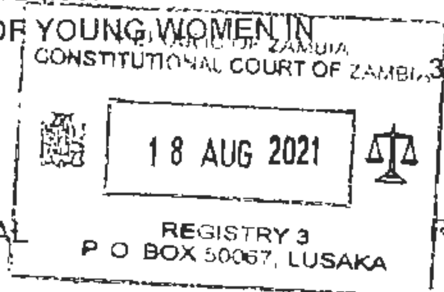
IN THE CONSTITUTIONAL COURT OF ZAMBIA 2020/CCZ/0013
AT THE CONSTITUTIONAL COURT REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

BETWEEN:

CHAPTER ONE FOUNDATION LIMITED — 1ST PETITIONER

THE NON-GOVERNMENTAL ORGANISATIONS COORDINATING COMMITTEE FOR GENDER AND DEVELOPMENT REGISTERED TRUSTEES — 2ND PETITIONER

HARRIET CHIBUTA (SUING IN HER CAPACITY AS EXECUTIVE DIRECTOR OF YOUNG WOMEN IN ACTION) — 3RD PETITIONER



AND

THE ATTORNEY GENERAL — RESPONDENT

CORAM: Chibomba, P.C., Sitali, Mulenga, Mulonda and Munalula, JJC.

On 17th March, 2021 and on 11th August, 2021

For the Petitioners: Ms. L. C. Kasonde and Ms. M. Milambo, both of Messrs LCK Chambers.

For the 2nd Petitioner: Ms. D. Ng'ambi of Nyakhata Chambers.

For the Respondent: Mr. L. Kalaluka, S.C., Attorney General and Ms. D. Mwewa, Principal State Advocate.

MAJORITY J U D G M E N T

Chibomba, PC, delivered the majority decision of the Court.

Cases cited:

1. **Kapesha and Kanyakula v The People SCZ Selected Judgment No. 35 of 2017**

2. **Federation of Women Lawyers of Kenya (FIDA) and 5 others v Attorney General and Another (2011) eKLR**
3. **Kankomba and Others v Chilanga Cement PLC SCZ Judgment No. 30 of 2002**
4. **Mutantika and Another v Chipungu SCZ Judgment No. 3 of 2014**
5. **Noel Siamoondo and 2 others v Electoral Commission of Zambia and Another 2016/CCZ/006**
6. **Steven Katuka and others v Attorney General 2016/CC/0010/0011 [2017] ZMCC 7 (17 November 2017); selected Judgment No 29 of 2016**
7. **Bizwayo Newton Nkunika v Lawrence Nyirenda and Another 2019/ CCZ/005**
8. **Khalid Mohammed v The Attorney General (1982) ZR 49**

Legislation referred to:

1. **Constitution of Zambia (Amendment) Act No. 2 of 2016.**

Other Works referred to:

1. **Phipson, On Evidence (17th edition), Thomson Reuters (Legal) Limited 2010.**
2. **Southern Africa Development Community (SADC) Gender Protocol**

Before we begin, we wish to apologize for the delay in the delivery of this Judgement. This delay was caused by the Covid-19 which affected some members of the Court.

1.0 INTRODUCTION

1.1 By Petition filed pursuant to Articles 128(1) (b), 128 (3) (b) and (c), 69 (1), 116 (1), 117(1) and (k), 173 (1) (j) and (k) and 259 (1) (b) and (c) of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016, the 1st, 2nd and 3rd Petitioners pray for the following reliefs against the Respondent:

1. That the Court makes a declaration that in nominating Members of Parliament and making the Ministerial appointments relative to the current Provincial Ministers and the Cabinet, the President did not adopt a procedure which ensured:

    (a) Gender parity in the nomination and appointment of the Provincial and Cabinet Ministers contemplated and in contravention of Article 259 (1) (b) of the Constitution; and

    (b) Equitable representation of persons with disabilities in the nomination and appointment of Provincial and Cabinet Ministers as contemplated in and in contravention of Article 259 (1) (c) of the Constitution.

2. That the Court makes a declaration that the nomination of Members of Parliament by the President in the fashion he did is unconstitutional.

3. That the Court makes a declaration that the current composition of Cabinet and Provincial Ministers is unconstitutional.

4. That the Court makes an order of *Mandamus* directing the President to use his power under Article 72(3) (f) to revoke the nomination of all or some of the Members of Parliament he nominated and nominate new members to comply with the provisions of Article 259 of the Constitution.

5. That the Court issue an order of *Mandamus* directing the President to within 90 days reconstitute the Cabinet by the powers vested in him by the Constitution to align the appointment procedures and composition of the Cabinet with the constitutional requirements outlined in Article 259 of the Constitution.

6. That each party bears their own costs.

1.2 The Petition was filed together with a Joint Affidavit Verifying Facts, deposed to on behalf of the three Petitioners.

1.3 The sum total of the Petitioners' case as pleaded in the Petition and Joint Affidavit Verifying Facts is that the Republican President

has breached Article 173 (1) (j) and (k) and Article 259 (1) (b) and (c) of the Constitution of Zambia in the manner in which he nominated and appointed nominated Members of Parliament, Provincial and Cabinet Ministers. The reason given is that although there are currently one hundred and sixty four (164) Members of Parliament out of which twenty nine (29) are females, two (2) are youths and one (1) is a person with disabilities, only nine (9) females out of thirty (30) positions in Cabinet have been appointed as Cabinet Ministers. And that out of the ten (10) Provincial Ministers appointed, none is a female, youth or person with disabilities. Further that out of the eight (8) nominated Members of Parliament, only two (2) are females. The Petitioners' contention was that the nomination and appointment procedures adopted by the Republican President did not therefore comply with the mandatory provisions of Articles 173 (1) (j) and (k) and 259 (1) of the Constitution as amended.

1.4 The Petitioners contended that the actions and decisions of the Republican President in nominating the Members of Parliament and appointing Cabinet and Provincial Ministers neither reflected gender parity considerations nor the equitable representation of youths and disabled persons as contemplated by the Constitution

and therefore, the President contravened the Constitution and acted in an unconstitutional manner.

2.0 RESPONDENT'S ANSWER TO THE PETITION

2.1In disputing liability, the Respondent filed an Answer accompanied by an affidavit in opposition. The Respondent took the position that although the contents of paragraphs 1 to 17 of the Petition on the number of females, youth and persons with disabilities appointed as Provincial and Cabinet Ministers and the number of those nominated as Members of Parliament was not in dispute, however all appointments made by the Republican President were in line with the President's constitutional mandate. And that although the Respondent does not dispute the contents of paragraphs 18 to 20 of the Petition as regards the list of persons appointed as Cabinet Ministers and the number of female Cabinet Ministers appointed, the appointments were done in line with the constitutional mandate of the President and that such appointments were at the discretion of the President.

2.2 Therefore, that although the Petitioners' contention is that there has been a breach of Article 259 of the Constitution, the provisions in that Article should be interpreted as a whole as that Article has

provisos which state respectively that, **"unless it is not practicable to do so"** in case of gender parity and **"where these qualify"** in case of youths and persons with disabilities. Hence, the fifty percent gender split of nominations and appointments as Cabinet Ministers and Provincial Ministers, must be practicable to the appointing authority. As such, the President still had discretion in making such appointments under Article 259.

2.3 It was the Respondent's further position that since Articles 116 and 117 of the Constitution, require the President to appoint Cabinet Ministers and Provincial Ministers from among Members of Parliament, the fifty percent gender threshold is not attainable where it is not practicable for the President to so appoint and where none are youth or persons with disabilities. And that the President therefore cannot be coerced in the manner suggested by the Petitioners.

2.4 As regards the relief sought by the Petitioners that the President be directed through an order of *mandamus* to invoke his powers under Article 69 to revoke some of the nominations for Members of Parliament so that more women are appointed, the Respondent's response was that such appointments too are at the pleasure of

the President as the Article uses the imperative "**may**" and hence, such power is discretionary.

2.5 Further, that Article 266 of the Constitution of Zambia, defines the "**executive function**" to mean the functions of the President set out in this Constitution.

2.6 It was the Respondent's further position that the Petitioners are indirectly bringing civil proceedings against the President in the performance of his executive function. Hence, the declarations and orders of *Mandamus* sought by the Petitioners are not tenable during the tenure of office of the President and as such, should be dismissed with costs to the Respondent.

3.0 THE PETITIONER'S EVIDENCE

3.1 At trial, the Petitioners called two witnesses in aid of their case, each of whom filed a witness statement.

3.2 PW1 was Ms Harriet Chibuta, the Executive Director of Young Women in Action, a non-governmental organisation whose goal is to improve and empower young women particularly, in school and community-based girls and young women between the ages of 15 and 35. PW2 was Mr. Whitney Mulobela, the 2nd Petitioner's Coordinator, Communication, Advocacy and Networking. We shall

reflect the evidence of these two witnesses later in this judgment where necessary.

3.3 The Respondent did not call any witness but relied on its Answer, Opposing Affidavit and Skeleton Arguments.

4.0 SUBMISSIONS BY THE PETITIONER AND THE RESPONDENT

4.1 At the close of the case, the learned Counsel for the respective parties relied on the arguments advanced in their respective Skeleton Arguments which they augmented with oral submissions.

4.2 In the Skeleton Arguments filed in support of the Petitioners' case, it was contended that none of the appointments by the Republican President reflect the values of the Constitution in respect of gender parity, equitable representation of youths and disabled persons. In support of the above argument, reference was made to Article 8 (d) of the Constitution as authority. Article 8 (d) defines national values and principles as:

"Human dignity, equity, social justice, equality and non-discrimination."

4.3 It was the Petitioners' contention that in nominating Members of Parliament under Article 69 (1) and in appointing Provincial Ministers and Cabinet Ministers under Articles 116 (1) and 117 (1)

respectively, the Republican President contravened Articles 173 (1) (j) and (k) and 259 (1) of the Constitution as only 2 women were nominated as Members of Parliament whilst no youths or persons with disabilities were appointed.

4.4 To buttress this point, reference was made to Article 7 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, (CEDAW) 1981. It was contended that this Article obliges State Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the member State and in particular, to ensure that women, on equal terms with men, have the right:

> **"to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government."**

4.5 It was argued that although the CEDAW is not binding on the Constitutional Court, Zambian Courts appear to consider the provisions of international instruments ratified by Zambia when construing provisions of Zambian laws as illustrated in the case of **Kapesha and Kanyakula v The People**[1] where the Supreme Court considered the provisions of the Convention on Civil and Political Rights and recommendations by the Committee on the Elimination of Discrimination Against Women (CEDAW) in

construing provisions of the Penal Code, Chapter 87 of the Laws of Zambia.

4.6 Reference was also made to the case of **Federation of Women Lawyers of Kenya (FIDA) and 5 others v Attorney General**[2], in which the Constitutional Court of Kenya stated that:

> ***"it is clear, therefore that judicial appointments should be based on the concept of equal opportunity, non-discrimination and above all must reflect the diversity of the people of Kenya taking into consideration the values, beliefs and experience brought about by an individual appointed for a particular position".***

The Petitioners argued that the Republican President in making the appointments in question did not reflect either the requisite gender parity or equitable representation of the youths and persons with disabilities.

4.7 As regards the Respondent's defence that it was impracticable to comply with the requirement of gender parity in the appointments in question, the Petitioners argued that the Respondent bears the burden of proving that it was not practicable to do so. In support of this position, the Petitioners referred to the case of **Kankomba and Others v Chilanga Cement PLC**[3], in which the Supreme Court held that: ***"he who asserts must prove"***.

4.8 To further buttress this point, the Petitioners referred the Court to **paragraph 6.06 at page 15, of Phipson, On Evidence**, where the learned authors state that:

> ***"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. This rule is adopted principally because it is just that he who invokes the aid of the law should be first to prove his case and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleading place it and never shifting in deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form, the latter the pleader can frequently vary at will".***

4.9 It was contended that Article 259 (1) (b) of the Constitution places the burden of showing that it was not practicable for the appointments and nominations to reflect gender parity or equitable representation of the youths and persons with disabilities on the Respondent, who according to the Petitioners, failed to discharge this burden. Therefore, that the justification of impracticability can only be raised when there has been failure to appoint or nominate fifty percent of each gender from the total available positions and cannot be raised when there is failure to ensure equitable representation of the youths and persons with disabilities, where

they qualify for nomination or appointment as the two are separate and are provided for under different sub Articles of the Constitution.

4.10 In response to the Respondent's assertion that the use of the word "**may**" in Articles 69, 116 (1) and 117 (1) of the Constitution gives the Republican President discretion to disregard the constitutional obligation of ensuring gender parity and equitable representation of youths and people with disabilities in making appointments, the Petitioners argued that Article 259 creates an overarching set of obligations which must be read into Articles 69, 116 (1) and 117 (1) as it uses the word "shall" which entails that the obligation created by Article 259 is mandatory.

4.11 In support of the above position, the case of **Mutantika and Another v Chipungu**[4] was cited as authority in which the Supreme Court held that the use of the word "shall" connotes a mandatory requirement. Reference was also made to our decision in **Noel Siamoondo and 2 others v Electoral Commission of Zambia and Another**[5] in which we pronounced that when interpreting the Constitution, the Constitution must be read as a whole.

4.12 The Petitioners, thus, argued that reading the Constitution as a whole should result into an interpretation that in exercising the discretion under Articles 69, 116 (1) and 117(1), the Republican President is obliged to ensure gender parity and equitable representation of youths and persons with disabilities in making the appointments.

4.13 As regards the Respondent's contention that this action must be defeated on account of the immunity the Republican President enjoys from civil suits, the Petitioners' response was that it is without doubt that the Constitution confers immunity to civil suits in favour of a sitting President. However, that the immunity is limited to suits in the President's private capacity. That the petition in *casu* relates to the performance by the Republican President of his constitutional functions relating to the appointments in question which fact the Petitioners argued, the Respondent does not dispute and recognise that the President is being sued by virtue of his constitutional mandate to make the appointments in question. And that Article 98 of the Constitution puts this beyond question. Article 98 provides that:

"98. (1) A person shall not institute or continue civil proceedings against the President or a person performing executive functions, as provided in Article 109, in respect of anything done or omitted to

be done by the President or that person in their private capacity during the tenure of office as president.

(2) The President shall not, in the President's private capacity during the tenure of office as President, institute or continue civil proceedings against a person".

4.14 It was argued that since this action is not against the Republican President in his personal capacity, the immunity in Article 98 of the Constitution is not available in this matter and that the Constitution makes it clear that every officer is accountable for violations of the Constitution as Article 1 (3) of the Constitution binds all persons in Zambia, state organs and state institutions. The Petitioners, wound up their written arguments by submitting that no one is immune to the Court's jurisdiction to adjudicate over whether there has been a violation of the Constitution as Article 265 (4) of the Constitution lays it bare by stating that:

"A provision of this Constitution to the effect that a person, an authority or institution is not subject to the direction or control of a person or an authority in the performance of a function, does not preclude a Court from exercising jurisdiction in relation to a question as to whether that person, authority or institution has performed the function in accordance with this Constitution or other laws."

4.15 In augmenting the Petitioners' written submissions, the learned Counsel for the Petitioners, Ms Kasonde, more or less repeated the arguments in the Petitioners' Skeleton Arguments. We do not intend to repeat these except to the extent reflected hereunder. In

her oral submission, Ms Kasonde began by referring us to the case of **Steven Katuka and others v Attorney General**[6], in which we stated that:

> **"the Constitution is the supreme law of the land meant to serve not only the current generation but generations yet unborn and that the Court must breath life...grow and develop the Constitution in order to meet the demands of an ever-developing society."**

4.16 Counsel submitted that the current case is about rights that are fundamental and intrinsic to human dignity, equality, non-discrimination, equity and social justice, whose values are enshrined in Article 8 (d). And that Article 9 of the Constitution states that the national values and principles shall apply to the interpretation of the Constitution.

4.17 Ms Kasonde submitted that the Republican President in his official capacity and as appointing authority both explicitly and implicitly appointed nominated Members of Parliament and Ministers in line with Articles 69, 116 (1) and 117 (1) and subsequently contravened Articles 173 (1) (j) and (k) as regards the guiding values and principles of the public service to advance both genders and representation of the disabled persons.

4.18 Ms Kasonde submitted that according to the evidence of PW1 and PW2, there are 10 Provincial Ministers and 30 Cabinet Ministers

totalling 40 ministerial positions and that there are 29 female Members of Parliament which according to her, are enough to provide equal representation of women. As regards nominated Members of Parliament, Counsel argued that the Republican President had a wide range of candidates to choose from as the only qualification needed is that one must be a Zambian citizen and must qualify to be a Member of Parliament. That however, only 2 out of the 8 Nominated Members of Parliament are women and no youth or person with disabilities.

4.19 It was thus Counsel's submission that the Respondent has not called any witness to prove that it was impracticable to achieve equality in the appointment of female nominated Members of Parliament and Ministers as no evidence was adduced as to why youths and disabled persons are not equitably represented when in exercising his powers under Article 69 to appoint nominated Members of Parliament the President is free to choose anyone from the entire population of the Country.

4.20 As regards the Respondent's argument that Parliament will be dissolved on 12th May, 2021 and that it is impracticable to enforce the provisions stated in the Petition, Ms Kasonde referred the Court to the minority opinion of Chibomba, PC, in **Bizwayo**

Newton Nkunika v Lawrence Nyirenda and Another[7] where she stated that:

"the implication of such a holding will be that the contravention of the Constitution does not arise until this Court so declares, any act that contravenes the Constitution after it came into force, is an infraction of the Constitution and should be rendered unconstitutional and therefore illegal *ab initio*."

4.21 Ms Kasonde concluded by submitting that:

"this is a case of equality, under our Constitution, nobody should be treated as a second-class citizen. Competence is not a preserve of old men and without diversity in the highest level of leadership, this Country will be left out of some of the best ideas".

Counsel urged the Court to recognise and uphold the right to equality and justice for all women, youths and persons with disabilities.

4.22 In supplementing Ms. Kasonde's oral submission, Mrs Ng'ambi submitted that it is on record that Zambia is a State Party to the Convention on the Elimination of all Forms of Discrimination Against Women, CEDAW. That Articles 1 to 5 of the Convention form a central interpretative framework which goes beyond a norm, and the issue of gender equality is not **"business as usual but business unusual".** That to that extent, Article 4 (1) of the Convention provides that State Parties may take action in favour of the women so as to make up for the lost opportunities through the years. Counsel submitted that this measure which the State Party

takes does not take away from the issues of merit. Ms Ngambi wound up her submission by arguing that although Article 173 (1) (i) of the Constitution on the values of the civil service states that appointments must be on merit, Article 4 (1) of the CEDAW provides that this may be looked at in favour of women. Counsel posed a question; **"if this was practical"** and answered the question in the affirmative **"that it is practical"** on the ground that Zambia ratified the Convention without reservations and since the Convention provides that in the absence of a provision in our laws, we must refer to the CEDAW.

4.23 The learned Counsel for the Respondent also relied on the filed Skeleton Arguments in opposition. The Respondent's position was that Article 259 (1) requires first that a person being appointed or nominated must have the requisite qualifications to discharge the functions of the office, as prescribed or specified in the Public Office Circulars or Establishment Registers, failure of which negates the fifty percent requirement of each gender and the equitable representation of youths and persons with disabilities. And that despite Article 259 (1) being couched in mandatory terms by the use of the word "shall", it is important to note that Article 259 (1) (b) and (c) has exceptions namely, under sub clause (b) the

words: "**unless it is not practicable to do so**". And under sub clause (c), the exception is "**where these qualify for nomination or appointment**".

4.24 The Respondent argued that Cabinet membership is provided for under Article 113 of the Constitution, which consists of the President, Vice President, Ministers and Attorney-General as ex officio member. And that for one to be appointed as Minister, Article 116 of the Constitution provides that one ought to be a Member of Parliament. In addition, that Article 117 (1) empowers the President to appoint a Provincial Minister for each province from amongst Members of Parliament. And that Article 173 (1) (i) provides for the guiding values and principles of the public service which includes merit as the basis of appointment and promotion.

4.25 It was the Respondent's contention that the first and most crucial requirement as envisaged under Articles 116, 117 and 113, is that Cabinet and Provincial Ministers be appointed from amongst Members of Parliament. As such, for gender parity or equitable appointment of youths and persons with disabilities to be satisfied, is thus, dependent on whether an individual possesses the relevant qualifications and is a sitting Member of Parliament. Consequently, if among the Members of Parliament from where

the President or appointing authority is required to nominate Ministers, fifty percent gender threshold is not tenable or no youths and persons with disabilities are available, the President's hands are tied. However, that the President may invoke Article 69 (1) which empowers the President to nominate a person as Member of Parliament pursuant to Article 68 (2) (b) where the President considers it necessary to enhance the representation of special interests, skills or gender. Thus, the Respondent's position was that the spirit of Articles 68 (2) (b) and 69 is the enhancement of representation of not only gender but also special interests and skills in the National Assembly as a whole and not merely in Cabinet or at Provincial Ministerial level.

4.26 It was submitted that the Respondent admits that gender equality and women's empowerment is a human right, contrary to the Petitioners' assertion and that the Respondent strongly advocates for the same. The Respondent therefore invited the Court to take judicial notice of the current number and gender of the Members of Parliament being that out of 156 elected Members of Parliament and 8 nominated Members of Parliament, only 29 are women, 3 are youths and 1 is a person with disability. That it is therefore

impracticable for the appointing authority to ensure equal appointment of women, youths and persons with disabilities.

4.27 The Respondent argued that based on the dynamics of the Constitution as amended, the Petitioners ought to consider challenging several political parties in the Country on the need to support more women in political empowerment and not take out Court actions against the Respondent because the political parties are the primary and most direct vehicle through which women, youths and persons with disabilities may access membership to Cabinet and other higher decision making offices in the country. That in a nutshell, political parties must nominate more women, more youths and more persons with disabilities as candidates for political office.

4.28 In response to the Petitioners' assertion that the burden of proof has shifted to the Respondent because of the nature of the Answer to the Petition as evidenced by the **KANKOMBA**[3] case, the Respondent refuted this claim and argued that the Petitioners had taken the **KANKOMBA**[3] case out of context and that the same must be distinguished from the case in *casu* which is a constitutional interpretation as opposed to the former case which

related to shareholding in Chilanga Cement PLC and a change in conditions of service without the employees' consent.

4.29 With regard to the Petitioners' assertion that the Respondent made admissions in its Answer, the Respondent argued in response that the response is not unequivocal to amount to an admission as is claimed.

4.30 As regards the practicability of the reliefs sought by the Petitioners, the Respondent's argument was that the 2021 General Elections are set for 12th August, 2021 and that Article 81 (3) of the Constitution provides that Parliament shall stand dissolved ninety days before the holding of the next general elections. Therefore, that Parliament will be dissolved by 12th May, 2021. Hence, it was not practicable to revoke nominations of Members of Cabinet and to appoint new Members of Cabinet and Provincial Ministers so that the President can within 90 days reconstitute Cabinet. That this renders this action an academic exercise as the reliefs sought would not be tenable. The Respondent, thus, prayed that the petition be dismissed with costs.

4.31 In augmenting the Respondent's written submissions, Ms Mwewa submitted that this matter relates to interpretation of Article 259 (1)

of the Constitution. Counsel contended that the first issue that is required to be taken into account is the requisite capacity to perform and execute the work as different positions call for different skills. Secondly, that the proviso to Article 259 (1) (b) which states that "**unless it is not practicable to do so"** provides a yard stick test of capacity and practicability in nominating or appointing persons of either gender.

4.32 In response to the argument by the Petitioners that the burden of proof is on the Respondent to prove that it was not practicable to achieve the fifty/fifty gender parity as provided under Article 259, Ms Mwewa submitted that it is not in dispute as to who is sitting in Cabinet, however that what is in dispute is the interpretation of Article 259. As regards the submissions by the Petitioners on the serving President's immunity, Ms Mwewa conceded to the argument by the Petitioners in that respect.

4.33 In supplementing Ms Mwewa's submissions, the learned Attorney General, Mr. Kalaluka, S.C., contended that Article 259 of the Constitution requires the President or any person making appointments to take into account the requisite qualification to discharge the function. He submitted that this Petition has not addressed the issue of requisite qualification as the appointment of

Cabinet Ministers is largely restricted to Members of Parliament. And that the Petition has not addressed the political composition of Members of Parliament as the President is required to appoint Ministers who are capable of working with him and that the Petition has not shown the interface of political composition as the 29 women in Parliament which translates into one sixth (1/6) percent of the total number of Members of Parliament cannot translate into the appointment of the fifty percent threshold taking into account the requisite qualifications that the female Members of Parliament possess. Thus, it was not open for the President to merely appoint all the 29 women in the National Assembly as Ministers owing to the fact that they belong to different political parties.

4.34 In concluding, the learned Attorney General repeated his submission that the Petition has not demonstrated the interplay of all the aspects required by Articles 259 and 173 (1) (j) as the appointing authority takes into account other linkages such as how many women qualify and that the Articles in question do not suggest that only one variable should override the other. Further, that the Petition has not addressed this Court as regards the extent ethnicity plays considering that it is one of the factors that the Republican President has to take into account when making

appointments. Hence, the President may appoint a man instead of a woman in addressing the issue of ethnicity. He submitted that the Petition was not ripe as it is devoid of all the relevant considerations that the appointing authority has to take into account

4.35 In reply, Ms Kasonde, insisted that the issue of practicability is essential to this case and that this issue is a question of fact and not one of legal interpretation. She went on to submit that although the Respondent has argued that Article 259 requires persons to be appointed to be competent and qualified, the Respondent has failed to bring evidence to show that there were no qualified people and thus it was impractical to appoint them. Counsel then stated that the three youths in Parliament meet the qualifications. That this Court should take judicial notice that there are a number of people on the streets of Zambia with qualifications but that the Respondent failed to produce a single witness to prove the impracticability of identifying suitable nominees. She concluded by stating that the Constitution had been abrogated because it is practical to find women, youths and disabled persons that are qualified and thus they should have been considered.

5.0 ANALYSIS

5.1 We have considered the contents of the Petition, the Affidavit Verifying the Petition, the Answer and the Opposing Affidavit together with the evidence adduced by the Petitioners. We have also considered the arguments advanced in the respective Skeleton Arguments and the authorities cited as well as the oral submissions by the learned Counsel for the respective parties. The major question raised in this matter is whether the Republican President in appointing Cabinet Ministers, Provincial Ministers and in nominating Members of Parliament contravened Articles 259 (1) (b) and (c) and 173 (1) (j) and (k) of the Constitution as amended on the ground that he did not take into account gender parity, equitable representation of youths and persons with disability as alleged by the Petitioners.

5.2 Before we consider the above question, we wish to start by highlighting the salient facts of this case that we shall bear in mind in determining the issues raised in this matter. These are that following the constitutional amendments of 2016, the 11th August, 2016 general elections were conducted and held under the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016. To ably determine the question

posed above, it is critical that the current composition of the National Assembly be considered in that the Constitution of Zambia has historically mandated the Republican President to appoint Cabinet Ministers and Provincial Ministers from amongst Members of Parliament.

5.3 As regards the composition of the National Assembly, Article 68 (2) (a) of the Constitution provides for one hundred and fifty-six (156) Members of Parliament to be elected to the National Assembly representing the current one hundred and fifty-six (156) Constituencies in Zambia. In addition to this number, Article 69 (1) empowers the Republican President to nominate not more than eight (8) persons to the National Assembly, making a total number of one hundred and sixty-four (164) Members of Parliament.

5.4 Although the Petitioners have argued in their petition that there are twenty-nine (29) female Members of Parliament, the current gender composition of the National Assembly as shown on the Parliamentary Website is that out of the one hundred and sixty-four (164) Members of Parliament, twenty-eight (28) are females. The Website shows that of the 28 females in Parliament, Twelve (12) were elected on the ruling Patriotic Front Party (PF) ticket, while ten (10) are from the opposition political parties. Two (2) are

independent Members of Parliament whilst two (2) are nominated Members of Parliament. The last two are the Vice President and the First Deputy Speaker.

5.5 It is a fact that pursuant to Article 116 (1) of the Constitution as amended, the Republican President has appointed nine (9) out of the 28 female Members of Parliament as Cabinet Ministers. It is not in dispute that out of the 10 Provincial Ministers appointed, none is female or a youth. It is also not in dispute that out of the eight (8) nominated Members of Parliament, the Republican President appointed two (2) females as Cabinet Ministers.

5.6 It is on the above status quo that the Petitioners premised their allegation in the petition and argued spiritedly, first, that the Republican President has contravened Articles 173 (1) (j) and (k) and 259 (1) (b) and (c) of the Constitution as he did not take into account the requisite gender parity, equitable representation of youths and persons with disabilities in appointing Cabinet Ministers, Provincial Ministers and in nominating Members of Parliament. Secondly, that there is no evidence to prove or show that in coming up with the said appointments or nominations, it was not practicable for the President to take into account the requisite gender parity, equitable representation of the youth and

persons with disabilities as enjoined by Articles 173 (1) (j) and (k) and 259 (1) (b) and (c) of the Constitution.

5.7 On the other hand, the Respondent has strongly argued that despite Article 259 (1) (b) and (c) being couched in mandatory terms, the provision still requires the person to be appointed or nominated to have the requisite qualifications to discharge the functions of the office. Further, that Article 259 (1) (b) and (c) has exceptions as the provisos therein state, respectively, that **"unless it is not practicable to do so"** and **"where these qualify for nomination or appointment".** That the above provisos in paragraphs (b) and (c) of Article 259 (1) qualify the requirement of gender parity, equitable representation of youths and persons with disabilities. Further, that the President could not have appointed all the 29 women in Parliament and that the Petitioners in their submissions did not address the issue of qualification and regional diversity of the people of Zambia which the President must also take into account when nominating or appointing persons to the offices in question.

5.8 In responding to the above submissions, Counsel for the Petitioners argued that the Respondent has not adduced any evidence to show that it was impracticable for the Respondent to

reflect the requirements of Article 259 as no witness was called to testify on that aspect. And that the burden of proof shifted to the Respondent to prove that it was not practicable to comply with the fifty-fifty gender parity required by Article 259 in the appointments in question.

5.9 We have considered the above arguments. As regards the applicable standard of proof and the party that bears the burden of proof, we reiterate the settled position that this case being a civil matter, the standard of proof applicable is the balance of probabilities and that the Petitioners being the claimants, bear the burden of proof to prove their case. The case of **KHALID MOHAMED v THE ATTORNEY-GENERAL**[8], aptly explains this position. The Supreme Court in that case put it as follows: -

> ***"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that the defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence".***

The Supreme Court reiterated the above principle in the **Kankomba**[3] case, which the learned Counsel for the Petitioners cited and relied upon to support their argument that the burden of

proof shifted to the Respondent to prove that it was impracticable to reflect the requirements of Article 259 in the appointments and nominations of Cabinet Ministers and Members of Parliament respectively. Our brief response is to agree with the learned Attorney General that the **Kankomba**[3] case has been cited out of context as the circumstances of the current case do not justify the shifting of the burden of proof, simply because the Respondent did not call any witness to show the impracticability of gender parity in the appointments in question.

5.10 In the current case, the question is whether the Petitioners have proved on a balance of probabilities that the Republican President contravened Articles 173 (1) (j) and (k) and 259 (1) (b) and (c) on the ground that he did not take into account gender parity, equitable representation of youths and persons with disabilities in making the appointments and nominations in question. It is our firm view that this question is a question of mixed law and fact.

5.11 In resolving the issues raised, the starting point should be for us to first consider the provisions of Articles 173 (1) (j) and (k) and 259 (1) (b) and (c) of the Constitution as amended upon which the allegations in this petition have been premised. We thus find it imperative to consider the rationale behind the enactment of Article

173 as reflected in the Final Report of the Technical Committee on Drafting the Zambian Constitution.

5.12 Article 173 which the Petitioners alleged was contravened in making the appointments and nominations in question is couched in the following terms:

"173. (1) The guiding values and principles of the public service include the following—

(a) maintenance and promotion of the highest standards of professional ethics and integrity;

(b) promotion of efficient, effective and economic use of national resources;

(c) effective, impartial, fair and equitable provision of public services;

(d) encouragement of people to participate in the process of policy making;

(e) prompt, efficient and timely response to people's needs;

(f) commitment to the implementation of public policy and programmes;

(g) accountability for administrative acts;

(h) proactively providing the public with timely, accessible and accurate information;

(i) merit as the basis of appointment and promotion;

(j) adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups; and

(k) representation of persons with disabilities in the composition of the public service at all levels.

(2) The values and principles specified in clause (1) apply to service-

(a) at national, provincial and local government levels; and

(b) **to all State organs and State institutions.**

(3) **A public officer shall not be—**

(a) **victimised or discriminated against for having performed functions in good faith in accordance with this Constitution or other law;**

(b) **removed from office, reduced in rank or otherwise punished without just cause and due process."**

5.13 The proposed Article 235 of the Report of the Technical Committee, which was the precursor to Article 173, gives the rationale for providing for values and principles of public service in the Constitution and states as follows: -

"Article 235: The rationale for the Article was to provide for values and principles to guide the conduct of holders of public offices as they were entrusted with enormous decision-making and discretionary powers which, if left unchecked, could erode principles of transparency and accountability which were cardinal to good governance. The Committee observed that public officials made a wide range of decisions pertaining to constitutional, statutory, administrative, financial, operational and other matters that have a direct bearing on the nation and citizens. Therefore, it was necessary for the conduct of such officers to be guided by a set of values and principles in the Constitution."

5.14 Article 173 must be read together with Article 266 of the Constitution which defines what public service means. It states:

"Service in the Civil Service, the Teaching Service, Defence Force and National Security Service, the Zambia Correctional Service, the Zambia Police Service, Emoluments Commission, State Audit Commission, Lands Commission, Electoral Commission, Human Rights Commission, Gender Equity and Equality Commission, the Anti-Corruption Commission, Drug Enforcement Commission, the Anti-Financial and Economic Crimes Commission, the Police and Public Complaints Commission, and Service as a constitutional office holder, service in other offices, as prescribed.

5.15 From our reading of Article 173 and the rationale behind its enactment, our understanding is that the Article relates to values and principles that guide the appointing authority in making nominations or appointments in the public service. Although the Petitioners have alleged contravention of Article 173 (1) (j) and (k) in this petition and that the same applies to the Republican President in exercise of his powers in nominating Members of Parliament and appointing Cabinet and Provincial Ministers, our firm view is that Article 173 does not apply to the appointment of Cabinet Ministers, Provincial Ministers and nominated Members of Parliament as they do not fall within the realm envisaged by Article 173 as read with Article 266 of the Constitution. To this effect, we find that the Petitioners have misapprehended the provisions of Article 173 in so far as they allege that the Republican President contravened the Article in question when he nominated Members of Parliament and appointed Cabinet and Provincial Ministers.

5.16 Article 259 of the Constitution as amended, which the Petitioners alleged the President violated in making the appointments and nominations in question, is couched in the following terms:

> **"259. (1)** **Where a person is empowered to make a nomination or an appointment to a public office, that person shall ensure-**

(a) that the person being nominated or appointed has the requisite qualification to discharge the functions of the office, as prescribed or specified in public office circulars or establishment registers;

(b) that fifty percent of each gender is nominated or appointed from the total available positions, unless it is not practicable to do so; and

(c) equitable representation of the youth and persons with disabilities, where these qualify for nomination or appointment;

(2) A person empowered to make a nomination or appointment to a public office shall, where possible, ensure that the nomination or appointment reflects the regional diversity of the people of Zambia. (Underlining is for our emphasis)

5.17 As to what Public Office is, Article 266 of the Constitution defines it as follows; -

"an office whose emoluments and expenses are a charge on the Consolidated fund or other prescribed public fund and includes a State office, Constitutional office and an office in the public service, including that of a member of a Commission."

5.18 In order to give meaning to Article 259, we again refer to the rationale for the Article given by the framers of our Constitution in the Final Report of the Technical Committee on Drafting the Zambian Constitution on appointments, reflected as draft Article 310 at page 829 as follows: -

"to provide guidelines that would be considered by persons empowered under the Constitution to make appointments so as to ensure equal representation and equitable consideration to gender, the youth and marginalised groups to participate in the affairs of the nation."

The Technical Committee at page 830 of the report did however observe that the:-

"fifty percent could be problematic as it would make appointments difficult in situations where one gender would not be competent for the job and that it would imply having to employ both gender for purposes of fulfilling the fifty per cent policy."

5.19 After deliberations on the proposed Article, the Committee at page 831 of the report amended the Article by including the principle of regional balancing as a basis for appointment to public office. The explanation given for this inclusion was:-

"this is in order to reflect the regional diversity of the people of Zambia and to avoid having skewed appointments in relation to specific regions or provinces."

5.20 The import of Article 259 is that the person who is empowered by law to make a nomination or appointment to a public office is enjoined by that provision to ensure that the person to be nominated or appointed possesses requisite qualifications relevant for the discharge of the functions of that office; ensure that fifty percent of each gender is nominated or appointed from the total number of available positions except where it is not practicable to do so; that there is equitable representation of the youth and persons with disabilities where they qualify. And ensure that the

regional diversity is reflected in nominating or appointing persons to public office.

5.21 Article 259 is couched in mandatory terms as the word "shall" is used, this connotes that all the four requirements should be taken into account. In this matter, the Petitioners have only raised two requirements, namely, the fifty percent representation of each gender and equitable representation of youths and persons with disabilities. Indeed, these are compulsory based on what is factually and legally possible. This means that the requirements of Article 259 must be fulfilled save for the exceptions contained in the provisos in that Article, namely, in case of gender parity, where it is not practicable to do so and in case of the youths and persons with disabilities, where these do not qualify for such appointment or nomination.

5.22 It is clear from a reading of Article 259 of the Constitution as amended that there was thus an affirmative measure taken by the framers of our Constitution to include marginalised groups which was not present in the previous Constitution and to increase their representation in public office or bodies. We see this as a positive and progressive measure by Zambia as a State Party to CEDAW in adhering to the objectives of not only the CEDAW but also the

SADC Gender Protocol guaranteeing and enforcing equality for women, the youth and persons with disabilities in public office.

5.23 Coming back to the major question posed above and having given meaning to Article 259, the current composition of the National Assembly lies at the heart in answering the question posed above. In our view, this question must be answered by the facts on the ground.

5.24 In her witness statement, PW1 told the Court that the Presidential and Parliamentary elections that were held in 2016, resulted in one hundred and fifty-six (156) elected members of Parliament and included twenty-nine (29) women, three (3) youths and one (1) person with disabilities. And that in addition to the elected members of Parliament, she was aware from a review of the National Assembly of Zambia Website that the Republican President nominated eight (8) members of Parliament and that only two (2) of these were females and none was a youth. PW1 further testified that the Republican President appointed thirty (30) Cabinet Ministers out of which nine (9) are females and none is a youth or person with disabilities. Further, that out of the ten (10) Provincial Ministers appointed, none is female or a youth.

5.25 We have perused the Parliamentary Website that PW1 referred to in her evidence as regards the current composition of the National Assembly. We note that of the 164 Members of Parliament, 28 are females. As stated at paragraph 5.4, out of the 28 females, 24 were elected whilst 2 are nominated Members of Parliament. The last two are the Vice President and the First Deputy Speaker.

5.26 With the above analysis in mind, we intend to consider the Petitioners' first, second and third prayers together as they are interrelated. The Petitioner seeks declarations that the Republican President contravened Article 259 (1) (b) and (c) of the Constitution on the ground that he did not take into account gender parity and adopt proper procedure in appointing Cabinet and Provincial Ministers and in nominating Members of Parliament.

5.27 In support of the above claims, the Petitioners relied on the evidence of PW1 and PW2. The tenor of PW1's evidence in this respect as stated above, was that of the 30 Cabinet Ministers appointed, only 9 were females and none was a youth or person with disability. And that of the 10 Provincial Ministers appointed, none was a female or youth. That this is despite there being 29 females, 3 youths and 1 person with disability among the Members of Parliament from which such appointment could have been made

to meet gender parity and equitable appointment of youths and persons with disabilities.

5.28 PW2 more or less repeated the evidence of PW1 in this respect. PW2 however went further to point out that the Constitution provides for fifty percent of gender nominations and appointments to the Public Service but that the 2018 statistics show gender parity of 18% women in Parliament and 26% in Cabinet. Further that the Southern Africa Development Community (SADC) Gender Protocol also requires all member States to ensure that special measures are put in place for equal participation of women in decision making.

5.29 In seeking to persuade this Court on the issue of gender parity not being practicable, the learned Attorney General argued that it was not only gender that has to be considered under Article 259, but that qualification is a prerequisite as well as regional diversity for appointment to public office which the appointing authority must also take into account.

5.30 We have considered the above evidence and submissions by Counsel on both sides. We agree with the Respondent's submissions that under Article 259, the appointing authority is not

only enjoined by the Constitution to consider gender parity and equitable representation of the youth and persons with disabilities but must also ensure that the person to be appointed or nominated has the requisite qualification for that office and that regional diversity of the Zambian people is also taken into account in making such appointments. The Petitioners in their evidence and submissions did not at all refer to the later requirements which could have had an impact on who was nominated or appointed to certain positions in public office.

5.31 As regards the Petitioners' contention that the President contravened the Constitution in appointing Cabinet and Provincial Ministers on ground that there is no evidence to show that he did take into account gender parity, equitable representation of the youth and persons with disabilities in making the appointments in question, we wish to observe that the power to make such appointments or nominations is a constitutional power conferred on the Republican President by the Constitution and is discretionary. This power is however, guided by the Constitution, as Article 259 itself has qualified this in the provisos stated in that Article, namely that "**unless it is not practicable to do so**" in case of gender parity; and in case of equitable representation of

the youth and persons with disabilities, **"where these qualify for nomination or appointment."**

5.32 Bearing in mind the composition of Parliament and considering the number of elected female Members of Parliament, youths and persons with disabilities as alleged by the Petitioners at pages 9 to 11 of their petition, our firm view is that the Petitioners have not proved to the required standard that the Republican President contravened the Constitution in the manner alleged by the Petitioners. These appointments have to be made from among the elected Members of Parliament save for up to 8 nominated Members of Parliament. In terms of nominated Members of Parliament, Article 69 provides that these may be appointed where it is considered necessary to enhance the representation of special interests, skills or gender. No cogent evidence has been proffered on these aspects or requirements. Out of the 24 elected female Members of Parliament, only 12 are from the ruling P.F. party whilst the rest were elected on the opposition political parties' tickets and 2 are independent Members of Parliament.

5.33 As regards the issue of nominated Members of Parliament and the Petitioners' arguments which *inter alia,* states that the President in nominating and appointing Members of Parliament did not reflect

the requisite gender parity or equitable representation of the youths and persons with disabilities as fewer women were nominated and with no youths and persons with disability having been nominated and appointed; we have above stated that the provision of Article 259 has qualified appointments not only to gender, youth and persons with disabilities but tied it to qualification and regional diversity of the people of Zambia which the Petitioners' did not at all address by providing cogent evidence.

5.34 It is our firm view that PW1 offered opinion evidence, which is inadmissible that she is a youth who is qualified for appointment. This opinion evidence thus cannot aid the Petitioners' case.

5.35 In concluding this issue, we wish to observe that the hurdle that may largely cause impediments to the fulfilment of the constitutional requirement enshrined in Article 259 (1) (b) and (c) and indeed those in the CEDAW and the SADC Gender Protocol, do not necessarily lie with the appointing authority alone, but with the selection or election of these marginalised groups which would have placed them in a position to be available for appointment to the positions in question. We thus agree with the oral submission by the learned Attorney General that political parties must nominate more women, more youths and more persons with

disabilities as candidates for political office. Hence, our view is that the realisation of gender parity in public office ought to begin and happen at the stage of selection of candidates sponsored by political parties.

5.36 As a Court mandated to interpret the Constitution of Zambia, we are compelled to draw the attention of not only the parties in this matter but all political party leaders to the provisions of Article 60 which governs the political parties that sponsor parliamentary candidates vying for elections. All political parties are bound by Article 1 (3) as well as Article 60 (2) (a) to promote the values and principles specified in the Constitution and spelt out in Article 8 including human dignity, equity, social justice, equality and non-discrimination.

5.37 In so saying, we are mindful of the fact that the outcome of this judgment must be addressed by not only the political party in power but by all political parties. We thus enjoin them to act in accordance with the said values and principles of our Constitution in adopting and supporting candidates for election, by ensuring gender parity and increased number of youths and persons with disabilities. We say so because one of the main impediments to the realization of the constitutional imperatives in Article 259 as

highlighted in this judgment is the few number of the female gender, youths and persons with disability in Parliament.

6.0 CONCLUSION

6.1 The Petitioners' 1st, 2nd and 3rd prayers in the Petition having failed on account of want of merit, the Petitioners' 4th and 5th prayers fall off and we shall not consider them as their outcome depended on the success of the 1st, 2nd and 3rd prayers.

6.2 The Constitutional provisions in Article 173 on guiding values and principles of the public service is a guide to the appointing and nominating authorities when making appointments to the public service and does not include nominations to Parliament or appointments of Cabinet or Provincial Ministers.

6.3 Article 259 is couched in mandatory terms and it requires the appointing authority in making nominations or appointments to ensure that fifty percent of each gender is nominated or appointed from the total available positions unless it is not practicable to do so and that there is equitable representation of the youth and persons with disabilities, where these qualify for nomination or appointment.

6.4 The constitutional imperatives enshrined in Article 259 (1) are not absolute as the Constitution in that same Article provides for exceptions under Article 259 (1) (b) and (c).

6.5 The Petitioners' evidence on record has not met the threshold for ousting the exceptions contained in the provisos to Article 259 (1) (b) and (c).

6.6 All in all, this petition has failed and the same is dismissed.

6.7 Since the Petition raised serious constitutional issues for our consideration, we order that each party bear own costs.

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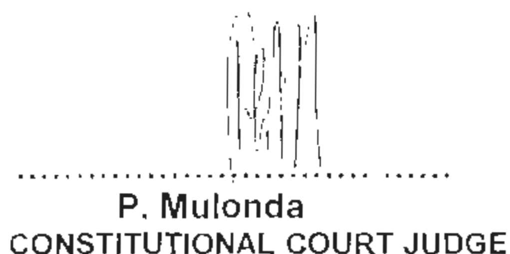
H. Chibomba
PRESIDENT, CONSTITUTIONAL COURT

....

A. M. Sitali
CONSTITUTIONAL COURTJUDGE

....

M. S. Mulenga
CONSTITUTIONAL COURT JUDGE



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P. Mulonda
CONSTITUTIONAL COURT JUDGE

DISSENTING JUDGMENT

Munalula JC, dissenting:

Case referred to:

Glenister v President of the Republic of South Africa and Others 2008 (1) SA 287

Legislation referred to:

Constitution of Zambia as amended in 2016

Works referred to:

Black's Law Dictionary Eighth Edition

Joni Lovenduski, Political Parties, Cheris Kramarae and Dale Spender, Routledge International Encyclopaedia of Women, 2001

1.0 Introduction/ Premise

1.1 I am constrained to write separately in this matter because I am of the opinion that the approach taken by the Majority of treating the gender category as no different from other categories cannot adequately address the fundamental issue of gender parity in the holding of Ministerial office as required by the Constitution. To address the issue, I choose to focus only on the question of gender. By so doing, it is apparent to me that, given the provisions of Article 259, the fact that only nine out of a combined total of 40 Cabinet and Provincial Ministers are women and only three out of eight Nominated Members of Parliament are female, proves that the appointing authority did not comply with the

Constitutional requirement for gender parity in making his Ministerial appointments.

1.2 I say so in my capacity as a judge of this Court, bound by Article 1 (3) to undertake constitutional review of the performance of constitutional executive functions. The President, in making Ministerial appointments is performing an executive function, guided by binding Constitutional provisions, hence this Court has a corresponding duty to consider and determine allegations of noncompliance with the Constitution in the appointment process.

1.3 In this regard I wish to borrow from the South African Constitutional Court which in **Glenister v President of the Republic of South Africa and Others**[1] put it thus, at paragraph 33:

> **[33] In our constitutional democracy the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do so. It is in the performance of this role that courts are more likely to confront the question of whether to venture into the domain of other branches of Government and the extent of such intervention. It is a necessary component of the doctrine of separation of powers that courts have the constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.**

1.4 I begin my analysis of the issue from the position that the Constitution of Zambia recognises only two genders constituting the human persons who are its subjects i.e., the female and the male. Every

person in Zambia is in the eyes of the Constitution and the law, either female or male, regardless of and before, they are anything else. Whatever their physical, racial, national, ethnic, social, economic, religious or political status they are either female or male. This gender binary demands a more rigid adherence to equality than any of the other categorisations accommodated by the Constitution. Hence, where there are questions about the equality of the two gender, the questions become fundamental questions which ought not to be obscured by addressing them under the rubric of secondary factors to be taken into account by the President in making Ministerial appointments.

1.5 That said, I will now proceed to address the constitutionally mandated gender parity requirement in relation to the Respondent's defences. In my summation the Respondent took refuge, first in the claim of unfettered discretion enjoyed by the President in making appointments and secondly in the averment that the Petitioners' claim was not practicable. I will refer to the two arguments as the 'discretion' and the 'practicability' defence, respectively, and will consider them sequentially.

2.0 The discretion defence.

2.1 I wish to begin with the nature of the President's power to make appointments to Ministerial office. The Respondent's argument is that the President's power to make appointments is discretionary and enables him to make appointments to Ministerial office as he sees fit. It is instructive that power is defined in Article 266 of the Constitution to include privilege, authority and discretion. Furthermore, discretion is defined in **Black's Law Dictionary** (Eighth edition) at page 499 as a public official's power to exercise judgment in the discharge of a duty. Thus whilst I agree that the President as head of the Executive Organ of Government should indeed be free to make the appointments that are within his mandate based on his exercise of due judgment, I wish to point out that the discretion is subject to Constitutional imperatives.

2.2 This is so because Zambia is a constitutional democracy. Supremacy of the Constitution is the linchpin of the governance system. It entails that the President as a public official must act in accordance with the Constitution, and the laws as founded on the Constitution, in exercising his powers to make appointments to Ministerial office even when those powers are framed in discretionary terms. The Constitution and the law therefore define the content and exercise of 'due judgment'.

2.3 I am fortified in so saying by Article 1 (3), under which all persons and State Organs are bound by the Constitution, as well as the content of Part VII of the Constitution which provides for Executive Authority. Although the President is bound to uphold the Constitution in its entirety, by virtue of Article 1 (3), Part VII is more specific. It limits the exercise of the President's appointment powers in clear terms.

Firstly, Article 90 provides that:

> **The Executive authority derives from the People of Zambia and shall be exercised in a manner compatible with the principles of social justice and for the People's well-being and benefit.** (emphasis added)

Article 91 (2) provides that the **executive authority of the State vests in the President** and Article 91 (3) provides in part, that:

> **The President shall in the exercise of the executive authority of the State-**
>
> **(a) Respect, uphold and safeguard this Constitution**
> **(b) .....**
> **(c) Promote democracy...**
> **(d) ....**
> **(e) Promote and protect the rights and freedoms of a person; and**
> **(f) Uphold the rule of law**

Article 92 then sets out the executive functions and begins in sub-Article (1) as follows:

> **The President hall perform with dignity, leadership and integrity, the acts that are necessary and expedient for, or reasonably incidental to, the exercise of the executive authority.** (emphasis added)

And Article 92 (2) (e) says that.

> **Without limiting the other provisions of this Constitution the President shall appoint persons as are required by this Constitution or any other law to be appointed by the President.** (emphasis added)

2.4 In my considered view, the sum of these provisions is that the President is obliged to ensure gender parity in making appointments to Ministerial offices. Based on the foregoing, it is my considered view that the Respondent's discretion defence has no merit and I would dismiss it.

3.0 Practicability defence

3.1 I now turn to the practicability defence contending that it was not practicable for the President to appoint more women to Ministerial office. That not only were there not enough women in Parliament, but of the few available, not all were suitable for appointment to Ministerial positions once other legitimate factors were taken into account. I have carefully considered the point.

3.2 For convenience I begin with Article 259 (1) (b) of the Constitution, relevant portions of which provide:

> **259. (1) Where a person is empowered to make a nomination or an appointment to a public office, that person shall ensure—**
> ***(b)* that fifty percent of each gender is nominated or appointed from the total available positions, unless it is not practicable to do so;** (emphasis added)

Of particular note is that the word 'shall', which is an imperative, is used. The Article clearly makes it mandatory to pursue gender parity in making appointments to public office, in this case, Ministerial office. Article 259 (1) (b) prescribes a quota system for appointments to public office. It specifically provides for a gender neutral quota for holders of public office. This is a quota that applies to both gender in equal measure. The quota places a maximum limit of fifty per cent on public office positions reserved for women and fifty per cent on the positions reserved for men. It says in no uncertain terms that women have an equal Constitutional entitlement to the holding of public office regardless of the level of that office. It is intended to ensure parity; and all things being equal would not favour a particular gender. Its effect in the short term however, is to prescribe an increase in the number of women appointed to Ministerial office until the half way mark is reached thereby forcing a corresponding reduction in the number of men appointed to the same office. Once the fifty per cent threshold is reached for each gender, their quota is full. Vacant positions cannot simply be filled in disregard of the other gender's entitlement. It is therefore the duty of the appointing authority to justify the imbalance in the appointments made. It follows that the 'evidentiary burden' (which in the circumstances is distinguishable from

the 'burden of proof') passed to the President to demonstrate or show why it was not practicable to appoint more women to Ministerial office.

3.3 Remedying the disparity is so important and so fundamental that it has been placed in the Constitution. The import of this is that Article 259 (1) (b) is in the short term, a remedy for women's historically disadvantaged position, which has resulted in much smaller numbers of women holding this type of public office (Ministerial office) as compared to men. Furthermore it cannot be said to be in any way discriminatory as it is framed in such a way that it protects both gender. And as such, it can remain a permanent feature of the Constitution. This way parity is not only achievable, it is sustainable.

3.4 I now turn to Article 69, relevant portions of which, when read with relevant portions of Article 68 on which it rests, provide:

> **68. (1) A Member of Parliament shall be elected in accordance with Article 47 (2) and this Article. (2) The National Assembly shall consist of—**
> **(a) one hundred and fifty-six members directly elected on the basis of a simple majority vote under the first-past the-post system;**
> **(b) not more than eight nominated members;**
>
> **69. (1) The President may nominate a person referred to in Article 68 (2) *(b)* where the President considers it necessary to enhance the representation of special interests, skills or gender in the National Assembly.**
> **(2) A person may be nominated as a Member of Parliament if the person qualifies to be elected as such under Article 70** (emphasis added).

3.5 Article 69 directly supports the actualisation of Article 259 (1) (b) where the numbers of elected female Members of Parliament is low. It is clearly, an affirmative action provision intended to enhance the numbers of the disadvantaged gender in Parliament. By boosting the number of the disadvantaged gender Article 69 helps achieve gender parity in Parliament and increases the number of women that the President can choose from in appointing Ministers. A look at the list of nominated Members of Parliament however shows that its purpose has been misunderstood and I shall now elaborate on why I say so.

3.6 Under Article 69 (1) the President may nominate a person referred to in Article 68 (2) (b), where the President considers it necessary to enhance representation to achieve (for purposes of my decision) the constitutionally mandated gender parity. This provision has to be used for affirmative action only. It cannot be used to appoint more of the same gender of which there is already an overwhelming majority in Parliament. It is also not about having an equal number of female and male nominated Members of Parliament. The focus is on the disadvantaged gender, in this case, women. As such, Article 69 can increase the representation of women in Parliament and meaningfully reduce the deficit in the number of women appointed to Cabinet and to the office of provincial Minister.

3.7 The Respondent argued that a strict application of Articles 259 (1) (b) and relevant portions of 69 was not possible in the circumstances. I do not find the position tenable for a number of reasons.

The first reason is the framing of Article 259 (1) (b). The practicability component of Article 259 (1) (b) is the lesser part of it or the claw back to the prescription of the fifty-fifty quota. A claw back should not render meaningless the protection intended by a particular provision. The aim of Article 259 (1) (b) is to achieve parity in the holding of public office, in this case, Ministerial office. The evidence shows nine female and 31 male Ministers. This is a huge mis-match. It is as if Article 259(1) (b) does not exist and women have no substantive entitlement to be appointed to Ministerial office equally with men. The practicability defence holds water, in my considered view, only where the discrepancy in the female/male ratio is minimal. Otherwise the exception becomes the Rule, blatantly disregarding the requirement for women and men to enjoy the equal entitlement enshrined in the Constitution to be appointed to Ministerial positions.

3.8 The second reason is that equality of the two gender is so important that it finds expression in the founding principles of the Constitution. The Preamble to the Constitution proclaims that:

> **We the People of Zambia...confirm the equal worth of women and men and their right to freely participate in, determine and build a sustainable political, legal economic and social order** *(emphasis added)*.

Further Article 8 provides for mandatory national values and principles which include human dignity, equity, social justice, equality and non-discrimination. And Article 9 requires that the said values be taken into account in interpreting the Constitution. And among the principles of the electoral system found in Article 45 (1) is (d), which is on gender equity in the National Assembly.

3.9 I agree with the Petitioners that gender equality is not just our own Constitutional peculiarity; it is an internationally recognised human right. It is trite that Zambia is signatory to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW); the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol); and the SADC Protocol on Gender and Development. Zambia must fulfil its obligations thereunder to actively pursue the goal of gender equality and non-discrimination. To illustrate, under the SADC Protocol, Article 4 enjoins its member countries which include Zambia, to enshrine gender quality in the Constitution by 2015. Gender equality is defined in the Protocol as equal enjoyment or rights and the access to opportunities and outcomes including resources by women, men girls and boys. Article 12 of the Protocol, which is on

representation, tasks State Parties, to endeavour by 2015, to have at least 50% of decision-making positions in both public and private sectors held by women through taking measures that include affirmative action. For Zambia, this is what was done in 2016.

3.10 The third reason is that the educational qualification for holding Ministerial office is tied to that of a Member of Parliament. The educational qualification for one to be a Member of Parliament as set out in Article 70, is easily achievable by many, many, women. At issue are a mere twenty Ministerial positions. Surely between the women elected to Parliament and those that could have been nominated by the President, it would have been possible to find twenty women to fill the positions without difficulty. I am not convinced that it was not practicable to find requisite candidates.

3.11 My final reason is perhaps the most pertinent. The Respondent has argued that the Petitioners have taken issue with the wrong person as they should have targeted political parties who ought to have sponsored enough women to stand as candidates in the 2016 Parliamentary elections. This does not help the Respondent or the President. Here is why. I take judicial notice that the President first took office in 2015 and signed the 2016 Constitutional amendments into law on 5th January 2016. That the said amendments removed the Mixed Member

Proportional Representation System recommended by the Technical Committee Drafting the Zambian Constitution which would have helped more women get into Parliament, and replaced it with the First Past the Post System which did not help them.

3.12 It is fortunate however that the amendments included Articles 1(3), 259 (1) (b) and 69 among others, which when read together, do favour pursuing gender equality. Hence the President was in my considered view, well aware of the pressing requirement for gender parity in Parliament and subsequently in Ministerial appointments as his Party went about the business of selecting candidates to stand for election as Members of Parliament. This is because whilst the August 2016 elections were in progress the President was already in office not only as Republican President but also President of the Ruling Party.

3.13 From this perspective, the small number of women elected to Parliament relates directly to the small number of women sponsored by the Ruling Party in 2016, as a result of the choices made by the leadership of the concerned political party when they failed to take into account Articles 1 (3) and Article 60 to ensure gender parity in the election process.

3.14 I am fortified in laying blame where I think it belongs by **Joni Lovenduski**'s piece in the Routledge International Encyclopaedia of Women entitled **Political Parties,** which notes at page 1565 that:

> Although voters choose candidates, they do so only after political parties have limited the options. Electoral systems are subject to government policy, but candidate selection rules are made within political parties. Because voters express party preferences the resulting male-dominated government representation is the result of party decisions. Parties not voters, determine the composition of elected assemblies. Moreover parties often determine who is awarded appointed offices of various kinds...

3.15 Being bound by Article **1** (3) in both his private and official capacities, the President could have ensured at the election stage, that adequate numbers of women, whom he could subsequently draw from for purposes of appointment to Ministerial offices, were nominated to stand on the Ruling Party ticket. More so as Article 92 (1) which I have already referred to expects this of a person holding the office of Republican President, as it provides that, the holder of the office is to perform with integrity, the acts that are necessary and expedient for, or reasonably incidental to the exercise of executive authority.

3.16 It does not end there. After his re-election the President had a second opportunity to ensure that he had an adequate number of women to choose from. He could have used Article 69 to nominate more (and especially qualified) women to Parliament. He did not. For this and the foregoing reasons combined, I would find that the President cannot

benefit from the absence of adequate women Parliamentarians so as to claim the practicability defence. I would dismiss it accordingly.

4.0 Conclusion

4.1 It follows that had this matter not meandered into an academic exercise by the time it was heard, I would have found merit in the gender related aspects of the Petitioners' 1st, 2nd and 3rd Prayers.

M M Munalula (JSD)

Judge Constitutional Court