

## IN THE CONSTITUTIONAL COURT OF ZAMBIA

2021/CCZ/0028/0032

## HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF : ARTICLES 52 (4) AND 128 (3) OF THE CONSTITUTION

IN THE MATTER OF : THE ALLEGED CONTRAVENTION OF ARTICLES 100  
AND 110 (2) OF THE CONSTITUTIONIN THE MATTER OF : THE NOMINATION OF VICE-PRESIDENTIAL  
CANDIDATES FOR THE GENERAL ELECTION SET  
FOR 12<sup>TH</sup> AUGUST, 2021

BETWEEN:

SISHUWA SISHUWA (Dr.) 1<sup>ST</sup> PETITIONERALFRED CHILESHE KANDA 2<sup>ND</sup> PETITIONER

AND

NKANDU LUO 1<sup>ST</sup> RESPONDENT(Vice-Presidential Candidate –  
Patriotic Front)BRIGHT CHOMBA 2<sup>ND</sup> RESPONDENT(Vice-Presidential Candidate –  
Third Liberation Movement)HENRY MULEYA 3<sup>RD</sup> RESPONDENT(Vice-Presidential Candidate –  
Patriots for Economic Progress)GERALD MULAO 4<sup>TH</sup> RESPONDENT(Vice-Presidential Candidate –  
People's Alliance for Change)SAMUEL KASANKA 5<sup>TH</sup> RESPONDENT(Vice-Presidential Candidate –  
New Heritage Party)CHANGALA SIAME 6<sup>TH</sup> RESPONDENT

(Vice-Presidential Candidate –



<i>Economic Freedom Fighters)</i>	
LUCY CHANGWE	7 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>National Restoration Party)</i>	
ROSEMARY CHIVUMBA	8 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>Zambians United for Sustainable Development)</i>	
KAELA KAMWENESHE	9 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>Leadership Movement</i> )	
KASOTE SINGOGO	10 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>Party of National Unity and Progress</i> )	
COSMAS MUSUMALI	11 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>Socialist Party</i> )	
JUDITH KABEMBA	12 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>Democratic Party</i> )	
MUTALE NALUMANGO	13 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>United Party for National Development)</i>	
REUBEN SAMBO	14 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>Movement for Multi-Party Democracy</i> )	
SIMON MBULU	15 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>United Prosperous Party and Peaceful Zambia</i> )	
JOHN BROWN HARAWA	16 <sup>TH</sup> RESPONDENT
(Vice-Presidential Candidate – <i>United National Independence Party)</i>	
ATTORNEY GENERAL	17 <sup>TH</sup> RESPONDENT

**CORAM: Chibomba PC, Sitali, Mulenga, Mulonda, Munalula, Musaluke, Chitabo, Chisunka and Mulongoti JJC on 8<sup>th</sup> June, 2021 and 11<sup>th</sup> June, 2021**

*For the 1<sup>st</sup> Petitioner:* Mr. J. Sangwa, SC, Mr. J. Chimankata and Mr. Nkunika of Simeza, Sangwa & Associates

*For the 2<sup>nd</sup> Petitioner:* In person

*For the 1<sup>st</sup> Respondent:* Mr. B.C Mutale, SC of Ellis & Co., Mr. E.S Silwamba, SC and L. Linyama of Eric Silwamba, Jalasi and Linyama Legal Practitioners, Mr. C. Bwalya of DH Kemp & Co., Mr. J. Zimba of Makebi Zulu & Co.

*For the 2<sup>nd</sup> to 15<sup>th</sup> Respondent:* No Appearance

*For the 16<sup>th</sup> Respondent:* Mr. S. Sikota, SC of Central Chambers

*For the 17<sup>th</sup> Respondent:* Mr. L. Kalaluka SC, Attorney General Mr. A. Mwansa SC, Solicitor General; Mr. F. Mwale, Principal State Advocate Mr. S. Mujuda, Principal State Advocate, Mr. C. Mulonda, Principal State Advocate, Mr. A. Mungaila, State Advocate, Mr. P. Phiri, State Advocate

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## JUDGMENT

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Munalula, JC, delivered the Judgment of the Court.

**Cases referred to:**

1. Law Association of Zambia and Chapter One Foundation v Attorney General 2019/CCZ/13/14
2. Bizwayo Newton Nkunika v Lawrence Nyirenda and the Electoral Commission of Zambia 2019CCZ/005
3. Milford Maambo & Others v The People (2017) 2 Z.R. 182

**Legislation referred to:**

The Constitution of Zambia, Act No. 2 of 2016

The Electoral Process Act No. 35 of 2016

The Constitutional Court Rules S.I No. 37 of 2016

Constitution of Kenya, 2013

**Works referred to:**

Rules of the Supreme Court 1965, White Book, 1999 edition

Report of the Technical Committee Drafting the Zambian Constitution, 2013

## **1.0 INTRODUCTION / BACKGROUND**

1.1 This Judgment relates to two Petitions filed on the 21<sup>st</sup> May, 2021 and 27<sup>th</sup> May, 2021 respectively, by Sishuwa Sishuwa and Alfred Chileshe Kanda against the 1<sup>st</sup> to 16<sup>th</sup> Respondents. The Petitions were each supported by Affidavit. By order of the Single Judge of this Court dated 31<sup>st</sup> May, 2021 the Petitions were consolidated so that they could be heard and determined together. The Attorney General of the Republic of Zambia applied and was joined to the matter on 26<sup>th</sup> May, 2021 by order of the Single Judge, as the 17<sup>th</sup> Respondent.

1.2 Although the 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Respondents each filed an Answer to the Petition together with a supporting Affidavit, the 17<sup>th</sup> Respondent further moved the Court by Notice of Motion to Raise a Preliminary Issue to Dismiss the Matter on Points of Law filed on 4<sup>th</sup> June, 2021. When the matter came up for hearing on 8<sup>th</sup> June, 2021, we decided to hear both the Motion and the main matter at the same time since the proceedings are time bound. We shall therefore deliver one Judgment.

## **2.0 THE PETITION**

2.1 The Petitioners moved this Court under Articles 52 (4) and 128 (3) of the Constitution of Zambia as amended in 2016 (henceforth the Constitution) alleging that the 1<sup>st</sup> to 16<sup>th</sup> Respondents who have been nominated for the position of vice-President alongside the Presidential

nominees have contravened Article 110 (2) read with Article 100 (1) (i) and (j) of the Constitution.

2.2 The first relief that the Petitioners seek is a declaration that to the extent that the Respondents have not complied with the provisions of Article 100 (1) (i) relating to the payment of a nomination fee and Article 100 (1) (j) relating to having 100 supporters from each Province, their respective nominations for election to the office of Vice-President are null and void. Secondly, the Petitioners seek an Order of *Certiorari* that the Petitions be allowed, and the 1<sup>st</sup> to 16<sup>th</sup> Respondents' nomination papers filed with the Returning Officer, be removed forthwith into the Constitutional Court for purposes of quashing.

### **3.0 THE PRELIMINARY ISSUE**

3.1 We shall first consider the Preliminary Issue. The Motion to Raise a Preliminary Issue to Dismiss the Matter on a Point of Law was filed pursuant to Order 14A Rule (1) and (2) and Order 33 Rule (3) of the Rules of the Supreme Court 1965, White Book, 1999 edition, read with Order I Rule (1) of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016. The Motion asked the following question:

**Whether or not this Petition should be dismissed for incompetence on the basis that the running mate is not amenable to Article 52 (4) of the Constitution in view of the following:-**

- (i) The Running Mate is not mentioned at all in Article 52 of the Constitution;

- (ii) The Running Mate is not a candidate as per the definition of the term candidate under Article 266 of the Constitution; and
- (iii) The Running Mate is not required to be voted for independently but relies on the votes of the Presidential Candidate as per the provisions of Article 110 (3) of the Constitution.

3.2 In support of the Motion, the 17<sup>th</sup> Respondent filed an Affidavit in which it was deposed that the Petitioners cannot pursuant to Article 52 (4) of the Constitution challenge the respective nominations for election to the office of Vice-President. The 17<sup>th</sup> Respondent also filed a list of Authorities and Skeleton Arguments in Support of the Motion in which it was contended that the questions raised are suitable for determination without a full trial. It was argued that the Petitioners cannot bring the Petitions pursuant to Article 52 (4) to challenge the nomination of the 1<sup>st</sup> to 16<sup>th</sup> Respondents as the selection of Running Mate is not amenable to challenge under the said provision or any other for that matter. That this is because the wording of the provision is quite clear that the only nominations envisaged are that of President, Member of Parliament and Councillor. That it does not include the position that the 1<sup>st</sup> to 16<sup>th</sup> Respondents are nominated to hold.

3.3 The 17<sup>th</sup> Respondent further relied on the definitions in Article 266 of the Constitution which provides as to what a candidate, a running mate and a Presidential candidate are, as follows:

"candidate" means a person contesting a Presidential, Parliamentary or local Government election; "running mate" means a person who is selected by a Presidential candidate to stand with the Presidential candidate in a Presidential election so that the person becomes the Vice President if that Presidential

candidate is elected as President; and "Presidential candidate" means a person nominated to stand for election as President in accordance with Article 52 (1).

3.4 It was contended that the term 'candidate' does not envisage the position of Vice-President or running mate to the President. That the person selected by the Presidential candidate to stand with them in the Presidential election is not nominated and thus the requirements as envisaged under Article 100 cannot literally be said to be applicable to a running mate. That Article 110 (3) is clear that the person selected relies on the votes cast for the Presidential candidate. Thus the two Petitions are misplaced.

The Court was urged to dismiss the Petitions accordingly.

3.5 At the hearing, The 17<sup>th</sup> Respondent augmented by arguing that Article 52 (4) is a jurisdictional clause of the Constitution which does not need to be interpreted with other clauses of the Constitution to validate it. The case of **Law Association of Zambia and Chapter One Foundation v Attorney General**<sup>1</sup> was cited in support of the above submission. It was contended that if the plain and simple reading of Article 52 does not give this Court jurisdiction to proceed then it should down its tools. That a presidential candidate is nominated, is clearly different from the running mate who's selected.

3.6 In opposing the Motion, Counsel for the 1<sup>st</sup> Petitioner, Mr. Sangwa, SC, filed written arguments which he augmented at the hearing. He

contended that the interpretation that has been given to Article 52 and in particular Article 52 (4) is a mis-direction as it is not backed by any canons of interpretation. That the Constitution ought to be interpreted as a whole taking into account all the Articles. That the interpretation cannot be applied selectively.

3.7 That it does not take into account Article 110 (2) whose import is that everything that pertains to the Presidential candidate shall also apply to the Vice-President including the qualifications and disqualifications. That all the Respondents in this matter complied with the process in Article 52 (1) (2) and (3) and that Article 52 (4) is a way of checking the Constitutionality of what the Respondents had done under Articles 52 (1) (2) and (3). That undergoing the process is what triggers Article 52 (4). That, the Respondents, cannot be exempt from the jurisdiction of this Court under Article 52 (4) and that the matter ought to be heard on the merits.

3.8 In the alternative, Mr. Sangwa, SC, contended that the matter was also brought under Article 128 (3) which allows the Petitioners to allege a contravention of the Constitution. That both Articles 52 (4) and 128 (3) are avenues to come to this Court. Whilst the former is specific, the latter is general. The contravention alleged being in relation to Article 100 (1) (i) and (j), the Petition is correctly before this Court and that a Petition once

filed must be heard and determined on the merits. The case of **Bizwayo Newton Nkunika v Lawrence Nyirenda and the Electoral Commission of Zambia**<sup>2</sup> was cited in aid of the above argument. Mr. Sangwa, SC, contended further, that there was no exemption from Article 52 as the Respondents had brought themselves within its ambit by filing their nominations under it.

3.9 The 2<sup>nd</sup> Petitioner who appeared in person, referred the Court to Article 55 which he said refers to the Vice-President as a candidate. He asserted his right to defend the Constitution. He argued that the Respondents' lawyers were trying to take away the jurisdiction of the Court and make the Respondents unaccountable by saying they are not amenable to the law when everyone is bound by the Constitution. That matters must be heard on their merits.

3.10 In Reply, the 17<sup>th</sup> Respondent, maintained that Article 55 refers to elections and does not help the 2<sup>nd</sup> Petitioner. That what gives the Court jurisdiction is not the acts of the Respondents but the law or the Constitution. No interpretation of the Constitution can give the Court jurisdiction which it does not have. That the Constitution treats the President and the Vice- President differently. It was thus the prayer of the 17<sup>th</sup> Respondent that the Petitions be dismissed in so far as they are premised on Article 52.

3.11 Having considered the preliminary issue, we find that it addresses more or less the same issues raised in the Petition. We shall therefore consider the issues in the course of determining the main matter.

## **4.0 THE MAIN MATTER**

### **4.1 THE PETITIONERS' CASE**

4.1.1 The 1<sup>st</sup> Petitioner's Petition disclosed that he is a lecturer and researcher while the Respondents are running mates to various candidates vying for the office of President. The 1<sup>st</sup> Petitioner asserted that pursuant to Article 1 of the Constitution of Zambia, the Constitution is the supreme law of the Republic of Zambia. It, therefore, binds all the Respondents. He stated the qualifications for nomination for election to the office of President as set out in Article 100 (1) of the Constitution adding that Article 110 (2) requires all presidential running mates to meet the same qualifications as the presidential candidates but had failed to meet some of the requirements, namely, payment of the nomination fee and harnessing the required number of supporters. That the Electoral Commission of Zambia appointed the 1<sup>st</sup> to 9<sup>th</sup> of May, 2021 for payment of nomination fees by Presidential Candidates, the 10<sup>th</sup> to 15<sup>th</sup> of May, 2021 as the period for processing supporters and the 17<sup>th</sup> to 20<sup>th</sup> May, 2021 as the period set for presidential candidates and their running mates

to file nomination papers with the Chairperson of the Electoral Commission as Returning Officer.

4.1.2 Despite the publication of the Calendar by the Electoral Commission of Zambia, the majority of the Respondents were announced as running mates on the day of filing the nomination papers. The 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents filed their nomination papers with the Returning Officer on Monday, 17<sup>th</sup> May, 2021, and their nominations were all declared valid by the Returning Officer. The 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents lodged their nomination papers on 18<sup>th</sup> May, 2021 and their nominations were declared valid by the Returning Officer. The 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, and 13<sup>th</sup> Respondents filed their nomination papers on 19<sup>th</sup> May, 2021 which were declared valid by the Returning Officer. The 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> Respondents all lodged their nomination papers on 20<sup>th</sup> May, 2021 which were equally declared valid by the Returning Officer.

4.1.3 According to the 1<sup>st</sup> Petitioner, subject to discovery, the 1<sup>st</sup> to 16<sup>th</sup> Respondents complied with the qualifications set out in Articles 100 (1) (a) to (h) but failed to comply with Articles 100 (1) (i) and (j) of the Constitution which required each Respondent to pay the nomination fee and be supported by at least 100 registered voters from each Province. However, that despite their failure to comply with Article 100 (1) (i) and (j) of the Constitution, the Returning Officer declared their nominations valid.

4.1.4 Although the 1<sup>st</sup> Petitioner had filed skeleton arguments, they were expunged from the Record as they were filed late and without leave of the Court. However oral Submissions were made at the hearing. Mr. Sangwa, SC, who appeared on behalf of the 1<sup>st</sup> Petitioner, submitted that Article 100 (1) and (2) of the Constitution set out the qualifications and disqualifications of the Presidential candidate and Article 110 (2) states that the same shall apply to the running mates. That the Respondents have not complied with Article 100 (1) (i) and (j) of the Constitution which requires them to pay the prescribed nomination fee and provide 100 supporters. Furthermore, that the Respondents do not dispute the 1<sup>st</sup> Petitioner's allegation. Instead, they offered an explanation for their non-compliance with the Constitution. That their acts of non-compliance contravene the Constitution and are illegal. That the logic in requiring the running mates to have the same qualifications as presidential candidates is because they would automatically assume the office of President in the event of a vacancy as enshrined in the Constitution. It was the 1<sup>st</sup> Petitioner's prayer that the nomination papers for the Respondents be declared null and void and therefore illegal for contravening the Constitution.

4.1.5 The facts disclosed in the 2<sup>nd</sup> Petitioner's Petition are that the Respondents are running mates to the various candidates running for the

office of Vice-President. As with the 1<sup>st</sup> Petitioner, the 2<sup>nd</sup> Petitioner also outlined the Constitutional provisions governing the qualifications and disqualifications for nomination for a presidential candidate, which, he said apply to their running mates.

4.1.6 The 2<sup>nd</sup> Petitioner averred that the filing of nomination papers for a presidential candidate and their running mate does not necessarily or compulsorily have to be done on the same date even though their election happens simultaneously depending on the votes cast for the former. That the running mates cannot depend on the qualification of the presidential candidates for their nomination. That the Electoral Commission of Zambia Calendar, also alluded to by the 1<sup>st</sup> Petitioner, stipulated the period for filing of nominations for presidential candidates and their running mates.

4.1.7 The 2<sup>nd</sup> Petitioner alleged that, unlike their appointing presidential candidates, the Respondents failed to comply with the procedure laid down by the Electoral Commission of Zambia as set out in Articles 100 (1) (i) and (j) as well as Article 110 (2) of the Constitution. That strangely, the Respondents proceeded to file their nominations on the same day and at the same event as the presidential candidates, where a good number of them were unveiled as running mates for their respective presidential candidates. That the Respondents' actions thus violated Article 100 (1) (i) and (j) and Article 110 (2) of the Constitution.

4.1.8 In support of his Petition, the 2<sup>nd</sup> Petitioner filed an Affidavit Verifying Facts. The main thrust of his Affidavit was to confirm the content of his Petition. He did not file written submissions however he too made Submissions orally at the hearing wherein the 2<sup>nd</sup> petitioner relied on his petition and Affidavit Verifying the Facts. He submitted that for the nominations of the running mates to be valid, they must meet the same qualifications as the President. That they are all required to pay the prescribed nomination fee and provide at least 100 supporters from each Province.

#### **4.2 THE RESPONDENTS' CASE**

4.2.1 The 1<sup>st</sup> Respondent, filed an Answer on 3<sup>rd</sup> June, 2021, in which she stated that the nominations of Presidential and Vice-Presidential candidates is set by the Electoral Commission of Zambia in line with its constitutional mandate to direct, control and supervise elections in Zambia. Nominations of the Presidential Candidates and their running mates were scheduled to and did close on 20<sup>th</sup> May, 2021. The Returning Officer determined that the nomination of the 1<sup>st</sup> Respondent as running mate was valid on 17<sup>th</sup> May, 2021. That there had been no competent Petition challenging the determination of the Returning Officer that the nomination of the 1<sup>st</sup> Respondent is invalid that was brought against the Commission within the period prescribed by Article 52(4) of the

Constitution. Further that the 1<sup>st</sup> Respondent has no control over or power to direct the determination of the Returning Officer in relation to election nominations or at all.

4.2.2 It was averred that the 1<sup>st</sup> Respondent complied with the qualifications set out in Article 100(1) (a), (b), (c), (d), (e), (f), (g) and (h) of the Constitution. That Article 266 of the Constitution states that the word "prescribed" means provided for in an Act of Parliament. Thus the election fee required to be paid under Article 100(1) (i) of the Constitution must be prescribed or provided for in an Act of Parliament. That the Electoral Process Act, 2016 and its Regulations do not provide any election fee to be paid on nomination of a running mate or Vice President. The 1<sup>st</sup> Respondent is and was supported by at least 100 registered voters from each province at the time of the nomination but Regulation 11(3) did not require these supporters to subscribe to Form GEN 3 of the Regulations. That Article 67(3) of the Constitution which is specific to statutory instruments, provides that a challenge to the constitutionality of a statutory instrument may only be brought within 14 days of publication of the statutory instrument in the Government Gazette. No such challenge has been made to any specific provision of the said statutory instruments. That a challenge to the constitutionality of Regulation 11(3) of the Electoral Process (General) Regulations, 2016, cannot be made at this late stage

as the Petitioner is out of time. That the Petitioners have not raised any cause of action against the 1<sup>st</sup> Respondent because her nomination as running mate was valid, final and conclusive as determined by the Returning Officer. The Commission was not made party to the proceedings, therefore, the Petitions purportedly challenging the determination of the Returning Officer were incompetent. That the remedy of *Certiorari* cannot lie against the 1<sup>st</sup> Respondent because her nomination as running mate is valid.

4.2.3 The 1<sup>st</sup> Respondent filed an Affidavit verifying the Answer on 3<sup>rd</sup> June, 2021. The Affidavit was sworn by the 1<sup>st</sup> Respondent. She deposed that she was selected as running mate to the incumbent Republican President, who is the Presidential Candidate, sponsored by the Patriotic Front in the forthcoming general election scheduled to take place on 12<sup>th</sup> August, 2021. That her selection as running mate was made long before the period scheduled by the Electoral Commission of Zambia for nomination of Presidential and Vice-Presidential Candidates. That she met all the qualifications in the Constitution and required by the Electoral Commission of Zambia for selection as running mate, and that none of the impugned qualifications apply to her. That the Returning Officer who is also the Chairperson of the Electoral Commission of Zambia determined her selection as running mate valid. That no fee was

prescribed or is required to be paid to the Electoral Commission of Zambia for her selection as running mate nor was any required to be paid to the Returning Officer on or before the delivery of the papers in support of her selection or nomination. She had no control over the decision of the Returning Officer to declare her selection and nomination as Vice-Presidential Candidate as valid.

4.2.4 During the hearing, Counsel for the 1<sup>st</sup> Respondent submitted that Section 30 (1) of the Electoral Process Act No. 35 of 2016 provides that a prescribed fee and the issue of 100 registered voters does not apply to a running mate. The rationale for this is that a running mate is a passenger on the ticket of a Presidential Candidate. That Regulation 11 of the Electoral Process General Regulations, 2016, Statutory Instrument No 63 of 2016, governs the nominations for Presidential elections. The requirement of 100 registered voters is not superintended by the Returning Officer but rather by an Assistant Returning Officer in the Capital City of each Town or Province. That a Presidential Candidate and a running mate are treated differently and this continues even after success in the elections as a President enjoys immunity whereas a Vice President does not. A running mate is selected and therefore, the onus falls on the selector to ensure that the running mate has the necessary qualifications.

4.2.5 Further that Article 52 (2) of the Constitution mandates the Returning Officer to reject a nomination paper if a candidate does not meet the stipulated requirements as it is implicit in Article 52 (2) that if the Returning Officer makes a determination that the requirements have been fulfilled, then there can be no challenge. If there is to be a challenge, then it must be directed towards the Returning Officer within 21 days. If the challenge against the Returning Officer is not instituted within 7 days, the Returning Officer's determination becomes final. That the Petitions herein, did not challenge the determination by the Returning Officer by joining the Electoral Commission of Zambia to this matter. Thus, the Petitions are incompetent and not a proper challenge within the meaning of Article 52 (4).

4.2.6 The 16<sup>th</sup> Respondent also filed an Answer together with an Affidavit which was more or less the same as that filed by the 1<sup>st</sup> Respondent. We shall not repeat the details for the sake of brevity. At the hearing Counsel for the 16<sup>th</sup> Respondent submitted that the 16<sup>th</sup> Respondent relied on and adopted the 1<sup>st</sup> and 17<sup>th</sup> Respondents' submissions. Counsel also relied on the 1<sup>st</sup> and 17<sup>th</sup> Respondents' arguments in the Notice of Motion to dismiss the matter on points of law.

4.2.7 The Court's attention was drawn to Article 70 of the Constitution that deals with the qualifications and disqualifications of a Member of

Parliament, which does not require the payment of a fee nor 100 registered voters. It was submitted that the same considerations under Article 70 must be applied to a running mate.

4.2.8 It was also submitted that a running mate does not exist in a vacuum. As such, a running mate is invariably attached to a Presidential Candidate. It is the election of a Presidential Candidate that bestows the running mate his/her status as Vice President. There was therefore, no need to require a running mate to pay a fee.

4.3 The 17<sup>th</sup> Respondent filed their combined Answer and Affidavit verifying Facts on 3<sup>rd</sup> June, 2021. It was stated in the said Answer that since a Vice-Presidential candidate's votes are not independent from the votes cast for the Presidential candidate, a Vice President is neither required to be separately supported by at least 100 supporters from each province nor to pay a separate nomination fee from that paid by the Presidential candidate. Further, that the qualifications and disqualifications referred to under Article 100 (2) of the Constitution refer to substantive qualifications and disqualifications as listed under Article 100(1) (a) to (f) that allow the Vice-President to take over as President in case of a vacancy in the office of the President.

4.3.1 The 17<sup>th</sup> Respondent averred that none of the Respondents have contravened the provisions of Article 100(1) (i) and (j) as the Running

is not a candidate in the nominations in issue herein. As such, that he/she is not amenable to be challenged under Article 52 of the Constitution.

4.3.2 At the hearing, the learned Attorney General, Mr. Kalaluka, SC, argued on behalf of the 17<sup>th</sup> Respondent that the provisions of Article 110 (2) of the Constitution do not apply to a running mate as careful scrutiny of the said Article demonstrates that running mates are not required to file nominations. It was further argued that a clear reading of Article 110 (2) of the Constitution reveals that a running mate is selected as opposed to being nominated. The Learned Attorney General went on to draw a comparison between Articles 110 (2) and 100 on one hand and Articles 69 (2), 70 and 71 of the Constitution on the other hand. He argued that while the provisions of Article 69, 70 and 71 of the Constitution have made a distinction between the substantive qualifications for Member of Parliament and the nomination qualifications for Member of Parliament, a similar distinction does not exist under Article 100. That Article 110(2) in fact does not talk about nomination qualifications but only refers to qualifications and disqualifications. He therefore, submitted that it is clear that qualifications and disqualifications referred to in Article 110(2) relate to the substantive qualifications and disqualifications and not to the nomination qualifications which relate to securing a certain number of registered voters and paying of prescribed nomination fees.

4.3.4 In buttressing the argument that the running mate need not pay nomination fees, the learned Attorney General referred us to the provisions relating to the nominated Members of Parliament and the Speaker. That while Article 69 (2) provides that a person may be nominated as Member of Parliament if that person qualifies to be elected under Article 70, the Article only talks about qualifications and disqualifications in general but does not include qualifications relating to securing a number of voters and paying nomination fees. That in fact Article 71 is the one that provides for payment of prescribed nomination fees and securing certain number of voters to support the nomination. He argued that similarly, the Speaker of the National Assembly is required to meet qualifications for Member of Parliament but does not need to meet the nomination qualifications relating to securing a certain number of voters and payment of prescribed nomination fees.

4.3.5 He argued that this was the same analogy that should be applied to the running mate who was not required to pay prescribed nomination fees or secure a certain number of voters because those are nomination qualifications which do not apply to him/her. The court was urged to take into account all provisions of the Constitution which demonstrate a distinction between substantive qualifications and nomination

qualifications including the definition of a 'candidate' as contained in Article 266 of the Constitution.

4.3.6 Arguing also on behalf of the 17<sup>th</sup> Respondent, Mr. Mwansa, SC, the learned Solicitor General contended that the issue that was pertinent lies in the definition of a 'candidate'. That according to the definition under Article 266, a running mate is not a candidate. That a running mate ought to meet only the substantive qualifications as contained under Article 100(1) (a) to (h) and that this has to be ensured by the person selecting the running mate which person is a nominated Presidential candidate such that in the event of a vacancy in the office of President, the running mate or vice president should be able to take up the reign of that office. He submitted in the alternative that should this Court agree with the Petitioners that the running mates ought to have paid prescribed fees and have 100 supporters from the ten (10) provinces, it would be the Respondent's argument that the Petitioners have not discharged their burden of proof by bringing any evidence before Court to show that the running mates were not supported by at least 100 registered voters from each Province and that they did not pay prescribed nomination fees. Furthermore, that the provision alleged to be contravened does not preclude a running mate from relying on the same supporters presented by a Presidential candidate that has selected the running mate. The 17<sup>th</sup>

Respondent prayed that both Petitions before us be dismissed as they lack merit.

#### **4.4 THE REPLY**

4.4.1 In Reply to the oral submissions by the 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Respondents, Mr. Sangwa, SC, argued that it is inconsequential to these proceedings what the definition of a candidate is. What is important is the provisions of Article 110 (2) of the Constitution that "the qualifications and disqualifications applying to a presidential candidate apply to the person selected by the presidential candidate to be the running mate." According to State Counsel, the running mates must simply satisfy the qualifications of a presidential candidate. It does not matter how the running mates are described.

4.4.2 Mr. Sangwa, SC, submitted that there is no burden to prove that running-mates are required to pay nomination fees because the running mates averred that the Electoral Process Act does not require them to do so. This, therefore, was a question of law and not fact. Furthermore, the requirement to pay is imposed by the Constitution and any law which does not comply with the Constitution is null and void to that extent. Regarding the Respondents' counsels' argument that the Respondents are exempt from complying with Article 100 of the Constitution on payment of fees just like nominated Members of Parliament and the Speaker, he agreed, but

said that the nominated Members of Parliament and the Speaker are exempted from paying fees by the Constitution itself.

4.4.3 In response to the argument that once the Returning Officer validated the nomination papers of the running mates, the Returning Officer's decision was final, Mr. Sangwa, SC, argued that the Respondents did not cite any law to support this proposition and that validity of a nomination is a matter of both law and fact. Regarding substantive and nomination qualifications, Mr. Sangwa, SC, argued that the Constitution does not differentiate between substantive and nomination qualifications. The Constitution only speaks to qualifications and disqualifications.

4.4.4 Mr. Chimankata, also appearing for the 1<sup>st</sup> petitioner, submitted, in Reply, that the definition of a presidential election in Article 266 of the Constitution includes the Vice-President. Therefore, the analogy drawn by the Respondents' counsel that running mates are exempt from paying nomination fees as with both Nominated Members of Parliament and the Speaker, flies in the teeth of Article 266 as Nominated Members of Parliament and the Speaker are not elected.

In response to the Respondents' oral submissions, the 2<sup>nd</sup> Petitioner submitted that there is no lacuna or ambiguity in the Constitution, on running mates. Even though the Presidential candidate selects the

running mates, the requirement by the Constitution to pay the prescribed nomination fee and provide at least 100 supporters in each Province must be complied with by the running mates. The decision of the Returning Officer is not final as it is amenable to this Court and the Constitution.

## 5.0 THE ANALYSIS

5.1 We have considered the consolidated Petitions and supporting Affidavits, the Answers and supporting Affidavits of the 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Respondents, and the oral arguments made in support of the same.

5.2 We will begin with the point about interpretation of the Constitution. As per this Court's decision in **Milford Maambo & Others v The People**<sup>3</sup> the correct approach to interpreting the Constitution is to use the plain meaning of the words in the statute. The approach should be vacated only when it leads to an absurdity. That said, we now turn to the substance of the Petition.

5.3 The Petitioners approached this Court under Article 52 (4) and 128 (3) alleging that the 1<sup>st</sup> to 16<sup>th</sup> Respondents have not complied with the provisions of Article 100 (1) (i) and (j) in filing their nominations as required by Article 110 (2) and have therefore contravened the Constitution and their nominations should be declared null and void and order of *Certiorari* granted to quash the nominations. While there was no appearance from the 2<sup>nd</sup> to 15<sup>th</sup> Respondents, the 1<sup>st</sup> and 16<sup>th</sup> Respondents have not denied

that they did not comply with Article 100 (1) (i) and (j) but have raised a number of defences for not doing so including that they were not required by the Rules and procedures of the Electoral Commission of Zambia (ECZ) to do so. The 17<sup>th</sup> Respondent has argued vehemently that the 1<sup>st</sup> to 16<sup>th</sup> Respondents do not fall within the ambit of Article 52 and their nomination cannot therefore be challenged under Article 52 (4) or any other law.

5.4 The issue as we see it is whether the 1<sup>st</sup> to 16<sup>th</sup> Respondents have been correctly challenged under Article 52 (4). And if not, whether the allegations of contravening the Constitution can be sustained under Article 128.

5.6 As regards whether the challenge to the 1<sup>st</sup> to 16<sup>th</sup> Respondents has been correctly brought under Article 52 (4) an understanding of the status of the Respondents at the nomination stage of the election process is best began with the provision dealing with nominations, Article 52 itself. It reads:

**52.** (1) A candidate shall file that candidate's nomination paper to a returning officer, supported by an affidavit stating that the candidate is qualified for nomination as President, Member of Parliament or councillor, in the manner, on the day, and at the time and place set by the Electoral Commission by regulation.

(2) A returning officer shall, immediately on the filing of a nomination paper, in accordance with clause (1), duly reject the nomination paper if the candidate does not meet the qualifications or procedural requirements specified for election to that office.

(3) The information contained in a nomination paper and affidavit shall be published by the Electoral Commission, as prescribed.

(4) A person may challenge, before a court or tribunal, as prescribed, the nomination of a candidate within seven days of the close of nomination and the court shall hear the case within twenty one days of its lodgement.

(5) The processes specified in clauses (1) to (4) shall be completed at least thirty days before a general election.

(6) Where a candidate dies, resigns or becomes disqualified in accordance with Article 70, 100 or 153 or a court disqualifies a candidate for corruption or malpractice, after the close of nominations and before the election date, the Electoral Commission shall cancel the election and require the filing of fresh nominations by eligible candidates and elections shall be held within thirty days of the filing of the fresh nominations. (Emphasis added)

5.7 The terms "running mate" or "vice presidential candidate" are not mentioned anywhere in article 52 of the Constitution. Article 52 specifically refers to a "candidate" and makes provision for nominations regarding a candidate. Article 52(1) only makes mention of a candidate being qualified for nomination as President, Member of Parliament or Councillor. The Petitioners are effectively inviting this Court to read the words "running mate" or "vice-president" into Articles 52 (4) and 266 of the Constitution so that a running mate is caught up by the provisions of Article 52. The Petitioners, however, have not demonstrated any absurdity that may exist in Article 52 as a result of the omission of the words "running mate" or "vice-president". Including a running mate in the definition of candidate in the Constitution has the potential danger of reading words into the Constitution that the Constitution does not provide for by itself, and in the absence of proving any absurdity inherent in the said Article, this would be untenable.

5.8 Further the words candidate and running mate are defined in Article 266 as follows:

'Candidate' means a person contesting a presidential, parliamentary or local government election;

'Running mate' means a person who is selected by a presidential candidate to stand with the presidential candidate in a presidential election so that the person becomes the vice president if that presidential candidate is elected as President. (Emphasis added)

5.9 We note that Mr. Sangwa, SC's argument was that, the Respondents triggered the application of Article 52 (4), by filing their nomination papers under Article 52(1) and (2). We agree that Article 52 ought to be read as a whole. That in fact all the relevant provisions in the Constitution ought to be brought to bear on the matter. We have therefore perused the rest of Part 5 of the Constitution providing for the Electoral systems and Process, beginning with Article 45 right through to Article 55 which was referred to by the 2<sup>nd</sup> Petitioner in support that a running mate is indeed a candidate and therefore captured by Article 52. Nowhere in the entire Part 5 does it provide for the nomination of a running mate. In addition to Article 52, Articles 47, 48, and 53 all of which refer to a candidate make no reference to a running mate. Article 55 which was brought to our attention, is about a person who has lost their bid to win the Presidential election and is therefore not a nominee. The election at the Presidential level is clearly for the President.

5.10 To illustrate, the impugned Article 100 (1) itself provides as follows:

100. (1) A person qualifies to be nominated as a candidate for election as President if that person—
- (a) is a citizen by birth or descent;
  - (b) has been ordinarily resident in Zambia;
  - (c) is at least thirty-five years old;
  - (d) is a registered voter;
  - (e) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent;
  - (f) is fluent in the official language;
  - (g) has paid that person's taxes or has made arrangements, satisfactory to the appropriate tax authority, for the payment of the taxes;
  - (h) declares that person's assets and liabilities, as prescribed;
  - (i) pays the prescribed election fee on, or before, the date fixed for the delivery of nomination papers; and
  - (j) is supported by at least one hundred registered voters from each Province.(emphasis added)

5.11 And Article 110 on the office of Vice-President provides in part:

- (1) There shall be a Vice-President for the Republic who shall be the running mate to a presidential candidate in a presidential election.
- (2) The qualifications and disqualifications applying to a presidential candidate apply to the person selected by the presidential candidate to be the running mate.(emphasis added)

5.12 It is also telling that Article 110(3) is framed quite differently from its precursor in the First Draft Constitution prepared by the Technical Committee Drafting the Zambian Constitution TCDZC) in 2012. According to the TCDZC's Final Report of 2013, at pages 300-302 the original formulation read:

- 107 (3) An election to the office of Vice-President shall be conducted at the same time as that of an election to the office of President so that a vote cast for a Presidential candidate is a vote cast for the vice-presidential candidate, and if the Presidential candidate is elected, the vice-presidential candidate is also elected.(emphasis added)

5.13 The final version in the TCDZC's Final Draft Constitution which was enacted into Article 110 (3) reads:

(3) An election to the office of Vice-President shall be conducted at the same time as that of an election to the office of President so that a vote cast for a presidential candidate is a vote cast for the running mate, and if the presidential candidate is elected, the running mate shall be considered to have been elected. (emphasis added)

5.14 The TCDZC deliberately removed the word 'candidate' in relation to the vice-presidential aspirant and replaced it with 'running mate' thereby taking the said persons out of the ambit of nomination under Article 52.

5.15 The reason for the distinction between a running mate and a candidate is quite clear when considered in the light of other provisions of the Constitution. Article 106(5) and (6) for instance, which provides for the manner in which the vice-President may take over the unfinished term of the President shows that it is only when the Vice-President undergoes an election for President in their own right that they become 'a candidate' to undergo the nomination process and become accountable for their own running mate. It goes without saying that a challenge to a running mate at the nomination stage pursuant to or premised on Article 52 as in this case is incompetent.

5.16 As we conclude on this point, we want to say that we are fortified in finding that the Constitution does not envisage a running mate as a candidate to undergo a nomination process by reference to the Kenyan

Constitution from which the concept of running mate was borrowed by the TCDZC. Article 148 of the 2013 Kenyan Constitution reads:

148. (1) Each candidate in a presidential election shall nominate a person who is qualified for nomination for election as President, as a candidate for Deputy President.

(2) For the purposes of clause (1), there shall be no separate nomination process for the Deputy President and Article 137 (1) (d) shall not apply to a candidate for Deputy President.

(3) The Independent Electoral and Boundaries Commission shall declare the candidate nominated by the person who is elected as the President to be elected as the Deputy President.(emphasis added)

5.17 The long and short of it, is that the Constitution does not envisage a 'running mate' as a candidate and consequently does not provide for a nomination process for them or for a challenge to their selection under Article 52 (4). The onus is upon the presidential candidate to ensure the running mate has the necessary qualifications.

5.18 We now turn to the issue of whether the allegations of contravening the Constitution can be sustained under Article 128. We take note that Section 30 (1) of the EPA provides for running mates to file nomination papers. It reads:

30 (1) A candidate for election as President or Vice-President shall deliver to the Returning officer – (a) the candidate's nomination paper; (b) the prescribed election fee, except that a candidate for election as Vice-President shall not pay the prescribed fee; (c) the prescribed statutory declaration of the candidate's assets and liabilities; and (d) an affidavit attesting that the person is qualified for election as President or Vice-President.(Emphasis added).

5.22 Section 30 (1) (b) exempts running mates from paying the fees. Mr. Sangwa, SC, argued that section 30 (1) be declared null and void to the extent that it is inconsistent with Article 100 (i) which requires presidential candidates and running mates to pay fees. The Submission that Section 30 (1) be declared null and void in these proceedings is untenable. To the extent that Section 30 (1) refers to a candidate filing a nomination as a Vice-President, the Section is in conflict with the provisions of Article 52 (1) of the Constitution. We urge the Attorney General to ensure that the Act is amended to harmonise its provisions with the requirements of the Constitution.

## **6.0 THE DECISION**

6.1 It is our holding that the framers of the constitution did not intend that running mates should undergo a formal nomination process accompanied with the payment of fees and the presentation of 100 registered voters from each province. The allegation that the Respondents have contravened the Constitution by filing in their nominations without complying with the requirement to pay a nomination fee and produce 100 supporters from each Province is therefore misplaced. The allegation of contravention having been found to have no merit because the Respondents are not required under the Constitution to be nominated

means that no action can be sustained against them either under the provisions of Article 52 (4) or Article 128 (3).

6.2 The Petition is dismissed forthwith. As it raised important Constitutional issues each party shall bear their own costs.



H. Chibomba  
President  
Constitutional Court



A.M. Sitali  
Constitutional Court Judge



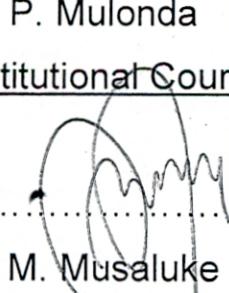
M.S. Mulenga  
Constitutional Court Judge



P. Mulonda  
Constitutional Court Judge



M.M. Munalula  
Constitutional Court Judge



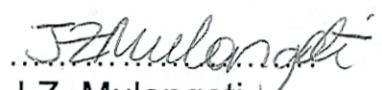
M. Musaluke  
Constitutional Court Judge



M. Chitabo  
Constitutional Court Judge



M.K. Chisunka  
Constitutional Court Judge



J.Z. Mulongoti  
Constitutional Court Judge