IN THE CONSTITUTIONAL COURT 2017/CCZ/004

AT THE CONSTITUTIONAL COURT REGISTRY

AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF:	THE INTERPRETATION OF ARTICLES 106 (1), (3), (6) AND 267 (3) (C) OF THE CONSTITUTION OF ZAMBIA
IN THE MATTER OF:	TENURE OF OFFICE OF MR. EDGAR CHAGWA LUNGU PRESIDENT OF THE REPUBLIC OF ZAMBIA
IN THE MATTER OF:	THE ELIGIBILITY OF MR. EDGAR CHAGWA LUNGU AS PRESIDENTIAL CANDIDATE IN THE PRESIDENTIAL ELECTION TO BE HELD IN 2021

BETWEEN:

DR. DANIEL PULE	1ST APPLICANT
WRIGHT MUSOMA	2ND APPLICANT
PASTOR PETER CHANDA	3RD APPLICANT
ROBERT MWANZA	4TH APPLICANT
AND	
ATTORNEY GENERAL	1ST RESPONDENT
DAVIES MWILA	2ND RESPONDENT
(In his capacity as Secretary General of The Patriotic Front)	
THE LAW ASSOCIATION OF ZAMBIA	1ST INTERESTED PARTY
STEPHEN KATUKA	2ND INTERESTED PARTY
(In his capacity as Secretary General of The United Party for National Development)	

Coram: Chibomba, PC, Sitali, Mulenga, Mulembe, and Munalula, JJC.

On 27th March, 2018 and on 6th April, 2018.

For the Applicants:	**Mr. B.C. Mutale, S.C., of Ellis and Company,** **Mr. S. Sikota, S.C., of Central Chambers,** **Mr. R. Malipenga of Malipenga and Company** **Mr. M. Lungu of Lungu Simwanza and Associates,** **Mr. C. Bwalya of D.H. Kemp and Company** **Mr. D. Jere of Mvunga and Associates.**
For the 1st Respondent:	**Mr. L. Kalaluka, S.C., Attorney General,** **Mr. A. Mwansa, S.C., Solicitor General,** **Mr. J. Simachela, Chief State Advocate,** **Ms. D. Mwewa, Assistant State Advocate.**
For the 2nd Respondent:	**Mr. J. Zimba of Makebi Zulu and Company**
For the 1st Interested Party:	**Mr. J. Sangwa, S.C., of Simeza Sangwa and Associates.**
For the 2nd Interested Party:	**Mr. K. Mweemba of Keith Mweemba Advocates** **Mr. G. Phiri of PNP Advocates.**

RULING

Chibomba, PC, delivered the Ruling of the Court.

Cases refereed to:

1. **Lewanika and Others v Chiluba (1998) Z.R. 79**
2. **Flannery v Halifax Agencies [2000] 1 All E.R. 373**

Legislation referred to:

1. **The Constitution of Zambia (Amendment) Act No. 18 of 1996**
2. **The Constitution of Zambia (Amendment) Act No. 2 of 2016**
3. **The Constitutional Court Act No. 8 of 2016**

By Notice of Motion filed on 26th January, 2018 the Applicants sought an order from this Court that a full bench comprising all seven

available Judges of the Constitutional Court should hear the main matter in this case.

The Notice of Motion was filed pursuant to Article 129 (1) and (3) of the Constitution. Although Brigadier General Godfrey Miyanda (Rtd) was party to these proceedings as the 3rd Interested Party, he has since withdrawn from the entire case. We, therefore, shall not refer to the submissions that he made in this Notice of Motion.

In support of this Notice of Motion, the learned Counsel for the Applicants relied on the Affidavit in Support dated 26th January, 2018 and deposed to by Robert Mwanza, the 4th Applicant in this matter and arguments advanced in the Skeleton Arguments filed on the same date.

Paragraphs 5, 6, 7 and 8 of the said Affidavit provide as follows:-

"5. **That I honestly believe that this matter before Your Lordships is of a novel nature and indeed of a high jurisprudential value in so far as the Zambian Constitutional Court decisions are concerned.**

6. **That owing to the novelty of the matter, I am of the considered view that all the available Judges ought to have a say on this matter, In order that the full potential and resource of the Court be attained and/or utilised.**

7. **That I am aware that there are presently seven (7) Judges of the Constitutional Court, and that; given what I have just stated supra, it is my wish and desire that all seven (7) Judges form part of the bench determining this matter.**

8. **That the above has been necessitated by what is stated in the above paragraphs, as well as my desire as a party to have a**

benefit of the full Court's (in this case, all seven available judges) determination in this matter."

The thrust of the arguments in the Applicants' Skeleton Arguments is that the matter before us is one that ought to be heard by the full bench as the questions raise novel issues in our constitutional jurisprudence and are of constitutional significance. And that the outcome will have legal, social and political consequences. Hence, the need for inclusion of all available judicial resources in order to give the decision the widest judicial interrogation.

It was contended that the prescription of a minimum as opposed to a maximum number of judges required to constitute a full bench is only aimed at preventing the recurrence of the challenge of jurisdiction faced by the Supreme Court in **Lewanika and Others v Chiluba**[1] wherein the Supreme Court interpreted the full bench as provided in Article 41 of the Constitution as amended by Act No. 18 of 1996 to be the maximum available odd number of the judges of the court that could be mustered to hear the case. And that in construing the purpose and objectives of Article 129 (3) of the Constitution, this Court should construe a full bench to be the maximum available uneven number of judges that the Court could muster to hear the case at any given moment but not less than

five, especially as the matter involves a substantial question regarding interpretation of the Constitution.

It was submitted that a bare minimum of a larger pool of judicial resources that can be mustered must be avoided in order to achieve robust development of constitutional jurisprudence as envisaged by Article 267 (b) of the Constitution. And that this would lead to the avoidance of lingering questions in the event that there is a split decision. It was contended that as such, a legalistic approach ought to be avoided.

It was further submitted that no prejudice would be suffered by the other parties by the constitution of the full bench. The case of **Flannery v Halifax Agencies**[2] was relied on to support the argument that cogent reasons ought to be given on why a full bench ought not to be constituted because fairness requires that the parties should not be in doubt as to why they have won or lost and that a lack of reasons is a ground for appeal.

In augmenting the Skeleton Argument, Mr. Mutale, S.C., submitted that there was no opposition to the Motion by all the Respondents and interested parties. He concluded his oral submissions by urging us to consider reconstituting ourselves as a panel of seven Judges.

Co-Counsel for the Applicants, Mr. Sikota, S.C., adopted the position taken by Mr. Mutale, S.C.

The learned Attorney General, Mr. Kalaluka, S.C., supported the Motion by the Applicants. Similarly, both Counsel for the 2nd Respondent, Mr. Zimba, and Co-Counsel for the 1st Interested Party, Mr. Sangwa, S.C., also supported the Motion.

In opposing the Motion, Counsel for the 2nd Interested Party, Mr. Mweemba, submitted that the Motion was opposed on a point of law. He submitted that there is no situation that has arisen to warrant changing the composition of the bench as the current composition of the Court had satisfied the letter of the law as provided by Article 129 (3) of the Constitution which provides that the full bench of the Constitutional Court shall be constituted by an uneven number of not less than five Judges.

In response to the Applicants' reliance on the case of **Lewanika and Others v Chiluba and Others**[1], Mr. Mweemba submitted that in that case, the issue of what constitutes a full bench arose, and it was held, *inter alia*, that the requirement of the full bench of the Supreme Court under Article 41 of the Constitution was satisfied when the maximum available odd number of judges of the court were impanelled to hear the case.

He submitted that at the time that the petition in this matter was filed, the composition of the Constitutional Court was six Judges. And that this Court was able to muster an odd number of five Judges and that this met the prescribed threshold for a full bench of not less than five Judges. Therefore, there is nothing unconstitutional, illegal or unlawful about the composition of the bench.

Counsel contended that if the Court agreed with the Applicants and increased the number of Judges, there was a danger of another application being made to re-constitute the bench in the event that there was a further appointment of an additional judge(s) to the Constitutional Court. And that this would result in compromising the delivery of justice in terms of public perception.

Counsel also submitted that Article 41 of the Constitution prior to the 2016 Amendment, which was applicable at the time the **Lewanika**[1] case was decided, did not have a definition of a full bench. However, that Article 129 (3) of the Constitution as amended provides for what constitutes a full bench. Therefore, the **Lewanika** case was cited out of context.

In response to the case of **Flannery v Halifax Estate Agencies**[2], relied upon by the Applicants to support their position, Mr. Mweemba submitted that the above cited case has no relevance to this case as

Britain is a parliamentary democracy which practices parliamentary sovereignty while Zambia is a constitutional democracy which practices constitutional supremacy.

Co-Counsel for the 2nd Interested Party, Mr. Phiri, adopted Mr. Mweemba's submissions in *toto*. He added that Article 129 (3) provides the minimum threshold for a full bench, and that the Constitution has not defined the term "full bench".

In response to the Applicant's proposition that this Court should construe the term "full bench" to mean the maximum available odd number of Judges that the Court could muster to hear the case at any given moment but not less than five, Mr. Phiri submitted that the Constitution does not use the word "available". He contended that the Applicants have not shown that the efficiency and competence of the bench, as currently constituted, would be enhanced by the inclusion of two extra Judges.

He also submitted that there is no requirement under Article 129 for increasing the number of judges on the panel when a matter is novel or is of high jurisprudential value.

In conclusion, Mr. Phiri posed the following rhetorical questions- would the court reconstitute itself if additional judges were appointed?;

or would the Republican President not appoint further judges during the pendency of these proceedings?; and why does the Court need to reconstitute itself?

In reply, Mr. Sikota, S.C., as regards Mr. Phiri's rhetorical questions responded that the questions were merely speculative. He contended that it would not be reasonable to request that the panel of judges be reconstituted if further appointments were made to the Constitutional Court after the hearing of the main matter has already commenced.

In addressing the attack on the contents of the Affidavit in Support of the application and in particular paragraph 6, State Counsel Sikota argued that there was no Affidavit in Opposition challenging its contents nor setting out the basis of disputing the novelty of the matter before us.

He submitted that Article 129 (3) does not preclude more than five judges constituting a panel so long as it is an uneven number. And that the novel nature of this matter requires the highest jurisprudential resource as set out in paragraph 5 of the Affidavit. And that it had not been shown what damage would ensue from the expansion of the panel.

He concluded by stating that the mere fact that Britain is a parliamentary democracy as opposed to Zambia which is a constitutional

democracy, does not suffice as a reason that its decisions should not have persuasive value in this jurisdiction.

In supplementing Mr. Sikota, S.C.'s reply, Mr. Lungu submitted that Article 127 of the Constitution places the full complement of this Court at thirteen judges and Article 129 (3) sets out five judges as the minimum number to comprise a full bench. And that no arguments had been advanced on whether this Court is precluded from sitting as 7, 9, 11 or 13 judges if resources permit. He implored this Court to adopt the practice in the Supreme Court through persuasive value.

In conclusion, he submitted that this application was neither on the efficiency nor competence but rather as of when the Court can exercise its discretion to sit as a bench of more than five judges to comprise the full bench. And that this being a matter of great national consequence and novel, the Court should consider sitting as the maximum available odd number of judges.

We have seriously considered this Notice of Motion, the Affidavit in Support, the arguments in the Applicants' Heads of Argument, the oral submissions by the learned Counsel for the respective parties and the authorities cited which we have interrogated. It is our considered view that this Notice of Motion raises the question whether or not the main

matter in this case should be heard by a panel of seven Judges of the Constitutional Court who are in place.

Article 129 of the Constitution, which provides for the sittings of the Constitutional Court is very clear. It provides that:-

> **"(1) The Constitutional Court shall be constituted by an uneven number of not less than three judges, except when hearing an interlocutory matter.**
>
> **(2) The Constitutional Court shall be constituted by one judge when hearing an interlocutory matter.**
>
> **(3) The full bench of the Constitutional Court shall be constituted by an uneven number of not less than five judges.**
>
> **(4) The Constitutional Court shall be presided over by-**
>
> **(a) the President of the Constitutional Court;**
>
> **(b) in the absence of the President of the Constitutional Court, the Deputy-President of the Constitutional Court; and**
>
> **(c) in the absence of the Deputy-President of the Constitutional Court, the most senior judge of the Constitutional Court, as constituted."**

As can be seen from the above, Article 129 (3) clearly spells out the number of judges that can constitute a full bench, namely, not less than five judges. Further, when Article 129 (3) is read together with Article 138, which places the administration of the Constitutional Court under the charge of the President of the Constitutional Court, it will be seen that the power to constitute a panel is the prerogative of the Court itself and not that of the parties or litigants. Therefore, ordinarily, this should not be a subject of litigation. We say so because the composition

of a panel is an administrative matter which is purely in the discretion of the Court and the Court takes into account many factors in constituting panels and such factors may include indisposition of judges. Further, Section 4 (2) of the Constitutional Court Act clearly states that:-

> **"(2) Subject to the provisions of this Act, the Court shall, at a sitting, be composed of such judges of the Court as the President may direct."**

We also wish to draw the attention of the parties to the fact that when this Court became operational, there were only six judges of the Constitutional Court. When this matter commenced, the number remained at six until 23rd December, 2017 when a seventh judge was appointed and sworn in. By that date, the panel of judges which was hearing the motions arising from the single Judge's scheduling of the main matter was already in place.

Further, it must be noted that a panel that hears a motion may not be the same that would be constituted to hear the main matter as this depends on the circumstances existing at the time the main matter is set for hearing. At the time this application was filed and heard, the panel that would hear the main matter had not yet been constituted. We do not thus see the relevance of this application.

Therefore, the application stands dismissed.

Each party to bear own costs.

H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT

A. M. Sitali
JUDGE
CONSTITUTIONAL COURT

M. S. Mulenga
JUDGE
CONSTITUTIONAL COURT

E. Mulembe
JUDGE
CONSTITUTIONAL COURT

M. M. Munalula
JUDGE
CONSTITUTIONAL COURT