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SELECTED JUDGMENT NO. 29 OF 2016

P. 957

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

2016/CC/0010/ 2016/CC/0011

**BETWEEN:**

**STEVEN KATUKA (Suing as Secretary General  
of the United Party for National Development)**

**2<sup>nd</sup> Petitioner**

**LAW ASSOCIATION OF ZAMBIA**

**3<sup>rd</sup> Petitioner**

**AND**

**THE ATTORNEY GENERAL**

**1<sup>st</sup> Respondent**

**NGOSA SIMBYAKULA AND 63 OTHERS**

**2<sup>nd</sup> to 64<sup>th</sup> Respondents**

Coram: Chibomba, PC, Sitali, Mulenga, Mulembe and Munalula, JJC.  
On 19<sup>th</sup> July, 2016 and on 8<sup>th</sup> August, 2016.

For the 2<sup>nd</sup> Petitioner: Mr. K. Mweemba of Messrs Keith Mweemba Advocates and  
Mr. G. Phiri of Messrs PNP Advocates.

For the 3<sup>rd</sup> Petitioner: Mr. J. Sangwa, S.C., of Simeza Sangwa & Associates.

For the Respondents: Mr. A. Mwansa, S.C., Solicitor General, Major C. Hara,  
Principal State Advocate, Mr. S.K. Mwale, Senior State  
Advocate, and Ms. K. Akapelwa, Assistant Senior State  
Advocate, all of the Attorney General's Chambers.

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**JUDGMENT**

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Chibomba, PC, delivered the Judgment of the Court

Cases referred to:

1. WynterKabimba v Attorney General and George Kunda (2011) 3 Z.R. 492.
2. Seaford Court Estates Ltd v Asher [1949] 2 K. B. 481.
3. Attorney General and Another v Lewanika and Others (1993-94) Z.R. 164.
4. James Wrotham Park Settled Estates [1980] A.C. 74.
5. Trop v Dulles (1958) 356 US 2 Led, 785.
6. South Dakota v North Carolina (1940) 192 USA 268: 48 ED 448.
7. Major General David Tinyefuza v The Attorney General of Uganda- Constitution Petition No. 1
8. Attorney General of Trinidad and Tobago v. Whiteman (1991) 240.
9. Attorney General v. Unity Dow(1992) BLR 119 (CA).
10. Minister of Lands and Another v, Slamdiern and Others.
11. Christine Mulundikaand 7Others v.The People (1995-1997) ZR 20.
12. Attorney General v Nigel Kasonde Mutuna and 2 Others- Appeal No. 088/2012.
13. Dkikuusooka Majidu and Others v Attorney General – Petition No. 10 of 2009.
14. Moonjelly Ouseph Joseph v. RDS Investments Limited (2004) Z.R. 67.
15. Reverend Dr, Timothy Njoya v the Attorney General(2004) 1 KLR 232.
16. Fothergill v. Monarch Airlines Ltd [1981] AC 251.
17. R. v. Jefferson [1994] 1 All ER 270.
18. Black-Clawson International Ltd v. PapierwerkeWaldhof-Aschaffenburg AG. [1975] AC 591.
19. Lumina and Bennie Mwiinga v. The Attorney-General (1990-1992) ZR 47.

Legislation referred to:

1. The Constitution of Zambia Act No. 1 of 2016.
2. The Constitution of Zambia (Amendment) Act No. 2 of 2016.
3. The Constitution of Zambia, 1991.
4. The Constitutional Court Rules 2016.
5. The Ministerial and Parliamentary Offices (Emoluments) Act, Chapter 262 of the Laws of Zambia.

Three Petitions were initially filed in the Constitutional Court and were given Causes No. 2016/CC/0001, 2016/CC/0010 and 2016/CC/0011 respectively. However, by Consent of the parties through a Consent Order filed into Court the three Causes were consolidated to be heard at the same time and in sequence based on the date that each process was filed into Court. The Parties also agreed that the Court should render one Judgment for all the three Causes. However, on 7<sup>th</sup> July, 2016 and by Notice to Withdraw, the Petition under Cause No. 2016/CC/0001 was

withdrawn. Therefore, this Judgment relates to Causes No. 2016/CC/0010 and 2016/CC/0011 only.

We wish to add that Causes No. 2016/CC/0010 and 2016/CC/0011 were filed on 12<sup>th</sup> May, 2016 and 18<sup>th</sup> May, 2016, respectively. However, this Court became operational on 27<sup>th</sup> May, 2016 after the **Constitutional Court Act No. 8 of 2016** and the **Constitutional Court Rules, Statutory Instrument No. 37 of 2016** were prescribed. The Court urged the parties, particularly the Petitioners to expeditiously prosecute their causes but this was not done. The matter was thus only heard on 19<sup>th</sup> July, 2016 when it was reserved for Judgment.

We wish to point out that under Cause No. 2016/CC/0010, the 2<sup>nd</sup> Petitioner did not challenge the continued stay of the Deputy Ministers in their offices while the Petitioner under cause No. 2016/CC/0011 has not challenged the Vice-President 's continued stay in office. What is however common is that both the 2<sup>nd</sup> and the 3<sup>rd</sup> Petitioners have challenged the continued stay in office of the Cabinet and Provincial Ministers although the differences were minor.

At the hearing of this matter, we first heard submissions from the 2<sup>nd</sup> Petitioner's Counsel and then from Counsel for the 3<sup>rd</sup> Petitioner before hearing the Respondents' combined submissions in opposition to the 2<sup>nd</sup> and the 3<sup>rd</sup> Petitioners' respective submissions.

The brief background of the second Petition is that the 2<sup>nd</sup> Petitioner, Stephen Katuka, filed his petition against the Attorney General of the Republic of Zambia. He did so in his capacity as Secretary General of the United Party for National Development (UPND) as a matter of public interest and as a person with interest in what he termed to be matters inconsistent with the spirit of the Constitution. The Petition was filed pursuant to Articles 2 and 128(3) of the Constitution as amended.

The 2<sup>nd</sup> Petitioner seeks the interpretation of the Court whether, pursuant to Articles 72(1), 81, 111(4) (c) and 116(3) of the Constitution of Zambia, the Vice-President and Cabinet Ministers of the Government of the Republic of Zambia can continue holding their ministerial positions and continue to enjoy benefits associated with their portfolios and draw salaries and allowances, among others. He therefore claimed the following reliefs from the Court against the Attorney-General:-

- “1. Declare that on a reading of Articles 72 (1) and 81(3) of the Constitution of Zambia as read with Articles 111(4) (c) and 116(3), and on a purposive interpretation of the same, the respective offices of Vice-President and Cabinet Ministers stand vacant after the dissolution of Parliament on 11<sup>th</sup> May, 2016, until the President-elect assumes office after the General Elections slated for 11<sup>th</sup> August, 2016;
2. Order that costs for the petition be borne by each party to this cause; and,
3. Any other relief that the Court may deem fit.”

In his Affidavit in Support, the 2<sup>nd</sup> Petitioner averred that the Vice-President and Cabinet Ministers hold their Cabinet portfolios by virtue of being Members of Parliament and that they cannot be a Vice-President or Cabinet Minister without first being elected or nominated as Member of Parliament. That the failure by the President of the Republic of Zambia to dissolve his Cabinet following the dissolution of Parliament was a deliberate infringement of the Constitution and that, in so doing, the President has failed in his duties to, *inter alia*, respect, uphold and safeguard the Constitution and the sovereignty of the Republic and to promote democracy and enhance the unity of the nation and to uphold the rule of law.

As regards the 3<sup>rd</sup> Petitioner's Petition, the Petitioner seeks against the Respondents, the following reliefs:-

- “1. A declaration that the office of Deputy Minister was repealed by the Constitution (Amendment) Act No. 2 of 2016.
2. A declaration that the continued occupation by the twenty-fifth to the fifty-fifth Respondents of the offices of Deputy Minister from 6<sup>th</sup> January, 2016 to 13<sup>th</sup> May, 2016 is ultravires Article 1 (3) of the Constitution hence illegal.
3. An order that all the salaries and allowances and all other emoluments drawn by the twenty-fifth to the fifty-fifth Respondents from the revenues of the Republic be paid back to the revenue of the Republic of Zambia.
4. A declaration that following the dissolution of the National Assembly on 13<sup>th</sup> May, 2016 by effluxion of time pursuant to the provisions of Article 72 of the Constitution, the continued occupation of the positions of Cabinet Minister and Provincial Minister by some of the Respondents is ultravires the provisions of Article 116 and 117 respectively.
5. AND THAT the costs of and occasioned by this Petition be paid by the Respondents to the Petitioner.”

The brief background of this Petition is that on 19<sup>th</sup> May, 2016 the 2<sup>nd</sup> Petitioner filed a Petition against the 2<sup>nd</sup> to the 64<sup>th</sup> Respondents pursuant to Section 11 of the **Constitution of Zambia Act No. 1 of 2016**; and Articles 1(3), 2(a), 8, 9, 56(1), 72, 81(3), 116,117 and 267 of the **Constitution of Zambia (Amendment) Act No. 2 of 2016** seeking the reliefs outlined above. On the same day, the Petitioner applied before a single Judge of this Court, by Summons and affidavit in support, for interim relief in form of an interlocutory injunction to restrain the Respondents, pending the determination of the Petition, from holding themselves out as Ministers, Deputy Ministers and Provincial Ministers or purporting to occupy the said offices; and drawing and continuing to draw the salaries and

allowances tied to their offices as Minister, Deputy Minister and Provincial Minister. The single Judge of the Court however, declined to grant the interim Order sought through a Ruling dated 20<sup>th</sup> June, 2016. In that Ruling, the single Judge also ordered the joinder of the Attorney-General as the 65<sup>th</sup> Respondent under this cause, on ground that as the Chief Legal Adviser to the Government, which is the employer of the Respondents, the Attorney-General would be affected by whatever decision the Court would make in this case.

In their Answer, the Respondents stated that their continued stay in office is not illegal. To support their assertion they pointed to Article 116(3) of the Constitution stipulating the circumstances when a Minister shall vacate office, namely, until the President terminates the appointment or until another person assumes the office of President.

As regards the Vice-President, they referred to Articles 111(2), 111(5) and 81 of the Constitution as amended and submitted that the life of Cabinet should not be linked to the life of Parliament as that would be contrary to Article 116(3) of the Constitution. Hence, the Petitioners are not entitled to any of the reliefs sought.

Regarding the Deputy Ministers, the Answer acknowledges the Respondents' continued stay in office after the enactment of the Constitution as amended. They state that the Deputy Ministers' stay in office is supported by Section 7 (2) of **Act No. 1 of 2016**, which is a transitional provision and by Article 47 of the 1991 Constitution of Zambia which they contend is still in force until the President terminates the appointments as provided under Article 44 (5) of the 1991 Constitution. For that reason, the Respondents claim that the Petitioners are not entitled to any of the reliefs sought in the Petition or at all.

At the hearing of the Petitions, the learned Counsel for the 2<sup>nd</sup> Petitioner, Mr. Mweemba and Mr. Phiri relied on the Petition, the Affidavit Verifying Facts and the Skeleton Arguments which they augmented with oral submissions. In their Skeleton Arguments, the learned Counsel for the 2<sup>nd</sup> Petitioner took the position that the issue for determination is whether the Vice-President and Cabinet Ministers should vacate their respective positions upon dissolution of Parliament. It was their submission that upon dissolution of Parliament on 11<sup>th</sup> May, 2016 all Members of Parliament ceased to hold their positions by operation of law.



Referring to the provisions of the Constitution as amended, Counsel referred us to the definition of "Member of Parliament" which is defined as "a person who is a member of the National Assembly." Counsel also referred to Article 68(2) which stipulates the composition of the National Assembly.

It was argued that Article 72(1) of the Constitution provides that with the exception of the Speaker and the First Deputy Speaker, a Member of Parliament shall vacate the seat in the National Assembly upon the dissolution of Parliament. And that, while by definition, Parliament includes the President and the National Assembly, the dissolution of Parliament only affects Members of Parliament as specified in Article 68(2) with the exception of the Speaker and the First Deputy Speaker. Counsel submitted that Article 81(8) allows for the President to continue in office until the President-elect assumes office. For that reason, it is only the President, the Speaker and the First Deputy Speaker who survive the dissolution of Parliament and that the Constitution does not provide for the Vice-President and Cabinet Ministers to continue in office upon the dissolution of Parliament.

With specific reference to the Vice-President, the 2<sup>nd</sup> Petitioner argued that Article 111(4) (c) provides that the office of Vice-President becomes vacant, among other reasons, the reason provided under Article 81 and of particular interest is the reason stipulated in Article 81(3) which states that Parliament shall stand dissolved ninety days before the holding of the next general election.

Counsel referred to Article 111(5) which he submitted is emphatic and categorical in prescribing that:-

**"Where a vacancy occurs in the office of Vice-President, except as provided under Article 81, the President shall appoint another person to be Vice-President and the National Assembly shall, by resolution supported by the votes of not less than two-thirds of the Members of Parliament, approve the appointment of that person as Vice-President."**

Counsel proceeded to argue that the President cannot fill a vacancy in the office of Vice-President actuated by Article 81(3). He further contended that Article 111(2) of the **Constitution**, which provides that the Vice-President holds office from the date of being sworn into office up to the date the next Vice-President-elect takes office will only apply after the 11<sup>th</sup> August, 2016 Elections.

Counsel referred to the **Constitution of Zambia Act No. 1 of 2016** which provides for, among other things, the savings and transitional provisions and submitted that the Act is subservient to the Constitution of Zambia as the Supreme Law of the land. Counsel cited Section 7(2) of Act No. 1 of 2016 and submitted that in Section 2 of the Act "Constitution" is defined as "the Constitution of Zambia, 1991, in force immediately before the effective date." His submission was that the provisions of Section 7(2) of **Act No. 1 of 2016** have been overtaken by the provisions of the amended Constitution, thus creating vacancies after the dissolution of Parliament in accordance with Article 81 of the Constitution as amended. And that only the President continues to serve for the unexpired term of the office of President pursuant to Section 7(1) of **Act No. 1 of 2016**.

Counsel also cited Section 11 of **Act No. 1 of 2016** and submitted that Sections 11(1) and (2) do not allow the Vice-President and Cabinet Ministers to continue in office as the section refers to continuation in office of occupants of offices "established by the Constitution immediately before the effective date". And that it does not refer to the offices of Vice-President and Cabinet Minister. And that Section 11(2) states that a "public officer" continues in office as if appointed under the Constitution as

amended. That according to the Constitution, "public officer" means a person acting in a public office and does not include a "State officer", which term includes the office of President, Vice-President, Speaker, Deputy Speaker, Member of Parliament, Minister and Provincial Minister. Hence, the 2<sup>nd</sup> Petitioner's assertion is that the Vice-President and Cabinet Ministers are excluded from the ambit of Section 11(2).

Counsel further submitted in the alternative, that should the Court find that Sections 7 and 11 allow the Vice-President and Cabinet Ministers to continue in office after dissolution of Parliament, then the 2<sup>nd</sup> Petitioner's argument is that the said provisions are in conflict with Articles 72(1) and 81(3) of the Constitution as amended and should be declared unconstitutional and *void ab initio*.

On Cabinet Ministers, Counsel argued that under Article 116(1), being a Member of Parliament is a condition precedent to being appointed as a Minister and, hence, the dissolution of Parliament on 11<sup>th</sup> May, 2016 effectively terminated their tenure as Minister in line with Articles 72(1) and 81(3) of the Constitution.

Citing Article 116(3) (e) of the Constitution, which provides for a vacancy in the office of Minister if "another person assumes the office of President", Counsel went on to argue that the Article does not refer to the assumption of the office of President by the President-elect unlike Articles 106(1) and 111(2). He pointed out that Article 116(3) (e) is one of general application and referred to scenarios and situations where the office of Minister becomes vacant during the term of Parliament, before its dissolution. He contended that a contrary interpretation would therefore, lead to absurdity. Further, that the situations referred to in Article 116(3) (e) are death or resignation, as provided for in Article 106(4), removal on ground of incapacity under Article 107 and impeachment under Article 108. Counsel contended that Article 116(3) (e) is intended to allow the in-coming President, not the President-elect as defined in Article 266, to freely constitute a Cabinet of his or her choice during the term of Parliament.

He further submitted that Article 267(1) of the Constitution requires the Court to apply a purposive and benevolent interpretation of the Constitution in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles and, contributes to good governance.

To buttress this contention, Counsel, drew our attention to the case of **Wynter Kabimba (Suing in his capacity as Secretary General of the Patriotic Front) v. Attorney General**<sup>1</sup> which he contended demonstrates the shift from the purely literal meaning towards the purposive construction of statutory provisions. He submitted that in that case, Wood, J, referred to the English case of **Seaford Court Estates Ltd v. Asher**<sup>2</sup>, in which Lord Denning stated that:-

"...The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'...in all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: "There is nothing we can do about it." Whenever strict interpretation of a statute gives rise to absurdity and an 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."

Counsel argued that Wood, J, said that the words of Lord Denning had been quoted with approval by the Supreme Court of Zambia in the case of **Attorney General and Another v. Lewanika and Others**<sup>3</sup>. Counsel pointed out that the learned judge also quoted from the writings of Francis Bennion, in his book, **Statutory Interpretation**, in which Bennion quoted from the case of **James v. Wrotham Park Settled Estates**<sup>4</sup>, in which Lord Diplock put it thus:-

**"I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But doing so, the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included."**

Drawing from his extensive quotation from the **Wynter Kabimba** case, Counsel for the 2<sup>nd</sup> Petitioner implored us to take judicial notice of the growing trend towards employing a purposive approach to interpretation of statutes.

He urged this Court to interpret the Constitution, being the supreme law of the land, with precision and caution given that all other laws derive their authority from it. To illustrate this point, Counsel referred us to the American case of **Trop v Dulles**<sup>5</sup> where Justice Wallen, C.J., stated that the provisions of the Constitution (the American Constitution) were not time worn adages but vital living principles that authorized and limited government powers.

Counsel also urged the Court to interpret the Constitution as a whole. To press this point, Counsel cited the following cases from other jurisdictions:-

1. **South Dakota v. North Carolina**<sup>6</sup>, where the United States Supreme Court stated that no single provision of the constitution was to be

segregated from the others but that all provisions bearing on a particular subject were to be brought into view and to be so interpreted as to give effect to the greater purpose of the instrument; and,

2. **Major General David Tinyefuza v. The Attorney General of Uganda**<sup>7</sup> where the Constitutional Court of Uganda held that the entire constitution was to be read as an integral whole with no one provision destroying the other but each sustaining the other.

It was submitted that the Court must consider the meaning of Articles 72(1), 81(3), 111(2) and 116(3) (e) in light of the Constitution as a whole. That in doing so, the Court would be upholding the principles of democracy and good governance and a sustainable political, legal, economic and social order, as to consider a particular provision in isolation, would be a dangerous course from which the Court may later be forced to depart as the relevant constitutional provisions on vacating of offices by the Vice-President and Cabinet Ministers were precise and unambiguous.

It was argued that should the Court find that the said provisions were imprecise and ambiguous, then the Court should employ a liberal, flexible, benevolent and purposive interpretation because the Constitution is not an ordinary statute capable of easy amendment. To illustrate the point, Counsel cited the case of **Attorney General of Trinidad and Tobago v. Whiteman**<sup>8</sup>, where the Judicial Committee of the Privy Council implored



the courts to construe the constitution "not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit...."

We were, accordingly, urged to give meaning to, and contextualise, phrases like "another person assumes the office of President" used in Article 116(3) (e) in order to give it legislative effect.

Counsel also called upon the Court to interpret the Constitution as a living document, having in mind present day circumstances. To illustrate this point, Counsel referred to, among others, the case of **Attorney General v. Unity Dow**<sup>9</sup>, where the court stated that the Constitution was the supreme law of the land meant to serve not only a current generation but generations yet unborn and that the courts must breathe life into it as occasion may arise to assure the healthy growth of the state through it. And that while a constitutional provision may be able to meet the designs of the society of a certain age, it was the primary duty of judges to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which was part of the wider society governed by acceptable concepts of human dignity. Counsel also referred to the South African case of **Minister of Lands and Another v.**

**Slamdiern and Others**<sup>10</sup>, in which the use of the purposive approach to statutory interpretation was underscored.

We were urged not to turn a blind eye to the political realities in Zambia which is a multiparty democracy. Counsel submitted that it would be against the constitutional values of Zambia for the ruling party to advantage itself during the campaign period by allowing it to have its members occupy critical and influential positions in government during the campaigns when, constitutionally, they were required to vacate those positions. He contended that it would never have been the intention of Parliament that the Vice-President and Ministers should continue in their offices after the dissolution of Parliament. And that allowing the Vice-President and Ministers to continue in office after dissolution of Parliament would not be an endearment to the tenets of democracy and good governance.

Counsel argued that only if they were appointed from outside Parliament, and the Constitution, expressly or impliedly, provided for their continuation, would their retention in office be tenable. Thus, to Counsel, the net-result of the continuation in their offices after dissolution of

Parliament is illegal in terms of Article 1(2) of the Constitution, which provides that an act or omission that contravenes the Constitution is illegal.

In drawing attention to the doctrine of separation of powers and the principle of checks and balances, Counsel for the 2<sup>nd</sup> Petitioner contended that these concepts ensure that each branch of government has a distinct role to play and that no one branch interferes in the functions of another and it also limits the unlimited exercise of power by any branch of government. That allowing Ministers to hold office after the dissolution of Parliament would be a legal, political and social tragedy as they would not be subject to any checks and balances, hence, increasing the likelihood of abuse of authority of office and resources as this is an election period and most Ministers are out campaigning to retain, not only their parliamentary seats, but to also help the President retain his seat after the 11<sup>th</sup> August, 2016 general elections. According to Counsel, the question which arises is: to which independent institution do the Ministers report?

Counsel submitted that the principles of accountability and transparency that are fundamental pillars of democracy were being violated by the Executive from the time Parliament was dissolved on 11<sup>th</sup> May, 2016

to-date as Parliament, which holds the Executive accountable on various matters of national and public interest, was no longer sitting following its dissolution as per constitutional requirement. There was, therefore, a serious breach of, and violation of, the doctrine of separation of powers. His position was that if the reliefs sought, are not granted, a breeding ground would be created for anarchy and result into what Counsel termed, a "legalised" violation of the fundamental principles of democracy which would render the Constitution, the Electoral Process Act and other laws which govern elections, otiose. His further view was that this would result into an inexorable distortion and breakdown in the country's legal order, marking the beginning of the end to Zambia's constitutionalism and the country's democracy and its fundamental pillars.

In summing up the written submissions, Counsel argued that on a meticulous reading of Articles 72(1) and 81(3) of the Constitution as read with Articles 111(4) (c) and 116(3), and on a purposive interpretation of the said Articles, the Court should declare that the offices of Vice-President and Cabinet Minister stood vacant after dissolution of Parliament until the President-elect assumes office after the elections slated for 11<sup>th</sup> August, 2016.

In augmenting the written submissions, Counsel for the 2<sup>nd</sup> Petitioner reiterated his arguments in the written submissions and added that although there was no express provision in the Constitution regarding the separation of powers, the doctrine is considered axiomatic and is subsumed in the structure of the Constitution itself. To elaborate this point, Counsel cited Section 4(4) of the **Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**, which reads:-

**"Where the words 'or', 'other' and 'otherwise' are used in any written law they shall be construed disjunctively and not as implying similarity, unless the word 'similar' or some other word of like meaning is added."**

Mr. Mweemba then went on to discuss the functions of Cabinet which he argued, cannot continue when the National Assembly which holds it accountable is dissolved as it cannot check itself.

As regards the Respondents' position that a vacuum would be created if Cabinet was not allowed to continue after dissolution of Parliament, Mr. Mweemba argued that there was no express provision to that effect in the Constitution. And that there can be no implied amendment of the Constitution by a court of law, not even by way of judicial activism for the reason that the Constitution was designed in that way to promote the fundamental principles of democracy, among which is the holding of

regular, general, free and fair elections. According to Counsel, it was never the intention of the people, who are sovereign, to allow a political player to use State resources to campaign and expect to receive a salary at the end of the month, thereby, making the political playing field unfair.

In response to the Respondents' position that Articles 107, 108 and 109 support the continuation in office of Cabinet after the dissolution of Parliament, Counsel submitted that those provisions point to situations when the life of the National Assembly is still subsisting. And that all the situations referred to in those Articles provide for a role for Parliament to play. He argued that Article 116, which provides for vacancy in the office of Minister should be read in the context of the entire Constitution, by adopting a purposive approach.

Winding up his submissions, Mr. Mweemba argued that this Court is not bound by the decision of the High Court in **Wynter Kabimba v. Attorney General and George Kunda**<sup>1</sup>, as this court should instead create its own precedents. He, therefore, prodded the Court not to lose sight of the essence of the principle of separation of powers.

In supplementing Mr. Mweemba's oral submissions, Mr. Phiri added that Article 114(1) shows that the functions of Cabinet are almost all the time aligned to Parliament with the only exception being in Article 114(1) (f), under which Cabinet has an advisory role to the President. He surmised that without Parliament, there can be no Cabinet. And that Article 91(2) is very clear in vesting executive authority in the President, which he can execute without Cabinet. He contended that Cabinet is not synonymous with the executive branch of Government but is only a component of it. And that it is non-existent by operation of Article 81(3) when Parliament is dissolved.

Counsel submitted that the 2<sup>nd</sup> Petitioner disagrees with the position taken by the Respondents that the Vice-President and Ministers are public officers who can indirectly perform executive functions as envisaged in Article 91(2).

To support this contention, Counsel referred to the definition of "public officer" in Article 266 of the **Constitution**, which he contended, does not refer to the Vice-President, Ministers and Members of Parliament.

He argued that the executive authority under Article 91(2) can therefore, be exercised by the President in the absence of Cabinet.

As regards the tenure of the Vice-President, Mr. Phiri argued that Article 111(2) does not aid the Respondents' position on the continuation in office of the incumbent Vice-President as it refers to the Vice-President-elect, an office which has not previously existed in Zambia and will only exist after 11<sup>th</sup> August, 2016.

In response to the Respondents' submission that the decision in **Wynter Kabimba v. Attorney General and George Kunda**<sup>1</sup>, supports the continued stay in office by the Vice-President, Mr. Phiri's argument was that **the decision in the earlier** case is not on all fours with the current case as the scenario in that case is different. According to him Article 81(3), relating to the dissolution of Parliament ninety days before the holding of general elections, did not exist in the 1991 Constitution. And that the President had the sole preserve of dissolving Parliament whenever he wanted and appointed the date for the next elections.

It was Mr. Phiri's further submission that the Respondents' position that Article 109 supports the continuation of the Cabinet after dissolution of



Parliament is not correct. He thus invited the Court to reconcile Article 81(3) with the provisions in Article 109. He stressed the point that the executive functions of the Republic continue to be performed by the President with assistance of the civil service in general. Conceding that there seemed to be a vacuum created in the Constitution, as to whether or not the Vice-President and Ministers should continue in office after dissolution of Parliament, Counsel submitted that the role of the Court is not to legislate but merely to interpret the Constitution. In furthering this point, he cited the case of **Christine Mulundika and 7 Others v. The People**<sup>11</sup>, in which the Supreme Court held that if a vacuum exists in the law, the only thing the court can do is to recommend to the Legislature to address the vacuum.

As regards the Respondents' position that since independence, the Vice-President and Ministers have always continued in office following the dissolution of Parliament and the reliance on Article 39(2) of the Constitution prior to amendment, Mr. Phiri argued that Article 39(2) of the Constitution prior to amendment does not assist the Respondents' position as it applied to a situation where the President is unable to discharge the functions of the office of President due to absence or illness. He contended that the proviso to Article 39 (2) aforesaid clearly shows that

Parliament was in existence and the person acting had no power to dissolve it.

The learned Counsel for the 3<sup>rd</sup> Petitioner, Mr. Sangwa, S.C., also relied on the Petition, Affidavit Verifying Facts and the arguments in the Skeleton Arguments which he too augmented with oral submissions.

According to the 3<sup>rd</sup> Petitioner's Petition and the Verifying Affidavit, the 1<sup>st</sup> to the 64<sup>th</sup> Respondents were either elected or nominated members of the eleventh National Assembly which commenced its business on 6<sup>th</sup> October 2011 and concluded its business on 11<sup>th</sup> May, 2016. On 5<sup>th</sup> January, 2016 however, the Constitution of the Republic of Zambia was amended, by **Act No. 2 of 2016** which repealed and re-enacted all the parts of the Constitution except for **Chapter III and Article 79** of the 1991 **Constitution**. That prior to the enactment of **Act No. 2 of 2016**, the Respondents, who were Members of Parliament were appointed as Cabinet Ministers, Provincial Ministers and Deputy Ministers pursuant to the provisions of Articles 46 (2), Article 47(1) and (3) of the 1991 **Constitution**. As a result of the said appointments, the Respondents have been receiving salaries and allowances prescribed by the **Ministerial and**

**Parliamentary Offices (Emoluments) Act, Chapter 262 of the Laws of Zambia** which are a charge on the general revenues of the Republic of Zambia.

The sum total of the Petition by the 3<sup>rd</sup> Petitioner is that it challenges the continued stay of the Deputy Ministers from 5<sup>th</sup> January, 2016 when the **Constitution of Zambia (Amendment) Act No. 2 of 2016** came into force and as against the Cabinet and Provincial Ministers, their continued stay in office after the dissolution of Parliament on 11<sup>th</sup> May, 2016 which the 3<sup>rd</sup> Petitioner alleges, is contrary to the Constitution as amended and hence, the orders sought above. That by virtue of their continued stay in office and by drawing salaries and allowances pertaining to their offices, the Deputy Ministers have violated and continue to violate the **Constitution of Zambia as amended**.

In the 3<sup>rd</sup> Petitioner's Skeleton Arguments, Mr. Sangwa, S.C., submitted that the only contention between the 3<sup>rd</sup> Petitioner and the Respondents is that they have different interpretations of the Constitutional provisions in issue in this case.

It is submitted that although the Respondents rely on the provisions of Section 7 (2) of **Act No. 1 of 2016** and on Articles 44 and 47 of the **1991 Constitution** to support their position that Deputy Ministers are lawfully in occupation of their offices until the President terminates their appointments, the 3<sup>rd</sup> Petitioner's submission was that since the Deputy Ministers were appointed pursuant to the provisions of Article 47 of the **1991 Constitution** prior to its amendment on 5<sup>th</sup> January, 2016 their continued stay in office is illegal as Article 47 pursuant to which they were appointed was repealed. It was pointed out that Part IV under which Article 47 fell which dealt with the Executive branch of Government before the amendment, was entirely repealed by **Act No. 2 of 2016** and was not replaced with a similar provision under which Deputy Ministers could continue in office. He therefore, argued that since Article 47 was not re-enacted in the Constitution as amended in order for the Deputy Ministers to continue in office, their continued stay is wrongful or illegal. State Counsel referred us to Article 79 (5) (b) of the **Constitution** as amended. He argued that this Article, on alteration of the Constitution, states as follows:-

**“ References to the alteration of this Constitution or the Constitution of Zambia Act or of any Part or Article include references to the amendment, modification or re-enactment with or without amendment or modification, of any provision for the**

time being contained in this Constitution, that Act, Part or Article, the suspension or repeal of any such provision and the making of different provision in lieu of such provision, and the addition of new provisions to this Constitution, that Act, Part or Article."

State Counsel submitted that the import of the above provision is that with effect from 5<sup>th</sup> January, 2016 when **Act No. 2 of 2016** came into force, Parliament abolished the position of Deputy Minister. Therefore, the said office, being a creature of the Constitution could only be continued by the Constitution itself. As such, he contended, there is no basis for the Respondents to claim to hold positions which do not exist at law as their office was abolished by Parliament. And that they cannot claim to continue in the said offices and continue to draw emoluments from the revenue of the Republic as doing so is ultra- vires the Constitution.

It was State Counsel's further submission that the claim that the Respondents are still Deputy Ministers by virtue of the provision of Section 7 (2) of **Act No. 1 of 2016** and Article 47 of the **1991 Constitution** is untenable as the reliance on the said provisions ignores the implication of amending the Constitution as provided under Article 79 (5) (b) of the **Constitution**.

State Counsel also referred to Section 7 (1) and (2) of the **Constitution of Zambia Act No. 1 of 2016** and pointed out that effective from 5<sup>th</sup> January, 2016 when **Act No. 2 of 2016** came into force, **Act No. 2** does not have its own existence, separate or distinct from the 1991 Constitution. He pointed out that Article 1 of **Act No. 2** makes it clear that **Act No. 2** shall be read as one with the 1991 **Constitution**. Hence, his position that **Act No. 2 of 2016** and **Act No. 1 of 2016** do not enjoy the same legal status because the former has become one with the 1991 Constitution while the latter remains a stand-alone Act of Parliament whose legality is subject to the Constitution. Therefore, that **Act No. 1 of 2016** must comply with the provisions of Article 1 of the **Constitution as amended**. Article 1(1) provides as follows:-

- "1. This Constitution is 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."

Therefore, that Section 7 of **Act No. 1 of 2016** should not be construed in a manner that alters or which is at variance with the Constitution. Further that since the Section does not provide that the Respondents who served as Deputy Ministers before 5<sup>th</sup> January, 2016 can continue in their offices after that date, their continued stay in office is illegal.

He pointed out that although admittedly, Section 7 seeks to provide for transition from the 1991 constitutional order to the one after amendment, a person can only move into an existing office. Hence, Section 7 was drafted on the assumption that after 5<sup>th</sup> January, 2016 the office of Deputy Minister will still be in existence. However, that this is not the case.

Mr. Sangwa submitted that if the Court accepts the Respondents' arguments in this respect, the Court will in effect be construing the provisions of the Constitution to conform to the provisions of an Act of Parliament which position is totally untenable since the Constitution of Zambia is the supreme law of the land and any law that is inconsistent with it is null and void to the extent of the inconsistency.

In light of the above, we were urged to grant the 3<sup>rd</sup> Petitioner the reliefs sought under paragraphs (1) to (3) of the Petition.

As regards the positions of Cabinet Ministers and Provincial Ministers, State Counsel advanced submissions relating to the two offices together on the ground that the provisions of the Constitution which are in contention are identical.

Counsel begun by repeating the 3<sup>rd</sup> Petitioner's position in respect of the Cabinet and Provincial Ministers that they too have violated and continue to violate Article 116 of the **Constitution** by their continued stay in office and for continuing to draw salaries and allowances from the revenue of the Republic notwithstanding the dissolution of the National Assembly by effluxion of time. He pointed out that unlike the position of Deputy Minister, the positions of the Cabinet Minister and Provincial Minister have continued under the Constitution and that Sections 7 and 11 of **Act No. 1** apply to the office of Minister.

His argument was however that Cabinet and Provincial Ministers were appointed pursuant to Articles 46 and 47 of the 1991 Constitution, and that they have continued in office as though they were appointed by the President pursuant to the provisions of Articles 116 and 117. The 3<sup>rd</sup> Petitioner's position however was that their continued stay in office after the dissolution of Parliament is illegal and a violation of the Constitution as the pre- condition of their appointment is that one had to be a member of Parliament. Therefore, that once Parliament dissolved, as a matter of law, the Respondents' right to continue holding the position of Minister or Provincial Minister was also extinguished. As such, their continued stay in



office, notwithstanding the dissolution of Parliament, is in violation of the Constitution and therefore, null and void.

As regards the Respondents' reliance on the provisions of Articles 116 (3) (e) and 117 (2) (d) of the **Constitution** to support their continued stay in office until another person assumes the office of President, Mr. Sangwa submitted that the Articles do not help the Respondents' case as both Articles enumerate instances in which the position of Minister and Provincial Minister become vacant. For an office to become vacant, there has to be a substantive holder who must be a member of the National Assembly and such a person ceases to hold office once he is no longer a Member of Parliament.

For that reason, the provisions relied upon by the Respondents do not help them as they do not apply in the current circumstances.

Further, that the provision that the office of both the Cabinet Minister and Provincial Minister become vacant if "another person assumes the office of President" envisages the assumption of the office of President by another person during the life of the National Assembly. It was submitted that the only person who can assume the office of President under the

Constitution is the Vice- President in line with Article 106 of the **Constitution**. However, that the starting point is Article 112 of the **Constitution** which stipulates that one of the functions of the Vice- President is to assume the functions of the office of the President. Articles 106 (5) and 112 respectively, provide as follows:-

"106 ...

- (5) When a vacancy occurs in the office of President, except under Article 81—
- (a) the Vice-President shall immediately assume the office of President; or
  - (b) if the Vice-President is unable for a reason to assume the office of President, the Speaker shall perform the executive functions, except the power to— (i) make an appointment; or (ii) dissolve the National Assembly; and a presidential election shall be held within sixty days after the occurrence of the vacancy."

"112

- (1) The Vice-President shall be answerable to the President in the performance of the functions of Vice-President.
- (2) The Vice-President shall—
- (a) perform the functions that are assigned to the Vice- President by the President;
  - (b) perform the executive functions during the periods specified in this Constitution; and
  - (c) assume the office of President as specified in Article 106 (5)."

It was pointed out that both Articles 116 (3) (e) and 117 (2) (d) deal with the assumption of office of the President without an election and only the Vice- President becomes eligible to assume the office of President

without being elected to that office once it becomes vacant. And that the situation at hand is covered by Article 81 of the **Constitution** as the life of Parliament has come to an end and provides for another person taking the office of President after the next general election slated for 11<sup>th</sup> August, 2016.

According to State Counsel, the office of President is currently vacant as the incumbent is merely exercising the functions of the office of President until the President- elect assumes office, (which in his oral submissions, he described as a care-taker position). Therefore, that Articles 116 (3) (e) and 117 (2) (d) do not apply in this case.

On the basis of the above submissions, he urged us to declare that following the dissolution of the National Assembly by expiration of time pursuant to the provisions of Articles 72 and 81 of the **Constitution**, the continued occupation of the positions of Cabinet Minister and Provincial Minister is *ultra vires* the provisions of Articles 116 and 117 of the **Constitution**.

In augmenting the Skeleton Arguments, Mr. Sangwa, S.C., more or less repeated the 3<sup>rd</sup> Petitioner's written arguments. He, however, added

that the 3<sup>rd</sup> Petitioner's action against the Respondents who are occupying the positions of Minister, Deputy Minister and Provincial Minister in their individual capacities and not against the Attorney General and that the same is founded on Article 1 (3) of the **Constitution** as amended which binds all persons in the Republic and that the said Respondents have violated the Constitution by their continued stay in office.

Mr. Sangwa, S.C., also urged us to consider, in determining this Petition, that there is no such thing as an old or a new Constitution as what we have is the Constitution of the Republic of Zambia whose genesis is the 1991 instrument which has been amended over the years but still remains the Constitution of Zambia, 1991.

He, then, went on to submit that in line with the arguments in his Skeleton Arguments, **Act No. 2 of 2016** is not the Constitution of Zambia because it is not a stand-alone legal instrument as provided. As authority, he referred to Article 1 of the **Constitution of Zambia (Amendment) Act No. 2 of 2016** which reads as follows:-

**"This Act may be cited as the Constitution of Zambia (Amendment) Act, 2016, and shall be read as one with the Constitution of Zambia, in this Act referred to as the Constitution."**

Therefore, that there can only be one Constitution at any time which will embody such amendments as may be effected over time.

He then went on to submit on Articles 116 (3) (e) and 117 (2) (b) relied upon by the Respondents for their continued stay in office that the import of these Articles is to provide for premature removal of a Cabinet Minister or Provincial Minister from his office. Therefore, that the listed situations do not apply as a Cabinet Minister or Provincial Minister still vacates office when the National Assembly is dissolved.

He therefore, urged us to grant the reliefs sought by the 3<sup>rd</sup> Petitioner in the Petition.

In opposing the Petitions, the learned Solicitor General, Mr. Mwansa, S.C., relied on the Respondents' answers and affidavits in opposition of the respective Petitions and the combined skeleton arguments in opposition.

In the Skeleton Arguments in opposition to the Petitions, the Solicitor General submitted that there is a plethora of authorities which have established the principles and rules of constitutional and statutory interpretation that have been applied by the courts. To start with, he cited

the case of **Attorney General v. Nigel Kalonde Mutuna and 2 Others**<sup>12</sup> in which the Supreme Court of Zambia put it thus:-

**"We are alive to the fact that there are a number of schools of thought on the legal interpretation of legal contexts. The first school of thought provides that the legal interpretation of a legal context is totally dependent on the nature of that legal context. This school of thought provides for example that the system of interpretation which applies to the Constitutional interpretation is different from the system of interpretation which applies to other legal documents such as wills, contracts, deeds, etc.**

**The other school of thought is known as the purposive system which is that there is a general approach of interpreting all legal documents. Incorporated in this system is the recognition of the uniqueness of each legal context. According to a plethora of authorities in Zambia, our approach has been to apply the first school of thought which is that the legal context of a document dictates the method of interpretation. So constitutional documents are interpreted differently from contracts or wills etc.**

**It is, therefore, common cause as demonstrated by well celebrated cases, that the Zambian courts have applied literal rule of interpretation to the constitutional texts, see the cases of *Miyanda v Handavu*, *Chiluba v Attorney General*, *Mazoka v Mwanawasa*. According to this approach, the primary rule of interpretation applicable in construing the Constitution is that the words should be given the ordinary grammatical and natural meaning and that it is only where there is ambiguity in the natural meaning of the words used that the court may resort to purposive interpretation of the Constitution."**

It was submitted that in interpreting the Constitution, the provisions have to be read as a whole to ensure that no singular provision should swallow or vanquish any other provision(s) as the ultimate result should be to achieve the interpretation that brings about a synergy between individual provisions of the Constitution in order to promote the general legislative purpose underlining such provisions. In support of this proposition, Mr.

Mwansa, S.C., referred to a number of cases from other jurisdictions including that of:-

1. **Attorney General v Unity Dow<sup>9</sup>**, in which the court in Botswana stated that:-

**"The very nature of a constitution requires that a broad and general approach be adopted in the interpretation of its provisions; 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."**

2. **Dkikusooka Majidu and Others v Attorney General<sup>6</sup>**, in which the court in Uganda held that:-

**"All the provisions relevant to an issue are to be brought into perspective to give effect to or not derogate from the intention of the Constitution. The purpose and effect of the provisions is relevant in determining constitutionality."**

Mr. Mwansa, S.C., further submitted that it is not in contention that after dissolution of Parliament, Members of Parliament, save for the President, the Speaker and the First Deputy Speaker, vacate their seats as members of parliament. However, that Article 81 is pertinent on the term and prorogation of Parliament as Cabinet or the Vice-President are referred to in that provision. He submitted that in order to appreciate the nature of the tenure of office of the Vice-President and Cabinet, other provisions of the Constitution have to be considered and appreciated. In particular, he

referred to Articles 113 and 114 on the composition and functions of Cabinet. He contended that the Constitution provides that among the functions of Cabinet is to approve and cause to be implemented Government policy and to advise the President on matters relating to the performance of executive functions. His position was, therefore, that the performance of these functions is continuous as they do not cease on dissolution of Parliament.

As regards the arguments relating to the Vice-President and the 2<sup>nd</sup> Petitioner's contention that upon dissolution of Parliament under Article 81, the Vice-President ceases to hold office and the reliance on Article 111 (4) and (5), Mr. Mwansa, S.C., referred to Article 111(2) of the Constitution of Zambia as amended. He argued that this Article is clear on when the Vice-President vacates office, that is, when the President-elect is sworn into office.

He further submitted that Article 111(5), by operation of factors in Article 81, excludes the appointment of a new Vice-President when Parliament stands dissolved. He also pointed out that there would be a power vacuum if the office of the Vice-President fell vacant due to



dissolution of Parliament. To buttress this point, Mr. Mwansa cited the case of **Wynter Kabimba v. Attorney General and George Kunda**<sup>1</sup>, in which the High Court found that Article 45(3) of the 1991 Constitution applied during the life of the National Assembly and after its dissolution and accepted that there would be a power vacuum in the event that a vacancy occurred by virtue of Articles 38 or 39 of the 1991 Constitution. In that case, the High Court concluded that it was in order for the then Vice-President to remain in office despite the dissolution of Parliament.

The learned Solicitor General was, however, quick to observe that the decision in the *Wynter Kabimba* case is not binding on this Court, but he then went on to stress that the case is of high persuasive value as the facts are on all fours with the current case and in light of the provision of Article 111(2) of the Constitution as amended on the tenure of office of the Vice-President which is not tied to that of Parliament.

Hence, the Respondents' prayer was that the Court should find that Parliament and Cabinet are two separate institutions and that Cabinet does not cease when Parliament is dissolved.

In his oral submissions, Mr. Mwansa, S.C., also more or less repeated the arguments in the Respondents' written submissions. He, however, added that **Act No. 1 of 2016** and the **Constitution of Zambia (Amendment) Act No. 2 of 2016** should not be read in isolation as in his view, **Act No. 2 of 2016** is a schedule to **Act No. 1** and that **Act No. 1** cannot be discarded and that **Act No. 1 of 2016** has preserved the office of Vice-President and Cabinet Minister.

Mr. Mwansa, S.C., then went on to embark on a journey of outlining the provisions relating to State organs and the members of those organs. He argued that Part IV of the Constitution includes the President, Vice President, Cabinet Ministers and Provincial Ministers and that Section 7(2) of Act No. 1 preserved those positions.

As regards the specific issues raised by the 3<sup>rd</sup> Petitioner on the position of Deputy Minister, Mr. Mwansa S.C., took the view that in determining whether or not Deputy Ministers are validly holding their offices after the effective date of the **Constitution of Zambia (Amendment) Act, No. 2 2016**, this Court should examine, as a whole, the provisions of the **Constitution of Zambia (Amendment) Act No. 2 of 2016** as read

together with the provisions of the **Constitution of Zambia Act No. 1 of 2016** as well as the **Constitution of Zambia, 1991**.

He then went on to submit that in order to appreciate the intended purpose of the provisions of the **Constitution of Zambia Act No. 1 of 2016**, the Court should examine the long title of the **Act**.

Mr. Mwansa, S.C., acknowledged the supremacy of the Constitution in relation to statutes and other legal instruments as submitted by Mr. Sangwa, S.C. He, however, contended that the **Constitution of Zambia Act No. 1 of 2016** stands in between the **Constitution of Zambia, 1991** and the **Constitution of Zambia (Amendment) Act No. 2 of 2016** as it carries the transitional force of the two constitutional regimes by way of handing over constitutional enforcement to the Constitution as amended. And that **Act No. 1 of 2016** contains transitional constitutional provisions which preserve certain state organs, institutions, administrations, offices, and laws created by the **Constitution of Zambia, 1991** until the **Constitution of Zambia (Amendment) Act, No. 2 of 2016** takes full force. To support the above arguments, he referred us to Article 266 of the **Constitution of Zambia (Amendment) Act, No. 2 of 2016** which defines

"State Organ" as the "Executive, Legislature and Judiciary." He, therefore, argued that it is a misconception to conclude that the Legislature intended an automatic abolition of the offices under the **Constitution of Zambia, 1991** without providing for the transitional procedure for the termination of such offices by the **Constitution (Amendment) Act No. 1 of 2016**.

Further, that Section 2 of **Act No. 1 of 2016** defines the "Constitution" as the **Constitution of Zambia, 1991**. Hence, the Respondents having been appointed pursuant to Article 46 and 47 of the **Constitution of Zambia, 1991**, they are part of the Executive until the President terminates their position in line with the **Constitution of Zambia, 1991**.

While acknowledging the removal of the office of Deputy Minister in the Constitution as amended, the learned Solicitor General took the view that Section 7 of **Act No. 1 of 2016** seems to suggest that it was not the intention of the Legislature to have an automatic abolition or termination of the office of Deputy Minister on the effective date of the Act in that if that was the intention, the Act could have clearly stated so. Thus, to him, the intention of the drafters was to preserve the office of Deputy Minister under

Section 7 of **Act No. 1 of 2016** until it is terminated by the President in accordance with the **Constitution of Zambia, 1991**.

Mr. Mwansa, S.C., however, conceded that the **Constitution of Zambia (Amendment) Act No. 2 of 2016** does not provide for the continuation of the office of Deputy Minister. Since there is no provision under the **1991 Constitution of Zambia**, which deals with the removal from the office of Deputy Minister, the President will have to exercise the power conferred on him by Section 7 of **Act No. 1 of 2016** to terminate all the appointments of Deputy Ministers as that is the procedure that the Legislature intended to take effect under the transition Act.

It was submitted that although the position of Deputy Minister cannot survive the next constituting of Cabinet after the 11<sup>th</sup> August, 2016 general elections, it must be appreciated that the Vice-President, Provincial Ministers and Deputy Ministers perform dual roles, that is, that of being members of the Legislature and of the Executive. Therefore, that it does not follow that once Parliament is dissolved, the Vice-President, Ministers and Deputy Ministers cease to be members of the Executive.

As regards the salaries and allowances received by Deputy Ministers, after the dissolution of Parliament, the learned Solicitor General took the position that in terms of Article 266 of the **Constitution of Zambia (Amendment) Act No.2 of 2016**, the Respondents are public officers who are performing public functions and as such, they are entitled to draw salaries and allowances from the general revenues of the Republic. He therefore, urged the Court to take judicial notice of the fact that the Deputy Ministers have been rendering services worth receiving salaries and allowances as it is not in dispute, and it has been seen and heard that they have continued to hold and render services of the said office. Therefore, that according to the laws relating to employment, every service rendered demands a payment. In support of this proposition, the learned Solicitor General relied on the case of **Moonjelly Ouseph Joseph v. RDS Investments Limited**<sup>7</sup> where the Supreme Court of Zambia held that:-

**"Under Section 48 of the Employment Act, Chapter 268 of the Laws of Zambia, no one can be employed to work without receiving a wage because that would be illegal."**

It was argued that since the Respondents who are holding the office of Deputy Ministers and rendering the services required by those offices, they are rightfully and legally entitled to draw salaries and allowances for

the services they are rendering so far. To support this argument, Mr. Mwansa, S.C., referred to Section 2 (1) of the **Ministerial and Parliamentary Offices (Emoluments) Act, Chapter 262 of the Laws of Zambia**, and to the first schedule, under which Deputy Minister is listed.

Section 2 (1) of **Chapter 262** provides as follows:-

**"There shall be paid to the holder of an office specified in the Schedule, a salary and allowances at such rate as the Minister responsible for finance may prescribe, by statutory instrument, in consultation with the Standing Orders Committee of the National Assembly."**

He submitted that should this Court find that Deputy Ministers should be ordered to pay back the salaries and allowances they have received after the dissolution of Parliament, the effect will be that they will be deprived of their entitlement as prescribed in the **Ministerial and Parliamentary Offices (Emoluments) Act** as the only incident recognised by law when such office holders are legally precluded from receiving a salary and an allowance is provided for by Section 7 of the said **Ministerial and Parliamentary Offices (Emoluments) Act** which provides as follows:-

**"Notwithstanding anything contained in this Act, no person shall be paid any salary under this Act in respect of any period during which he is serving a sentence of imprisonment or is restricted or detained in terms of or under the authority of any such law as is referred to in the Constitution."**

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He submitted that in view of the above position of the law, the Deputy Ministers do not fall under any of the categories described in the above provision of Section 7 to warrant their preclusion from receiving salaries and allowances whilst holding office or their being ordered to pay back the salaries to the State. And that this is so regardless of whether or not this Court should find that they should have vacated their offices. Further, that in the unlikely event that the Court was to arrive at the conclusion that Deputy Ministers were supposed to vacate their office after the dissolution of Parliament, it would still not be in order to order them to pay back the salaries and allowances they would have received as they would already have worked for the said money.

As regards the office of Cabinet Minister and Provincial Minister, the learned Solicitor General begun by quoting Articles 116 and 117 of the **Constitution** as amended.

He submitted that Section 7 of **Act No. 1 of 2016** as read together with Article 116(3) and Article 117(2) of the **Constitution** as amended supports the continuation in office of the Vice-President, Minister, Provincial Minister and Deputy Minister until the appointments are terminated by the President.



Further, that dissolving the position of Minister defies the provisions of Article 109 of the **Constitution** as amended and the principle behind the doctrine of 'Three Arms of Government' and of the '**Separation of Powers.**'

Article 109 (2) refers to instances when the President and Vice-President are occupying their offices but are incapable of performing the executive function of Government and not to instances in Article 106 (5) when there is a vacancy in the office of President, as argued by the 2<sup>nd</sup> Petitioner.

Therefore, if the events in Article 109 (2) occur, the Executive is expected to be functional from which a Minister as member of Cabinet can be appointed to perform the functions of the office of President as envisaged by Article 91 (2).

It was submitted that in the light of the above provisions of the Constitution as amended, it was a clear intention of the drafters to have no power vacuum in the event that the President was incapable of directly exercising the executive functions.

As regards the doctrine of Separation of Powers, Mr. Mwansa, S.C., submitted that the three arms of government are distinct organs which

operate independently from each other. In view of this, dissolution of Parliament refers to the dissolution of the Legislature and not the Executive. He contended that once the ministers are appointed, they become part of the executive which survives the dissolution of Parliament.

Mr. Mwansa, S.C., contended that upon dissolution of Parliament Articles 116(3) (e) and 117(2) (d), provide for the Respondents continuity in the Executive until after another person assumes the office of President, and for purposes of the events envisaged in Article 109 and for the continuation of the performance of the Executive functions of the Government.

In support of this proposition, the learned Solicitor General referred to the case of **Wynter Kabimba v Attorney General And George Kunda**<sup>1</sup> in which, he submitted, the High Court found that Article 45(3) of the 1991 **Constitution of Zambia 1991**, had a similar effect as Article 109 of the **Constitution**, as amended which applied during the life of the National Assembly and after its dissolution, up until a new Government was elected. And that the High Court accepted that there would be a power vacuum in the event that a vacancy occurred by virtue of Articles 38 or 39 of the **1991**

**Constitution** and found that it was in order for the then Vice-President to remain in office despite the dissolution of Parliament.

As regards the salaries and allowances received by Ministers and Provincial Ministers after the dissolution of Parliament, the learned Solicitor General maintained his earlier submissions with regard to the salaries and allowances received by Deputy Ministers after the dissolution of Parliament.

In conclusion, the learned Solicitor General urged the Court to decline to grant the reliefs sought by the Petitioner on ground that the Respondents have demonstrated that they are validly holding their respective offices as Ministers, Deputy Ministers and Provincial Ministers and that they are entitled to draw salaries and allowances by virtue of holding the said offices.

In reply, Mr. Mweemba, stressed the point that Zambia has a written Constitution which is supreme, passed by the sovereign people and as stipulated categorically in Articles 8 and 9 of the Constitution as amended which outline the national values and principles as follows:-

- "8. The national values and principles are:**
- (a) Morality and ethics;**
  - (b) Patriotism and national unity;**

- (c) Democracy and constitutionalism;
- (d) Human dignity, equity, social justice, equality and non-discrimination;
- (e) Good governance and integrity; and
- (f) Sustainable development.”

“9.

- (1) The national values and principles shall apply to the –
  - (a) Interpretation of this Constitution;
  - (b) Enactment and interpretation of the law; and
  - (c) Development and implementation of State policy.
- (2) The President shall, once in every year, report to the National Assembly the progress made in the application of the values and principles specified under this Part.”

Mr. Mweemba argued that this Court cannot be invited not to take into account the principles and values that are enshrined in the Constitution as suggested by the learned Solicitor General.

To illustrate that there can be no isolation between Parliament and the Executive, Mr. Mweemba referred to Articles 63(2) on the functions of Parliament and National Assembly, and to Article 114(1) on the functions of Cabinet. He argued that the use of the conjunctive “and” in Article 63(2)(d) and also in 114(1)(e) shows this.

Counsel, further, argued that contrary to the learned Solicitor General’s submission, Article 109 refers, by necessary implication, to a

situation when Parliament is still subsisting. And hence, Article 106 (5) (b) refers to the Speaker performing executive functions with the exception of the situations arising under Article 81. According to Counsel, this is so because the Speaker remains in office notwithstanding the dissolution of Parliament. Mr. Mweemba therefore, took the opposite view of Mr. Mwansa, S.C.,'s analogy of a ladder being used to climb a building and of a person remaining there even if the ladder was removed. He argued that Parliament was similarly, a platform for ascending to the Executive but that the Solicitor General's comparison was untenable as the essence of Articles 63(2) and 114(1) aforesaid was accountability and observance of the separation of powers doctrine. Counsel therefore, contended that whenever there is reference to vacancy in Article 109, there is reference to Parliament, meaning that Parliament is still subsisting or is in existence.

He wound up his submission by reiterating the point that being a Member of Parliament was a condition precedent to being appointed a Minister and that the 2<sup>nd</sup> Petitioner's position is therefore *terra firma*.

In reply, Mr. Sangwa, SC., on behalf of the 3<sup>rd</sup> Petitioner, submitted that the **Constitution of Zambia (Amendment) Act No. 2 of 2016** remains

a schedule to the Constitution of Zambia Act No. 1 of 1991 and that the Constitution of Zambia Act No.1 of 2016 does not amend or repeal the Constitution of Zambia Act No. 1 of 1991 and as such, the provisions of Act No. 1 of 1991 still apply to the provisions of the Constitutional (Amendment) Act No. 2.

As regards, Section 7 of the Constitution (Amendment) Act No. 1, Mr. Sangwa submitted that there is no provision in the Constitution as amended which empowers the President to disappoint Ministers, that in fact, Section 7 was drafted under the assumption that there would be such office when in fact there is none.

It was further submitted that when the life of Parliament comes to an end, the tenure of the President also comes to the end and that the only continuation possible, which is envisaged, is to facilitate transition in line with Article 105 of the Constitution as amended.

State Counsel also argued that the suggestion that the dissolution of Parliament does not affect the Executive has no foundation as the precondition to being Minister or member of the Executive is that one must be a Member of Parliament.

As regards the argument that the phrase 'another person', includes the incumbent President, the submission by State Counsel Sangwa was that the phrase does not mean the incumbent but simply that another person assumes the office of President.

We have seriously considered the Petitions by the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners, the contents of the Verifying Affidavits, the Respondents' Answers to the Petitions, the respective Affidavits in Opposition, the detailed written Arguments and the oral submissions by the learned Counsel for the parties. Although lengthy submissions have been made by Counsel for the parties in this matter, our firm view is that the two Petitions raise one central question for determination. This is whether the continued stay in office by the Vice- President, Cabinet Ministers and Provincial Ministers following the dissolution of Parliament on 11<sup>th</sup> May, 2016 and Deputy Ministers after the enactment of the **Constitution of Zambia (Amendment) Act No. 2 of 2016**, which came into force on 5<sup>th</sup> January, 2016 is illegal, *ultra- vires* the Constitution, null and void. In the event that the Court should find that the continued stay of the Deputy Ministers in office was unconstitutional, illegal, null and void, the Court should order

them to pay back the salaries and allowances that they have so far received and continue to receive after 5<sup>th</sup> January, 2016.

To enable the Court to effectively determine the issues raised in the Petitions and for convenience, we shall firstly, consider the challenge to the continued stay of the Vice-President in office following the dissolution of Parliament. Secondly, the continued stay of Cabinet Ministers and Provincial Ministers in their respective offices following the dissolution of Parliament. Lastly whether the continued stay of Deputy Ministers following the enactment of the **Constitution of Zambia (Amendment) Act No. 2 of 2016** on 5<sup>th</sup> January, 2016 is unconstitutional and therefore, illegal.

As already stated above, the 2<sup>nd</sup> Petitioner did not challenge the continued stay of Deputy Ministers in their office while the 3<sup>rd</sup> Petitioner did. The 3<sup>rd</sup> Petitioner did not challenge the continued stay in office by the Vice-President while the 2<sup>nd</sup> Petitioner did. We must also point out from the outset that the challenge to the continued stay in office by the Cabinet and Provincial Ministers is common to both the 2<sup>nd</sup> and 3<sup>rd</sup> Petitioners but we note the slight differences in terms of the arguments and reasons given for the challenge and we shall highlight these later.



As a starting point, we wish to observe that Article 267 (1) enjoins us to interpret the Constitution in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles. This entails that this Court must have in mind the broad objects and values that underlie any particular subject matter. In terms of the general or guiding principles of interpretation, the starting point in interpreting words or provisions of the constitution, or indeed any statute, is to first consider the literal or ordinary meaning of the words and articles that touch on the issue or provision in contention. This is premised on the principle that words or provisions in the constitution or statute must not be read in isolation. It is only when the ordinary meaning leads to absurdity that the purposive approach should be resorted to. The purposive approach entails adopting a construction or interpretation that promotes the general legislative purpose. This requires the court to ascertain the meaning and purpose of the provision having regard to the context and historical origins, where necessary. This exercise would sometimes require reading into the provision what the Legislature had intended. Therefore, in determining the issues raised in this matter, we shall be guided by the above principles.

With regard to the question whether the continued stay in office by the Vice-President, is unconstitutional and therefore, null and void, the thrust of the argument by Counsel for the 2<sup>nd</sup> Petitioner is that the Vice-President ought not to have continued in office. The details of these arguments have been summed up above. We do not wish to repeat them here.

In the Kenyan case of **Reverend Dr. Timothy Njoya v the Attorney General**<sup>16</sup>, the Court stated that:-

**"The entire constitution has to be read as an integrated whole and no one particular provision destroying the other as to effectuate the great purpose of the instrument..."**

In determining the issue, we have to consider the history of that office which has shown that in the past, the Vice-President has continued in office after the dissolution of Parliament. In this respect, we refer to Article 45(3) of the **1991 Constitution of Zambia** which was in place before **Act No. 2 of 2016** was enacted. Article 45 (2) and (3) provided that:-

- "(2) The Vice-President shall be appointed by the President from amongst the members of the National Assembly.**
- (3) Subject to the provisions of this Constitution the Vice-President shall vacate that office upon the assumption by any person of the office of President."**

The argument by the Solicitor General is that the Vice- President continues in office despite the dissolution of Parliament by virtue of Article 111(2) which provides as follows:-

"(2) A Vice-President shall hold office from the date the Vice- President-elect is sworn into office and ending on the date the next President-elect is sworn into office."

However, this clause does not relate to this interim period as it relates to the period after August, 2016.

It has been contended by the 2<sup>nd</sup> Petitioner that section 7(2) as read with section 11(2) and the definition of public officer in Article 266 does not support the stay in office by the Vice- President as she too was appointed from Parliament which has been dissolved.

We have considered the above arguments. Properly read, sections 7(2) and 11(1) of **Act No. 1 of 2016** as read together with Article 267 allows the Vice-President to continue in office until the President-elect is sworn in. We are fortified in so holding because accepting the 2<sup>nd</sup> Petitioner's argument would be absurd and create a vacuum in the event that the office of President becomes vacant in accordance with Article 106.

We agree with the Solicitor General's submission to the extent that it could not have been the intention of Parliament to create a vacuum in the

event of the instances referred to above occurring. In fact, there is a similar case which challenged the continued stay of the Vice-President following the dissolution of Parliament. This is the case of **Wynter Kabimba v. The Attorney General and George Kunda**<sup>1</sup>, which has been referred to by Counsel on both sides in the current case. In that case, Wood, J, stated at page 506:

"If I agreed with the applicant, there could be a power vacuum in the event that a vacancy occurred by virtue of Article 38 or Article 39 of the Constitution. For the Court, as Benion states at page 357, to apply the literal meaning regardless of the consequences is contrary to the judicial oath requiring a judge to do right. He then goes on to give the example of the 'universal repealer' Act which contained a section which effectively abrogated all the laws of the State of Arkansas. If the so-called literal rule were applied the State would be left without law. In the New Zealand case of *Simpson v A-G of New Zealand*, Parliament had been dissolved, but by mistake the Governor General issued his warrant for the holding of the ensuing general election later than was prescribed by the relevant constitutional enactment. A case was brought to establish that the returns in the election were therefore a nullity. This would have meant that there would be a power vacuum in the State which no one could lawfully fill. It was held that the time requirement must be treated as directory rather than mandatory, so that the election was after all valid."

We too are alive to the importance of ensuring that there is no vacuum created in the governance of the nation thus avoiding a possible Constitutional crisis which could arise.

Turning to the alternative argument made by Counsel for the 2<sup>nd</sup> Petitioner to the effect that section 7 (2) of **Act No. 1 of 2016** is *ultra-*

*vires* the Constitution as amended, to the extent that it provides for the Vice-President's continuation in office after the dissolution of Parliament, we hold that this argument is untenable at law. This is because it is trite that on the passing of a new law, not to mention the Constitution of the land, it is necessary to provide for the transition from one constitutional order to another in order to avoid a gap in the governance of the country. A provision which continues the Vice-President in office in keeping with the provisions of Article 45(3) of the **Constitution** prior to the amendment of the Constitution cannot be said to be *ultra vires* the provisions of the Constitution as amended. This is particularly so when the provisions of Article 267(3) (c) of the **Constitution** are applied.

Consequently, the invitation for us to declare Sections 7(2) and 11 of **Act No. 1 of 2016** unconstitutional is untenable. This is due to the fact that Sections 7 and 11 contain fundamental transitional provisions and we find no basis to declare them unconstitutional in as far as they relate to the Vice-President.

Therefore, for the reasons given above, the 2<sup>nd</sup> Petitioner's prayer that the Vice-President should vacate office following the dissolution of Parliament is dismissed on account of want of merit.

With regard to the question whether Cabinet and Provincial Ministers should or can continue to hold their portfolios after the dissolution of Parliament on 11<sup>th</sup> May, 2016, it is imperative that we explore the legislative history behind the provisions in Article 116 and Article 117.

The principle underlying the use of legislative history as an aid to interpretation of statutes was clearly espoused by Lord Diplock in the case of **Fothergill v. Monarch Airlines Ltd**<sup>17</sup>. He laid down valuable guidelines to the effect that the beginning point is to refer to the actual meaning of the words themselves and that if the result is manifestly absurd or unreasonable, then reference should be had to other identifiable sources.

We borrow these words and we shall apply them in interpreting the provisions in issue in the case before us. In this vein, we have had recourse to the Reports and drafts of the **Technical Committee on Drafting the Zambian Constitution** because it is common knowledge that the **Constitution of Zambia (Amendment) Act No. 2 of 2016** is the product of proposals that emanated from the constitution review process undertaken by the Technical Committee. The case of **R v. Jefferson**<sup>18</sup>,

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shows that pre-parliamentary materials can be useful for identifying the purpose of the enactment or the mischief that was intended to be cured.

A perusal of the final Draft Constitution and the final Report of the Technical Committee shows that the current Articles 116 and 117 were basically as they were proposed apart from the fact that they provided for Ministers and Provincial Ministers to be appointed from outside Parliament and not from among members of Parliament. The rationale as stated in the final Report of the Technical Committee was to enhance separation of powers and thereby strengthen the role of Parliament in providing checks and balances.

The Constitution of Zambia (Amendment) Bill, N.A.B 17/2015 (which we will henceforth refer to as the Bill) also provided for the appointment of ministers and provincial ministers from outside the National Assembly.

A review of the debate in the Hansard on Articles 116 and 117 when the Bill was considered in the National Assembly shows that the Minister of Justice proposed amendments to Articles 116 (1) and 117 (1) to provide for the appointment of Ministers and Provincial Ministers from among Members of Parliament as opposed to appointing persons from outside

Parliament. When the amendment to Articles 116 (1) and 117 (1) of the Bill was proposed, there was no further debate on the rest of the clauses of Articles 116 and 117.

The amendment to Articles 116(1) and 117(1) was adopted by the Legislature which enacted the Bill as amended. The Bill was assented to by the President on 5<sup>th</sup> January, 2016.

As can be seen from the submissions by Counsel on both sides and from the provisions of Articles 116 and 117, the pre-condition to qualify for appointment to a ministerial position under the Constitution as amended is that one has to be a Member of Parliament. As regards the tenure of office of a Member of Parliament and when one can cease to be so, these are also clear. What is in issue in this case and as already stated above is whether, upon dissolution of Parliament, those holding ministerial positions can continue to occupy their portfolios until after the general elections when the President-elect assumes office.

To support his position that Ministers should continue in office until another person assumes the office of President after the general elections slated for 11<sup>th</sup> August, 2016 the learned Solicitor General referred to Articles



109, 113 and 114. According to him, there should be no vacuum in Cabinet and that Cabinet should continue to assist the President in the discharge of his executive functions.

We have considered the above submissions. The question is do the specified provisions of the Constitution as amended support the continued stay of the Respondents in their respective offices? It is crystal clear that under the Constitution, the executive power of the State vests in the President. He is assisted by his Vice-President and Cabinet in the exercise of executive power. However, the question is, following the dissolution of Parliament, can Ministers who were appointed from amongst the Members of Parliament, continue in office when the pre-condition of their appointment is no longer there? What is the effect of dissolution of Parliament on Ministers?

We have considered the above arguments and examined the Articles cited by the learned Solicitor General. As regards the provisions of Article 109 of the Constitution as amended, clearly, the submissions by the Solicitor General are not well founded and are therefore untenable because the Article relates to the performance of executive functions during the absence of the President and only applies during the life of Parliament. The

Article provides in clear terms what should happen in the event that the President and Vice-President are unable to perform executive functions. In those circumstances, Cabinet would elect one of their members to perform the executive functions until the Vice-President can perform the functions or the President returns to the office or revokes the authority.

Further, Article 106(5) provides for what should happen when a vacancy occurs in the office of President. Article 106(5) (b) provides a solution if the Vice-President is unable to assume the office of President. This is that the Speaker performs the executive functions and the country goes to the polls within sixty days of the occurrence of the vacancy to elect a new government. This however would only apply after the 2016 polls.

The Petitioners' further argument is that Article 116(3) (e) and 117(2) (d) only apply when another person assumes the office of President during the life of the National Assembly and not after dissolution of Parliament. And that it is only the Vice-President and not the President-elect who can assume the office of President. On the other hand, the Solicitor General argued that Articles 116 (3) (e) and 117(2) (d) do not only apply during the life of Parliament but also upon the dissolution of Parliament until the President-elect assumes office.

We have considered the above submissions. In the case of **Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg AG**<sup>19</sup>, Lord Reid, as regards interpretation of statutes put it thus:-

**"We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."**

In the case at hand, the expression to be interpreted is "until another person assumes the office of President" which is used in Articles 116 (3) (e) and 117 (2) (d). The words present some problems because when read in the context of other relevant provisions of the Constitution which are applicable to Ministers regarding their appointment, tenure and vacation of office, the phrase is ambiguous and obscure. Given its natural meaning, the literal interpretation of the provision leads to absurdity because on one hand, the Constitution says Ministers will be appointed from among Members of Parliament and, yet, on the other, it appears to allow for the continuation of Ministers in their Cabinet portfolios following the dissolution of Parliament when the foundation upon which their ministerial positions

stand, namely, membership of Parliament has been removed, once Parliament has been dissolved.

In the circumstances, the purposive rule of interpretation has to be applied to the relevant provisions of the Constitution as a whole to determine the intention of the Legislature on the expression "another person assumes the office of President" used in Articles 116(3) (e) and 117(2) (d). This is due to the fact that the expression is capable of more than one meaning as has been illustrated by the opposing arguments by the Petitioners and the Respondents. We are, of course, alert to the position that in determining the meaning of the words used in the Constitution, the words used should be understood according to their plain meaning or normal usage. Whereas in this case, the plain meaning of the words does not resolve this issue, resort should be made to the purposive approach. This is also in line with Article 267(1) which provides that the Constitution must be interpreted in line with its purposes and values, among others.

In view of the clear position that the Respondents were appointed to their portfolios from Parliament which has since been dissolved, we find that the claim that they should continue holding their portfolios until another

person assumes the office of President after the dissolution of Parliament, is clearly not what Parliament could have intended. Had that been the intention, clear provision could have been made in the Constitution to that effect because a provision requiring a departure from the position which prevailed before the amendment of the Constitution where Cabinet Ministers vacated their office upon dissolution of Parliament is so important that it could not have been left to speculation or conjecture. Parliament ought to have made express provision in the two Articles to the effect that, notwithstanding the dissolution of the National Assembly, the Ministers and Provincial Ministers would continue in office until the President-elect assumed office. In the absence of such express provision, the Ministers ought not to have continued in office following the dissolution of Parliament on 11<sup>th</sup> May, 2016.

Articles 116(3) (e) and 117(2) (d), in their current form cannot thus stand side by side with Article 116(1) and 117(1) which provide for Ministers and Provincial Ministers respectively being appointed from within Parliament.

Therefore, we can only enjoin Parliament to address this ambiguity.

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For the reasons given above, the continued stay in office by the Respondents who are Cabinet Ministers and Provincial Ministers after the dissolution of Parliament on 11<sup>th</sup> May, 2016 is contrary to the spirit of the Constitution as amended, as the Ministers do not qualify to continue to hold office as the basis of their appointment to those offices no longer exist. We order that they should forthwith vacate office.

Further, although the 3<sup>rd</sup> Petitioner's prayer is that the continued stay in office by the Cabinet Ministers and Provincial Ministers is *ultra vires* the provisions of Article 116 (3) (e) and 117 (2) (d) of the Constitution as amended, we do not accept this suggestion as on the face of it, the above Articles appear to give support to the continued stay in office by the Cabinet Ministers and Provincial Ministers. However, as we have already held based on a purposive interpretation of the two provisions, this is not the case.

As regards the continued stay of Deputy Ministers in office, the thrust of State Counsel Sangwa's submission on behalf of the 3<sup>rd</sup> Petitioner was that the Deputy Ministers ought not to have continued in office after the **Constitution of Zambia (Amendment) Act No. 2 of 2016** came into force on 5<sup>th</sup> January, 2016. To support this position, State Counsel Sangwa

argued that the office of Deputy Minister was abolished by the **Constitution of Zambia (Amendment) Act No. 2 of 2016** as Part IV of the **Constitution of Zambia, 1991**, which contained Article 47 under which the Deputy Ministers were appointed was repealed and the position of Deputy Minister no longer exists. He submitted that Section 7(2) of the **Constitution of Zambia Act No. 1 of 2016** which the Respondents relied upon, to support the continued stay by Deputy Ministers in office, does not support their case because as of 5<sup>th</sup> January, 2016 when the **Constitution of Zambia (Amendment) Act No. 2 of 2016** came into force, the position of Deputy Minister ceased to exist. Therefore, that since there is no office or position under the Constitution as amended to which the Deputy Ministers could continue to hold or which they can transition into, their continued stay in office has no legal basis and is, therefore, *ultra vires* the Constitution as amended and hence, null and void.

In response, Mr. Mwansa, S.C.'s position was to firstly acknowledge the removal of the office of Deputy Ministers in the Constitution as amended. He, nevertheless, took the position that Deputy Ministers continued and should continue in office until the appointment is terminated by the President in accordance with the **Constitution of Zambia**,

1991. Further, that it was not the intention of the Legislature to have an automatic abolition of the office of Deputy Minister which existed under the **Constitution of Zambia, 1991** as Section 7 of the **Constitution of Zambia Act No. 1 of 2016** has preserved that office and provides for its final disposal by way of termination by the President in accordance with the 1991 Constitution of Zambia.

The reply, by Mr. Sangwa, S.C., was that since there is no provision in the Constitution as amended which empowers the President to disappoint Deputy Ministers; their continued stay in office has no basis and that Section 7 of **Act No. 1 of 2016** relied upon was drafted under the assumption that there would be the office of Deputy Minister in the Constitution as amended when in fact, there is none.

We have considered the above arguments. We note that the office of Deputy Minister was provided for under Article 47 of the 1991 Constitution. The position of Deputy Minister was however not maintained in the Constitution Bill that was considered by Parliament prior to the enactment of the Constitution as amended. Thus, the Constitution as amended does not contain any provision regarding the position of Deputy Minister.



Further, Part IV of the 1991 Constitution under which Article 47 fell was repealed without re-enactment of a similar provision to that Article as regards Deputy Ministers. The effect is that the office of Deputy Minister no longer exists under the Constitution as amended.

The point of contention was that while the Constitution as amended does not provide for Deputy Minister, Section 7(2) of **Act No. 1 of 2016** provides for the continuation of persons holding the position of Deputy Minister under the **Constitution of Zambia, 1991**, until the appointment is terminated by the President.

The question, therefore, is whether the continued stay in office by the Deputy Ministers is legally supported by the law when the Constitution as amended has not established their office. The learned Solicitor General has argued with force that the continued stay by the Deputy Minister is legal until the President terminates the appointment as provided in the 1991 Constitution which was in force at the time of appointment. And that Section 7(2) is a transitional provision for the Deputy Ministers which allows their continuation until the President terminates the appointment.

We have considered the above arguments. To start with, we wish to refer to the long title to **Act No. 1 of 2016** which provides as follows:-

**"An Act to provide for the printing and publication of the Constitution; to provide for the savings and transitional provisions of existing state organs, state institutions, administrations, offices, institutions and laws; to provide for the savings of succession to assets, rights, liabilities, obligations and legal proceedings; and to provide for matters connected with, or incidental to, the foregoing."**

As can be seen from the above provisions, **Act No. 1 of 2016** provides for savings and transitional provisions between the 1991 Constitution and the Constitution as amended. Therefore, Act No. 1 should be read together with the 1991 Constitution and the Constitution as amended. To that extent, we do not agree with the suggestion that **Act No. 1 of 2016** is a stand-alone Act because it is an instrument that provides for smooth transition from the 1991 Constitutional regime to the current Constitutional order.

Section 7 (2) of **Act No. 1** provides as follows:-

**"7(2) A person holding the post of Vice-President, Minister or Deputy Minister shall continue to hold that position under the Constitution until that appointment is terminated by the President in accordance with the Constitution." (underlining is ours for emphasis only).**

The key words in Section 7 are ***"under the Constitution."***

The use of the above words means that Section 7(2) allows for the continuation in office by those office bearers whose offices or positions are provided for in that section and includes Deputy Ministers. This view is supported by Section 2 of **Act No. 1 of 2016** which defines the "Constitution" as the **Constitution of Zambia, 1991**.

As stated above, the Deputy Ministers were appointed pursuant to Article 47 of the 1991 Constitution of Zambia. However, the Constitution as amended has not made provision for the establishment of that office while Section 7(2) of **Act No.1** provides for the continuation of that office until the President terminates it. In fact, the Solicitor General was quick to acknowledge the removal of the office of Deputy Minister in the amended Constitution.

The question therefore is can Section 7 of **Act No. 1** be legally construed as supporting the continued stay of the Deputy Ministers in office until the President terminates it? What was the intention of the Legislature in enacting this provision? Read as a whole, Section 7 (2) was intended to provide for the preservation, continuation and transition of the offices

mentioned into the Constitution as amended. This, in our view, includes the office of Deputy Minister.

The question that follows is what were the Deputy Ministers to transit into since the office that they could have transited into was not re-established under the Constitution as amended? Mr. Sangwa has argued that the Deputy Ministers' office came to an end on 5<sup>th</sup> January, 2016 when the Constitution as amended was enacted. On the other hand, Mr. Mwansa's position was that the Deputy Ministers continue in office until the President terminates their appointments.

In the case of **Lumina and Mwiinga v The Attorney-General**<sup>20</sup>, the Supreme Court was faced with a similar situation as in the current case. The appellants were Members of Parliament who resigned from the then ruling party, the United National Independence Party (UNIP) following the re-introduction of a multi-party system of government. The appellants, among other things, sought a declaratory order that the nominated Members of Parliament, including the Prime Minister and some Cabinet Ministers, had ceased to be members of the National Assembly following amendments to the constitution that established the position of nominated

Member of Parliament. The Supreme Court held that the offices of nominated Members of Parliament were saved until the dissolution of Parliament or until their nomination was revoked by the President as Article 4A (a) of the amended Constitution had made provision for the continuation of existing institutions and organs recognised under the Constitution until the dissolution of Parliament.

Although the abovedecisionby the Supreme Court, is not binding on the Constitutional Court, it is of persuasive valueon the aspect of continuation, on a transitional basis, in an office that has been abolished through an amendment to the Constitution.

Section 7(2) requires the termination of the appointment as Deputy Minister to be done by the President in accordance with the Constitution, 1991. Under the 1991 Constitution, the position of Deputy Minister was tied to the life of Parliament unless earlier terminated by the President. Taken in that light, it logically means that the transition period with respect to the office of Deputy Ministers could at most, only go up to the dissolution of Parliament if not sooner terminated by the President. This shows that the transition period envisaged in Section 7(2) of **Act No. 1** was from the date of the coming into effect of the Constitution as amended to the dissolution

of Parliament. It cannot be stretched to continue beyond the dissolution of Parliament. This apparently is the reason why Parliament whilst being aware that it had not re-enacted the position of Deputy Minister, nonetheless, provided in **Act No. 1 of 2016** for the continuation of the office of Deputy Minister beyond the coming into effect of the Constitution as amended.

Taken further, the interpretation by the Solicitor General on behalf of the Respondents that Deputy Ministers should continue in office beyond the dissolution of Parliament until the President terminates their appointments, would lead to absurdity as the Deputy Ministers would continue in office in perpetuity if the incumbent President is re-elected on 11<sup>th</sup> August, 2016 and he does not terminate their appointments. This would apply even where one is not re-elected as Member of Parliament. This clearly is not what Parliament could have intended when Section 7(2) of **Act No. 1 of 2016** was enacted as it could not also be supported under the 1991 Constitution of Zambia.

To further illustrate this point, the 1991 Constitution under which this office has been continued by Section 7(2) of **Act No. 1 of 2016**, did not provide for the office of Deputy Minister to go on after dissolution of

Parliament as the position was tied to the life of Parliament. The Constitution as amended has made no provision for the President to terminate the position of Deputy Minister. The reason is that the position no longer exists. Simply put, the President cannot terminate after the dissolution of Parliament that which does not exist but could have terminated during the transition period.

In the current case, we are thus of the firm view that based on the transitional provision in Section 7(2) of **Act No.1**, the Deputy Ministers were to continue in office only until the dissolution of Parliament on 11<sup>th</sup> May, 2016.

Consequently, we do not agree with the learned Solicitor General's submission that the Deputy Ministers should continue in office beyond dissolution of Parliament or until the President terminates their position as clearly, going beyond the dissolution of Parliament is not what the Legislature could have intended. In our view, the transitional provisions in Section 7(2) of **Act No. 1 of 2016** was intended to empower the President to terminate a Deputy Minister's appointment during the transitional period from 5<sup>th</sup> January, 2016 up to dissolution of Parliament.

There is therefore, no inconsistency between Section 7 (2) and the Constitution as amended in so far as it relates to the transition period for the office of Deputy Minister up to dissolution of Parliament except when the position is extended beyond that period. To interpret the words used in Section 7 otherwise would mean Deputy Ministers would serve in perpetuity.

Consequently, since the office of Deputy Minister no longer exists under the Constitution as amended, the Respondents who are Deputy Ministers have no basis to hold on to their office which was terminated by operation of the law when Parliament was dissolved. They cannot and should not continue to hold on to the office when the basis upon which they were appointed no longer exists. Their continued stay in office after 11<sup>th</sup> May, 2016 is therefore unconstitutional, null and void.

The 3<sup>rd</sup> Petitioner has also sought for an order that the 26<sup>th</sup> to the 56<sup>th</sup> Respondents should pay back the salaries and allowances received from 6<sup>th</sup> January, 2016 to the dissolution of Parliament on 11<sup>th</sup> May, 2016. The 3<sup>rd</sup> Petitioner did not seek for an order against the appointing authority through the Attorney General but sought the order against the 26<sup>th</sup> to the 56<sup>th</sup> Respondents in their individual capacity. Mr. Sangwa, S.C., insisted on



this position even after this Court had ordered the joinder of the Attorney General. At the hearing, Mr. Sangwa, S.C., maintained that the 3<sup>rd</sup> Petitioner's action was only against the 2<sup>nd</sup> to 64<sup>th</sup> Respondents.

In light of our earlier finding that the continued occupation of office by Deputy Ministers from 6<sup>th</sup> January, 2016 to the dissolution of Parliament is supported by Section 7(2) of **Act No. 1 of 2016** which provides for the transition period, this order cannot be granted.

However, having held that the Ministers, the Provincial Ministers and the Deputy Ministers did not qualify to continue holding their respective offices after the dissolution of Parliament, we order that the 2<sup>nd</sup> to the 64<sup>th</sup> Respondents do refund to the State, all the salaries and allowances which they have so far been paid from 12<sup>th</sup> May, 2016 after the dissolution of Parliament to date.

In making this order, we are alive to the fact that the peculiar situation which we are dealing with is such that it is the same Cabinet Ministers, Provincial Ministers and Deputy Ministers who in their capacity as Members of Parliament enacted the **Constitution of Zambia (Amendment) Act No. 2 of 2016** as well as **Act No.1 of 2016** which have raised the issues in dispute as to whether or not they should continue in office until the

President-elect is sworn in or until the President terminates their appointments following the dissolution of Parliament. The Ministers, Provincial Ministers and Deputy Ministers were therefore aware of the effect of the amendments to the Constitution on their continued stay in the respective offices, which was that they would cease to hold office upon dissolution of Parliament. Against this backdrop, we do not see any injustice that will be caused to them by our order that they should pay back the emoluments they received with effect from 12<sup>th</sup> May, 2016 after Parliament was dissolved to date. It is for this very reason that we do not accept the arguments by the learned Solicitor General that the Ministers are rightfully and legally entitled to draw salaries and allowances for the services they have rendered after the dissolution of Parliament. In our view, they have no legitimate expectation to receive such payments.

The invitation to us by the Solicitor General to take judicial notice that they have been rendering services for which they are entitled to remuneration cannot stand in the circumstances as the matter is being decided on its own peculiar circumstances to which Section 48 of the Employment Act or any other employer and employee relationship cannot

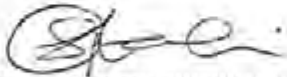
apply. To put it in its proper context, the Ministers cannot be said to be discharging the functions of their offices to entitle them to any payments, as appointments to the said offices ceased upon the dissolution of Parliament on 11<sup>th</sup> May, 2016. We would have agreed with the Solicitor General's argument if the Cabinet Ministers and Provincial Ministers were appointed from outside Parliament as was initially proposed in the Bill that was tabled and considered by the National Assembly. This is what was envisaged by Articles 116 and 117 prior to the amendment to Articles 116 (1) and 117 (1). Remaining in office after the dissolution of Parliament was tied to the Ministers and Provincial Ministers being appointed outside Parliament so that the dissolution of Parliament would not have had an effect on their continued stay in office until the President-elect is sworn into office.

The emoluments paid to the 2<sup>nd</sup> to the 64<sup>th</sup> Respondents from the 12<sup>th</sup> of May, 2016 to date are to be agreed by the Petitioners and the Respondents. In default of such agreement, the matter shall be referred by either party for assessment by the Registrar of the Constitutional Court.

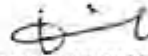
Since the two petitions have raised serious constitutional issues of public interest, we order that each party shall bear their own costs.



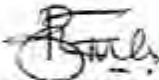
.....  
**H. CHIBOMBA**  
**PRESIDENT**  
**CONSTITUTIONAL COURT**



.....  
**A. M. SITALI**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**M.S. MULENGA**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**E. MULEMBE**  
**CONSTITUTIONAL COURT JUDGE**



.....  
**M.M. MUNALULA**  
**CONSTITUTIONAL COURT JUDGE**