therefore, in case of a conflict between the two Articles, the provisions of Article 28 will prevail. In the cited case of **THE SOUTH INDIA CORPORATION (P) LTD V THE SECRETARY, BOARD OF REVENUE, TRIVAANDRUM AND ANOTHER**[18], the Supreme court of India reconciled a stand-alone provision and another subject which was subject to the stand-alone provision, in the following terms:-

While Art. 372 is subject to Art, 278, Art. 278 operates in its own sphere in spite of Art. 372. The result is that Art. 278 overrides Art. 372...

In our view, the precise meaning of Article 28 must first be ascertained, and it is that meaning which will override Article 128 of the Constitution.

15.34 According to the marginal notes of Article 28, the provision is on 'enforcement of protective provisions' contained in Articles 11 to 26 inclusive of the Bill of Rights. These marginal notes are just a pointer to the subject matter of the Article. The real subject matter of the provision is in the language of the Article itself. It provides that any person who alleges that any protective provisions in the Bill of Rights **'...has been, is being or is likely to be contravened in relation to him'** may apply for redress to the High Court. At the end of the hearing, the High Court is empowered to '**make such order, issue such writs and give such directions as it may consider appropriate <u>for the purpose of enforcing or securing the enforcement</u> of, any of the provisions of articles 11 to 26.'** (underlining ours)

15.35 The clear and natural import of the words used in Article 28, as can be discerned from the language of the latter part of Article 28(1) which we have underlined, is that it provides an avenue for the enforcement of rights contained in the Bill of Rights. The High Court, in this respect, has to be moved by an aggrieved person; or one who fears or is apprehensive that his/her rights under the Bill of Rights may be infringed in relation to him or her. Such a person may apply for redress under Article 28(1) of the Constitution. We do not find, in the words of this Article, that the High Court has been bestowed with exclusive jurisdiction to interpret the provisions of the Bill of Rights. The High Court can only be moved under Article 28 for the purpose of enforcing or securing the enforcement of the provisions of the Bill of Rights. This means that the High Court can only interpret the rights in the context of what is alleged to be contravened or likely to be contravened in an application for redress under Article 28(1); and this is without prejudice **'to any other action with respect to the same matter which is lawfully available.'** In this respect, we find the argument by Mr. Mwale that Articles

128 and 28 of the Constitution are quite distinct in that while both Articles use the word 'contravene', it is only Article 128 which uses the word 'interpret'; to be persuasive in support of the argument that the Constitutional Court has jurisdiction to interpret the whole constitution.

15.36 Arising from the foregoing, it is our view that the current constitutional landscape is that the Constitutional Court has the mandate under Article 128, to interpret the entire Constitution. It cannot, however, entertain an application for redress, to enforce or secure the enforcement of any of the provisions envisaged under Article 28(1) of the Constitution. With regard to the enforcement of the protective provisions of the Bill of Rights, therefore, the Constitutional Court must give deference to the High Court under Article 28 of the Constitution.

15.37 The cardinal question arising from this appeal, is whether the High Court can exercise its jurisdiction under Article 28 to enforce a person's right to a fair hearing as guaranteed by Article 18(1) of the **CONSTITUTION** against a superior court, such as the Constitutional Court. Article 128 has vested the

Constitutional Court with both original and appellate jurisdiction in constitutional matters. Article 18(9) requires all courts in the land or other adjudicating authorities to be independent and impartial and to give every case, a fair hearing. Now, can the Constitutional Court, which is a superior court, be dragged to the High Court, on an allegation that it breached the provisions of Article 18(1) of the Constitution?

15.38 There is a hierarchy of Courts in Zambia. At the apex of the court system are two superior courts; the Supreme Court and the Constitutional Court. According to Article 121 of the Constitution, the two courts rank equivalently. In terms of Article 128(1) of the Constitution, a decision of the Constitutional Court is final and under Article 128(4), such a decision is not even appealable to the Supreme Court.

15.39 Below the two apex courts is the Court of Appeal and thereafter the High Court. Below the High Court are the Courts mentioned in Article 120 of the Constitution.

15.40 Subject to the laws and rules governing the respective courts, one can escalate a matter from the lowest court up to an apex

court and not the other way. The decisions of the apex courts are binding on the lower courts.

15.41 In the way that the Appellant's petition in the lower Court was framed, it is clear that it was targeted at reviewing the decision of the Constitutional Court in the failed Presidential Election Petition. The Appellants sought, among others:

> **An Order that the Ruling of the Constitutional Court made on 5th September, 2016 dismissing the Appellants' petition in Cause No. 2016/cc/31 for want of prosecution is ultra vires Article 18(9) of the Constitution of Zambia and therefore null and void;**
>
> **An Order directing the Constitutional Court to hear and determine the Appellant's petition independently, fairly and within a reasonable time in line with the provision of Article 18(9) of the Constitution.**

Much as Article 18(9) enjoins 'every court or other adjudicating authority' to give cases a fair hearing, the decisions and processes employed by the Constitutional Court or any other superior court in the judicial hierarchy cannot be subject of a review process by an inferior court. In this case, and more importantly, Article 128 of the Constitution has clothed the Constitutional Court with final jurisdiction and its decisions are not appealable even to the Supreme Court.

15.42 To interpret Article 18(9) of the Constitution in a manner that will empower the High Court to review decisions and processes of superior courts would create an absurdity and go against the established norms of deference by lower courts to decisions of superior courts and the provisions of Article 128 itself, which has insulated the decisions of the Constitutional Court from being questioned in any other court. Also, if superior courts were amenable to the jurisdiction of the High Court, the administration of justice would be brought into disrepute and offend against the public interest in that there would be no end to litigation. In deference to higher courts, a lower court should not purport to interrogate the conduct of a case which has been decided upon by a higher court with a view to determining whether the higher court conducted the case properly.

15.43 We accept that the High Court is the enforcer of the rights enshrined in the Bill of Rights in line with Article 28 of the **CONSTITUTION**. We restate that its power must be exercised in deference to superior Courts. In the case of **ELIAS KUNDIONA V THE PEOPLE**[17], we censured a High Court

Judge who criticized this Court for substituting a sentence which he had imposed. We stated:-

> **...the learned trial judge preferred to criticize in unnecessarily uncomplimentary terms the sentence which this Court substituted for his own in the related case involving the practitioner. The principles of *stare decisis* (sic) and binding superior precedent so necessary in our hierarchical system of justice received short shrift. It is wrong in principle and conducive of discord, uncertainty and inconsistency for any lower court to adopt such a stance towards a senior court.** (underlining ours)

15.44 From the foregoing, we are of the firm view that the High Court cannot review or annul decisions of superior courts in the manner in which the Appellants invited it to do in relation to the decision of the Constitutional Court, in the Presidential Election Petition. The **CONSTITUTION** itself recognizes the hierarchy of the Courts and through the Constitution itself and the various enactments, the jurisdiction of the various courts has been defined.

15.45 It follows, therefore, that the High Court has no power under Article 28 of the **CONSTITUTION** to 'review' and dictate to a superior Court, such as the Constitutional Court, the manner in which it should conduct its proceedings. This was the net effect of the Orders which the Appellants sought before the

High Court. As we have stated above, this goes against the provisions of the Constitution itself and judicial hierarchy.

15.46 We do not therefore fault the Judge in the Court below when he allowed the preliminary issues and rejected the invitation to entertain the Appellant's petition. He was on firm ground when he held that his Court had no jurisdiction to subject a decision of a superior court to a process of judicial review.

15.47 Coming to the second ground of appeal, the Appellants contend that the Court below should not have entertained the issue of multiplicity of actions because it was not raised in the notice of motion to raise a preliminary issue. The record does show that the issue of multiplicity of actions was not one of the grounds upon which the preliminary issue was raised. However, the learned Solicitor General did raise the issue of multiplicity of actions before the Court below, in his arguments in support of the first ground of the preliminary issue.

15.48 The Solicitor General contested the first substantive relief sought by the Appellants, and argued that by pushing the High Court to order that Articles 101(2) and 102(3) are ultra

vires Article 18(9) and therefore null and void to the extent construed by the Constitutional Court, the Appellants were on a path of forum shopping and abusing the court process because they sought to re-litigate issues which had already been determined. We did state, in the case of **ANDERSON KAMBELA MAZOKA AND OTHERS V LEVY PATRICK MWANAWASA AND OTHERS**[11] that:

> **In cases where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of un-pleaded issues.**

15.49 The issue of multiplicity of actions was clearly raised by the Respondent in the context of rebutting the first substantive relief sought by the Appellants. The court had no choice but to address its mind to it. In such circumstances, we cannot fault the learned trial Judge for having considered the Respondent's submission on the matter. As we said in the case of **WILSON MASAUSO ZULU V AVONDALE HOUSING PROJECT LIMITED**[16]**,** a trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. We find

absolutely no merit in the argument that the Court below should not have entertained the issue of multiplicity of actions purely because it was not raised in the notice of motion to raise preliminary issues.

15.50 The Appellants have also argued that even if the issue of multiplicity of actions had arisen, the facts of this matter could not support the finding of the Court below that the filing of the petition amounted to multiplicity of actions. We have considered the facts of this case and it is evident from the reliefs sought, that the Appellants were not only desirous of re-litigating the issues which the Constitutional Court had already determined, but also to have its final decision annulled.

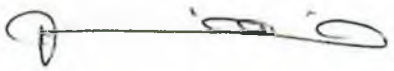
15.51 From the pleadings, the Appellants invited the High Court to order that Articles 101/(2) and 103(2) of the **CONSTITUTION "...to the extent to which they have been construed.."** by the Constitutional Court to literally mean that it **'shall hear an election petition relating to the President-elect within 14 days of the filing of the Petition are ultra vires Article 18(9) of the Constitution and hence null and void.'** They

also sought an Order that the decision of the Constitutional Court that the Appellants had until 24:00 hours on 2nd September 2016 to prosecute their petition, was *ultra vires* Article 18(9) and therefore null and void. Most glaringly, the Appellants sought the annulment of the final Ruling of the Constitutional Court which dismissed the election petition for want of prosecution, for being *ultra vires* Article 18(9). The Appellants further sought the High Court to direct the Constitutional Court to hear and determine their petition in line with Article 18(9) of the **CONSTITUTION.**

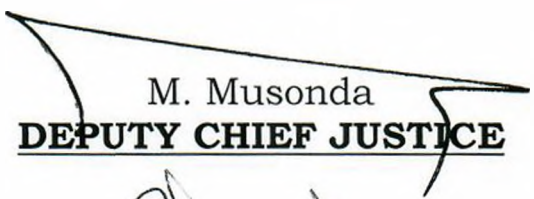
15.52 Clearly, the Appellants' desire was for the High Court to review the proceedings and the decisions of the Constitutional Court, so that it ultimately orders a re-hearing of the petition under the guise that the Court violated Article 18(9) of the **CONSTITUTION.** There is no doubt that the Appellants were seeking to re-litigate issues which the Constitutional Court had already decided, and this amounted to a multiplicity of actions and an abuse of court process. We find that the second ground of appeal also has no merit and we hereby dismiss it.

16. CONCLUSION

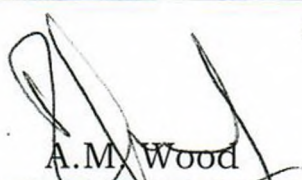
Both grounds of appeal have failed, this appeal accordingly fails and it is dismissed. We make no order as to costs as the appeal has raised important constitutional issues.



I.C. Mambilima
CHIEF JUSTICE



M. Musonda
DEPUTY CHIEF JUSTICE



A.M. Wood
SUPREME COURT JUDGE

M. Malila
SUPREME COURT JUDGE

N.K. Mutuna
SUPREME COURT JUDGE