

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

2019/CCZ/005

IN THE MATTER OF:

Article 70(1) (D) and Article 72(2) (B) of
the Constitution of Zambia

IN THE MATTER OF:

Contravention of Article 70(1) (D) of the
Constitution of Zambia Chapter one (1)
of the Laws of Zambia

AND

IN THE MATTER OF:

Article 128(1) (b) of the Constitution of
Zambia

BETWEEN:

BIZWAYO NEWTON NKUNIKA

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA

PETITIONER

AND

LAWRENCE NYIRENDIA

10 MAR 2021
REGISTRY 1
P O BOX 50067, LUSAKA

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

Coram: Chibomba P.C, Sitali, Mulenga, Mulonda and Musaluke,
JJC. On 8th July, 2020 and 9th March, 2021.

For the Petitioner:

Mr. C. K. Banda, S.C., and Mrs. S. Phiri-Hinje of Chifumu Banda & Associates.

For the 1st Respondent:

Mr. T. S. Ngulube of Tutwa S. Ngulube & Company.

For the 2nd Respondent

Mr. B. Musenga, Commission Secretary- Electoral Commission of Zambia

MAJORITY JUDGMENT

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA

Musaluke JC, delivered the majority decision of the Court.



CASES REFERRED TO:

1. Sibongile Zulu v Electoral Commission of Zambia and The Attorney General 2016/HB/24 (unreported)
2. Hadkinson v Hadkinson (1952) ALL E.R. 567
3. Henry Kapoko v The People, Selected Judgment No. 43 of 2016

LEGISLATION REFERRED TO:

1. The Constitution of Zambia (Amendment Act) No. 2 of 2016
2. The Constitutional Court Act No. 8 of 2016
3. The Constitutional Court Rules Statutory Instrument No. 37 of 2016
4. The Electoral Process Act No. 35 of 2016
5. The Electoral Commission of Zambia (Amendment) Act No. 5 of 2019
6. The education Act, No. 23 of 2011
7. The Examinations Council of Zambia Act, Chapter 137 of the Laws of Zambia

8. The Zambia Qualifications Authority Act No. 13 of 2011
9. The Electoral Commission of Zambia Act No. 25 of 2016
10. The Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia.
11. Practice Direction No. 1 of 2016

OTHER WORKS REFERRED TO:

1. Final Report of the Technical Committee on Drafting the Zambian Constitution -13th December, 2013
2. The Examinations Council of Zambia Regulations on School Certificate and General Certificate of Education -2018
3. The Zambia Qualifications (Accreditation, Validation and Evaluation of Qualifications) Regulations, 2018
4. Concise Oxford Dictionary, 8th edition (Oxford University Press)

1.0 BACKGROUND

- 1.1 The Petitioner and the 1st Respondent amongst others, stood as candidates for Member of Parliament for Lundazi Central Constituency in the parliamentary elections held on the 11th August, 2016. The 1st Respondent emerged victorious in the said

election and was declared duly elected Member of Parliament for Lundazi Central Constituency a seat he holds to this date.

2.0 INTRODUCTION

- 2.1 The Petitioner has alleged that the 1st Respondent does not meet the minimum academic qualifications as prescribed under Article 70(1) (d) of the Constitution of Zambia as amended by Act No. 2 of 2016 (hereinafter referred to as the Constitution) as he does not hold a minimum of a grade twelve (12) Certificate. That as such the 1st Respondent has contravened and continues to contravene the said provisions of the Constitution by holding office as Member of Parliament when he does not have the prescribed minimum academic qualification.
- 2.2 With regard to the 2nd Respondent, the allegation is that it too contravened the provisions of Article 70(1)(d) of the Constitution by allowing the 1st Respondent to contest the Lundazi Central Constituency seat without meeting the minimum academic qualification and continues to contravene the said Article 70(1)d) of the Constitution by not taking appropriate action against the 1st Respondent, whom it is now aware did not submit a grade twelve

(12) certificate at nomination as constitutionally required for a candidate in parliamentary elections.

3.0 PETITIONER'S CASE

3.1 The Petitioner commenced process against the 1st and 2nd Respondents herein on 18th February, 2019 pursuant to the provisions of Articles 70(1) (d), 72(2) (b) and 128(1)(b) of the Constitution seeking the following reliefs:

- i) **That this Honourable Court orders that the 1st and 2nd Respondent contravened and have continued to contravene Articles 70(1)(d) and 72(2)(b) of the Constitution of Zambia Chapter 1 of the Laws of Zambia;**
- ii) **That this Honourable Court declares the Lundazi Central Constituency seat vacant and that the 2nd Respondent holds elections within 90 days;**
- iii) **Any other orders that this Honourable Court shall deem fit.**

3.2 The Petitioner contends that the 1st Respondent is holding office as Member of Parliament for Lundazi Central Constituency contrary to the provisions of Article 72 (2) (b) of the Constitution and that by allowing the 1st Respondent to continue holding a parliamentary seat when he does not meet the minimum

academic qualifications as prescribed, the 2nd Respondent has also contravened the said Article 72 (2) (b) of the Constitution.

- 3.3 The petition was accompanied by an affidavit verifying facts in which it was deposed that the 1st Respondent at the time of nomination submitted documents relating to his attendance of an in-service course at Zambia National Service for six months, religious short course in Chipata for two weeks; music in Kitwe; and education trainer at Lundazi Resource Centre for one week. That at the time of the nominations the 1st Respondent was granted a provisional certificate by the 2nd Respondent on condition that he submits a grade twelve (12) certificate prior to the date of elections.
- 3.4 It was deposed that upon learning that the 1st Respondent did not possess a grade twelve (12) certificate or its equivalent, the Petitioner wrote letters to the 2nd Respondent, the Clerk of the National Assembly of Zambia and the Zambia Police Service raising this issue.
- 3.5 That the 2nd Respondent advised the Petitioner that it would only take appropriate action after the conclusion of investigations by

the Zambia Police Service whilst the Clerk of the National Assembly advised the Petitioner that the complaint was not within their jurisdiction.

- 3.6 That the Zambia Police Service conducted investigations and consequently issued a report in a letter dated 7th February, 2019. The Zambia Police Service advised the Petitioner that the 1st Respondent did not hold a grade twelve (12) certificate.

3.6.0 EVIDENCE AT TRIAL

**3.6.1 EVIDENCE OF PETITIONER'S WITNESS NUMBER ONE
(PW1)**

- 3.6.2 At the trial of the petition, three (3) witnesses were called in aid of the Petitioner's case, each of whom filed witness statements.

- 2.6.3 The 1st witness to take the stand was the Petitioner himself (hereinafter referred to as 'PW1') who relied on the witness statement filed before Court on 3rd April, 2019 and exhibited at pages 134 and 135 of the consolidated record of proceedings of 12th July, 2019. PW1 adopted his witness statement as his evidence in chief. In that statement, the Petitioner reiterated the

contents of his petition and affidavit verifying facts as summarized above.

- 3.6.4 In cross-examination by Mr. T. Ngulube, Counsel for the 1st Respondent, PW1 denied that the reason he was before Court was because he had lost an election to the 1st Respondent. He stated that his reason for moving the Court was because the 1st Respondent was in Parliament illegally as he does not possess a grade twelve (12) certificate or its equivalent. He testified that the 1st Respondent neither held the said qualifications at the time of nomination, at the time of elections nor at the time of bringing the matter before Court.
- 3.6.5 When referred to the 1st Respondent's qualifications exhibited at pages 101 of the consolidated record of proceedings of 11th March, 2020, PW1 maintained that the 1st Respondent does not possess a grade twelve (12) certificate or its equivalent and that the document exhibited at page 101 of the consolidated record was a General Certificate of Education (GCE) where the candidate passed only one subject.

- 3.6.6 When referred to his witness statement in relation to his complaint to the Zambia Police Service, PW1 denied that the complaint to the Police alleged forgery but that his complaint was that the 1st Respondent did not have the necessary qualifications to be in Parliament.
- 3.6.8 Prodded as to the outcome of Police investigations, PW1 stated that the Police wrote to him confirming that the 1st Respondent did not have the requisite qualifications to be in Parliament and advised him to notify the 2nd Respondent.
- 3.6.9 When referred to pages 130 and 131 of the consolidated record of proceedings of 11th March, 2020 bearing a statement of results for the 1st Respondent, it was PW1's evidence that the two certificates combined did not constitute a grade twelve (12) certificate but a GCE as the passes recorded did not add up to five O' levels in that English as a subject was repeated.
- 3.6.10 PW1 admitted that he was aware that the issues he had raised in the proceedings before this Court relating to Article 70(1) (d) of the Constitution were determined before the nominations in the

2016 judgment of the High Court in the case of **SIBONGILE ZULU v THE ATTORNEY GENERAL¹**.

- 3.6.11 PW1 also conceded that he was aware that a person cannot at this stage challenge the nomination of a candidate after the general elections as per dictates of Article 52 of the Constitution. He insisted however, that his petition was neither challenging the nomination nor election of the 1st Respondent but was alleging a breach of the Constitution.
- 3.6.12 PW1 stated in his continued cross-examination that he neither engaged the Examinations Council of Zambia (**ECZ**) nor the Zambia Qualifications Authority (**ZQA**) during the course of investigations but relied on the Zambia Police Service to conduct the investigations.
- 3.6.13 PW1 testified that he was not aware that the 1st Respondent's qualifications appearing at pages 101 to 106 of the consolidated record of proceedings of 11th March, 2020 were submitted to the Examinations Council of Zambia for verification at the time of nomination. He further stated that he was not aware that the 2nd Respondent certified the 1st Respondent's qualifications as being

equivalent to a grade twelve (12) certificate and allowed the 1st Respondent to contest the elections.

3.6.14 When shown the verification for grade twelve (12) certificate receipt for the 1st Respondent's GCE issued by the Examinations Council of Zambia and exhibited at page 75 of the consolidated record of proceedings of 12th July, 2019, PW1 maintained that the 1st Respondent did not possess a grade twelve (12) certificate, adding that by practice, a grade twelve (12) certificate meant a pass in a minimum of five (5) subjects.

3.6.15 In further cross-examination by Mr. Musenga counsel for the 2nd Respondent, PW1 stated that nominations for the Lundazi Central Constituency were held on 21st May, 2016 and that he participated in the nomination. He confirmed that there were four (4) candidates who filed in their nominations and whose qualifications he did not verify. PW1 also stated that he was not present when the 1st Respondent filed in his nomination.

3.6.16 PW1 contended that the 1st Respondent breached Article 70(1)(d) of the Constitution at the time of nomination as the said

provision prescribes that a candidate must have a grade twelve (12) certificate or its equivalent.

3.6.17 PW1 confirmed that the High Court is the court mandated to handle all nomination related complaints and that the timeframe prescribed by law for the filing of such complaints is fourteen (14) days from the date of nomination. He reiterated that he did not have any grievance with the nomination process.

3.6.18 Asked what further role the 2nd Respondent had to play after the declaration of a candidate as a winner, the Petitioner explained that the 2nd Respondent was mandated to deal with matters arising post elections such as the one he presented before this Court.

3.6.19 In re-examination, PW1 clarified that he did not petition the 1st Respondent's nomination or his election, but explained that the petition before this Court sought to challenge the legality of the 1st Respondent's sitting in Parliament when he does not have the minimum academic qualifications stipulated by the Constitution.

3.6.20 PW1 maintained that the 1st Respondent had violated the provisions of Articles 70 and 72 of the Constitution by contesting

the Lundazi Central Constituency Parliamentary elections when he did not meet the prescribed minimum academic qualifications of a grade twelve (12) certificate or its equivalent. He urged us to grant him the reliefs as prayed in his petition.

3.7.0 EVIDENCE OF PETITIONER'S WITNESS NUMBER TWO
(PW2)

- 3.7.1 The Petitioner's second witness (hereinafter referred to as 'PW2') was Mr. Moses Kabamba a Senior Superintendent in charge of the Anti-Fraud Unit, under the Zambia Police Service. PW2 equally relied on his witness statement filed into Court and exhibited at pages 128 to 130 of the consolidated record of proceedings of 12th July, 2019 and adopted it as his evidence in chief.
- 3.7.2 PW2 testified that his role was to investigate a complaint brought by the Petitioner in relation to allegations that the 1st Respondent did not possess requisite qualifications to hold the office of Member of Parliament as prescribed under Article 70(1) (d) of the Constitution.

3.7.3 He stated that upon instituting investigations, it was established that at the time of nomination, the 1st Respondent, submitted four (4) tertiary qualifications without a grade twelve (12) certificate.

The documents submitted were:

- i. Tutor's certificate issued by the Theological Education by Extension Studies in Zambia,
- ii. A Grade three (3) certificate of Theory of Music issued by the Association Board of the Royal Schools of Music,
- iii. A Certificate of Achievement in Computer Basics issued by the Lundazi Teacher's Resource Centre and;
- iv. A Certificate of Military Training issued by the Zambia National Service.

3.7.4 That the 1st Respondent confirmed during an interview at the Zambia Police Service Headquarters that he did not have a grade twelve (12) certificate at the time of filing his nomination in 2016 and that the four (4) certificates submitted were his highest qualifications. That the 1st Respondent requested for time to submit other qualifications he claimed to have obtained after the 2016 general elections which he never did.

3.7.5 In cross-examination, it was PW2's testimony that a criminal offence of forgery was alleged to have been committed and that

that formed the basis upon which the investigation were anchored. PW2 testified that none of the 1st Respondent's qualifications were proved to be forged.

3.7.6 PW2 confirmed that the Petitioner wrote a letter of complaint to the Inspector General of Police on 16th April, 2018 alleging electoral malpractices and that that was the genesis of the Police investigations. He also confirmed that from the investigations conducted, there were no electoral malpractices committed by the 1st Respondent.

3.7.7 PW2 further testified that he visited the National Assembly to compare the documents submitted by the 1st Respondent during nominations with those submitted at Parliament which documents were found to be the same.

3.7.8 PW2 further testified that at the conclusion of investigations, a docket was sent to the National Prosecutions Authority for study and opinion which authority found that no criminal offence had been committed by the 1st Respondent and consequently advised that the case be closed. That the response from the National

Prosecutions Authority was shared with the Petitioner and the case was closed.

3.8.0 EVIDENCE OF PETITIONER'S WITNESS NUMBER THREE
(PW3)

- 3.8.1 The Petitioner called Mr. George Banda as his third and last witness (hereinafter referred to as PW3). PW3 relied on the witness statement filed into Court and exhibited at pages 131 to 133 of the consolidated record of proceedings of 12th July, 2019 and adopted it as his evidence in chief.
- 3.8.2 PW3 testified that he was a retired Accountant of the Lundazi Town Council. That in 2016, he was appointed Returning Officer for the Lundazi Central Constituency Parliamentary elections.
- 3.8.3 PW3 testified that his role at the time of nomination, was to receive nominations from aspiring candidates in parliamentary elections for the Lundazi Central Parliamentary elections who were required to produce the following documents:
- (i) An adoption certificate from the party that sponsored the person;
 - (ii) A voter's card;

- (iii) A green National Registration Card;
- (iv) A grade twelve (12) certificate or its equivalent; and
- (v) An assets declaration form.

3.8.4 In his continued testimony, PW3 stated that on 31st May, 2016 the 1st Respondent filed his nomination accompanied by the following documents:

- (i) A green National Registration Card;
- (ii) A voters' card;
- (iii) An assets declaration form;
- (iv) Zambia National Service certificate of Military Training; and
- (v) Nomination Form.

3.8.5 That upon receipt of the 1st Respondent's nomination, the words "provisional nomination" were endorsed on the 1st Respondent's nomination form in accordance with instructions issued by the 2nd Respondent, which meant that the 1st Respondent did not meet the academic qualification for a Member of Parliament and that the 1st Respondent was accordingly advised to have his nomination validated by the 2nd Respondent.

- 3.8.6 That at about 15:00hrs on the day of the nominations, the names of the candidates whose nominations were declared valid were announced and these included the Petitioner Bizwayo N. Nkunika, Frackson Banda and Evans Kazonga Ngoma. That it was further announced that the 1st Respondent's nomination was provisional and subject to validation by the 2nd Respondent.
- 3.8.7 In cross-examination by Mr. Ngulube counsel for the 1st Respondent, PW3 identified the document exhibited at page 102 of the consolidated record of proceedings of 11th March, 2020 as the Zambia National Service certificate in Military Training which was the only document that the 1st Respondent produced at the time of nomination.
- 3.8.8 When asked to produce the nomination form marked "provisional nomination", PW3 stated that the nomination form was not in his possession as the forms were dispatched to the 2nd Respondent on the nomination day. PW3 confirmed that the nomination form had no provision for "provisional nomination" but that he wrote the words on the 1st Respondent's form, in his own handwriting, following instructions from the 2nd Respondent.

- 3.8.9 PW3 further testified that as Returning Officer, he had the power to reject nominations but that he did not reject the 1st Respondent's nomination as there was an instruction from the 2nd Respondent in a letter written by Mr. Chella Chomba which directed the returning officers to accept nominations from candidates who did not possess a grade twelve (12) certificate but possessed other qualifications. PW3 confirmed that from the date of nomination, he did not receive any challenge against the nominations.
- 3.8.10 PW3 stated that he had no complaint with what transpired on the nomination day as everything was done in accordance with instructions from the Electoral Commission of Zambia within the law and regulations.
- 3.8.11 Under cross examination by Mr. Musenga counsel for the 2nd Respondent, PW3 testified that as returning officer, he did not have power to disqualify a candidate after nomination. He stated that the period allowed for an aggrieved person to challenge a nomination is fourteen (14) days from the date of nomination and that the nomination of the 1st Respondent was never challenged.

3.8.12 In re-examination, PW3 clarified that a provisional nomination meant that a candidate had not met certain qualifications hence his sending the papers to the 2nd Respondent for validation. PW3 further stated that the 1st Respondent's nomination was received in the presence of polling assistants.

3.8.13 This marked the close of the Petitioner's case.

4.0 1st RESPONDENT'S CASE

4.1 The 1st Respondent opposed the petition in his answer filed on "23rd May, 2019." The 1st Respondent denied the Petitioner's allegations that he does not meet the minimum academic qualifications as prescribed under Article 70(1) (d) of the Constitution as the wording of the Constitution says "*Grade twelve or equivalent*" and that the term "equivalent" in this case meant the 1st Respondent's tertiary qualifications and GCE certificate of 2013. The 1st Respondent emphasized that he is a holder of qualifications equivalent to a grade twelve (12) certificate.

4.2 The 1st Respondent also filed an affidavit in opposition to the petition. The gravamen of the said affidavit was that he

possesses both a grade twelve (12) certificate and or its equivalent. These were listed in paragraph four (4) of the affidavit in opposition as follows:

- (a) Grade twelve (12) certificate of 2013 attached with a certificate from the Examinations Council of Zambia. Exhibit Marked "LN01"
- (b) Zambia National Service Military Certificate. Exhibit Marked "LN02"
- (c) Computer Course Certificates. Exhibit Marked "LN03"
- (d) Theory of Music Certificate. Exhibit Marked "LN04"
- (e) Theological Tutors Certificate. Exhibit Marked "LN05"

4.3 The 1st Respondent further deposed in paragraphs five (5) and six (6) of his affidavit in opposition as follows:

"5. That the Electoral Commission of Zambia, Lundazi Constituency presiding officer, Mr. George Banda received all my five certificates and he was satisfied with them according to the Electoral Commission of Zambia requirements. He categorized my qualifications into two parts namely: "My grade twelve certificate belonged to Part "A" and my Tertiary Certificates belonged to part B.

6. That the Electoral Commission of Zambia collected all the tertiary certificates and returned the Grade 12 certificate to the 1st Respondent on the basis that all the tertiary certificates were enough for him to contest the elections thus no provision has been violated.”

4.4 1ST RESPONDENT'S EVIDENCE AT TRIAL

4.5 EVIDENCE OF RESPONDENT'S WITNESS NUMBER ONE (RW)

4.6 Mr. Lawrence Nyirenda the 1st Respondent testified on oath on his own behalf as the only witness for his case (hereinafter referred to as 'RW'). He relied on the witness statement filed before Court on 20th August, 2019 and exhibited at page 12 to 13 of the supplementary record of proceedings filed on 21st August, 2019. He adopted his witness statement as his evidence in chief.

4.7 RW testified that prior to the elections in 2016, he presented his credentials to the 2nd Respondent for purposes of his nomination to stand as Member of Parliament for Lundazi Central Constituency which were received by the 2nd Respondent's

returning officer PW3. That the returning officer was satisfied that the credentials met the 2nd Respondent's qualification standards.

4.8 RW stated that the Petitioner's claims are unfounded as he possesses certificates that are equivalent and or higher than a grade twelve (12) certificate. Further, that as at 2018, he now possess a degree in Christian Entrepreneurship obtained from Team Impact Christian University.

4.9 During cross-examination by Mr. Chifumu Banda, S.C., counsel for the Petitioner, RW testified that he became Member of Parliament for Lundazi Central Constituency on 11th August, 2016. He stated that he possessed a grade twelve (12) certificate as at the time of elections which certificate is exhibited at page 83 of the consolidated record of proceedings of 11th March, 2020 in addition to the four (4) tertiary qualifications which were deemed equivalent to a grade twelve certificate as provided for in the Constitution.

4.10 In continued cross examination, RW testified that in August, 2019 whilst this matter was before Court, he sat for GCE examinations for purposes of upgrading his grade twelve (12) certificate, as

evidenced by the GCE exhibited at page 131 of the consolidated record of proceedings of 11th March, 2020. That the subjects he sat for included Mathematics, Civic Education, Biology and Religious Education out of which he recorded passes in four (4) subjects. RW maintained that the purpose of sitting for the GCE examinations in 2019 was merely to upgrade his already existing grade twelve (12) certificate and had nothing to do with the elections.

- 4.11 RW stated that he was not aware that a candidate needed to have recorded passes in a minimum of five subjects in order to obtain a full grade twelve (12) certificate. He confirmed that he did not have a degree in Christian Entrepreneurship from Team Impact Christian University as at 11th August, 2016 but that he acquired it in 2018 after the elections.
- 4.12 RW also testified that he sat for his first grade twelve (12) examinations in 1990 wherein he recorded unsatisfactory grades in all the subjects.
- 4.13 When referred to the four (4) tertiary certificates exhibited at pages 102 to 106 of the consolidated record of proceedings of 12th July, 2019, RW testified that he was not aware that the said

certificates were not equivalent to a grade (12) twelve certificate. RW testified that he submitted the four (4) tertiary certificates to the 2nd Respondent in line with the guidelines issued by the 2nd Respondent to candidates with tertiary and or trade certificates to file nomination.

- 4.14 In re-examination, it was RW's evidence that Article 70(1) (d) of the Constitution states that for a candidate to contest as a Member of Parliament, he needs to have a minimum of a grade twelve (12) certificate or its equivalent and that the Constitution does not specify that it has to be a full certificate.
- 4.15 RW testified that at the time of nomination he presented four (4) trade or tertiary certificates in addition to the GCE to the 2nd Respondent in accordance with the requirements set by the 2nd Respondent.
- 4.16 RW maintained that he is fully qualified to sit in Parliament and was qualified to contest the elections in accordance with the credentials he possessed at the time adding that his nomination of 31st May, 2016 was never challenged but was declared valid.
- 4.17 This marked the close of the 1st Respondent's case.

5.0 2ND RESPONDENT'S CASE

5.1 The 2nd Respondent filed its answer to the petition on 17th January, 2020 which appears on pages 21 and 22 of the consolidated record of proceedings of 12th July, 2019.

5.2 The gist of the 2nd Respondent's answer was as outlined at paragraphs 3 and 4 as follows:

"3. The nomination process including the challenging of the process in respect of candidates for the office of Member of Parliament is prescribed under Article 52 (4) of the Constitution and requires that the challenge of nomination of a candidate is made within seven (7) days of the close of nomination.

4. Article 73 of the Constitution further prescribes the procedure for challenging the election of a Member of Parliament and prescribes the High Court as the Court of first instance and the Constitutional Court as an appellate Court."

5.3 A perusal of the 2nd Respondent's answer shows that it revolves around issues that this Court has no jurisdiction to entertain the petition before it. These issues have already been determined by this Court in its Ruling on the Preliminary Issue delivered on 3rd December, 2019. As such, the 2nd Respondent's Answer will not assist us in determining the current issues before this Court.

5.4 The 2nd Respondent did not call any witness during trial.

6.0 EVIDENCE BY EXPERT WITNESSES

6.1 On 8th July, 2020 we subpoenaed two (2) witnesses from the Examinations Council of Zambia and the Zambia Qualifications Authority respectively, pursuant to the provisions of section 13 of the Constitutional Court Act No. 8 of 2016 for purposes of clarifying what constitutes a grade twelve (12) certificate and its equivalent for purposes of Article 70(1) (d) of the Constitution.

6.2 Dr. Michael Muyambwala Chilala who at the time of trial was the Director and Chief Executive Officer of the Examinations Council of Zambia (ECZ) was called as expert witness number one (1) (**EW1**).

6.3 EW1 explained what constitutes a "School Certificate" and the difference with a "General Certificate of Education" (GCE). His opinion was that a grade twelve (12) certificate is an academic qualification awarded to a person who has earned it by satisfying one of the following two conditions at one sitting for school certificate examinations:

- a) has obtained a pass in at least six (6) subjects, including English Language, one (1) of which should be a credit or better; or
- b) has obtained a pass in at least five (5) subjects, including English Language, two (2) of which should be a credit or better

6.4 EW1 explained that the examination one sits to obtain a grade twelve (12) certificate is the school certificate examination and therefore the actual name of the grade twelve (12) certificate is school certificate. In sum, he testified that 'grade twelve (12) certificate' is reflective of the fact that one only qualifies to sit the examination that leads to its award after fulfilling twelve (12) years

of schooling, including three (3) years at senior secondary school level.

6.5 As regards the term 'equivalent' to a grade twelve (12) certificate, EW1 gave examples of qualifications that are equivalent to a grade twelve (12) certificate as follows:

- (a) Any ordinary or 'O' Level school certificate, which was awarded by the University of Cambridge before 1983, or by any recognized foreign examination body is equivalent to the school certificate awarded by the Examinations Council of Zambia;
- (b) The GCE, when the number of subjects passed, and grades satisfy the requirements for the award of a school certificate.

6.6 As regards the GCE, EW1 explained that a candidate is awarded a GCE if the candidate obtains grades one to eight in at least one subject if the candidate:

- a) Entered for and wrote school certificate examinations but did not satisfy the requirements for the award of a school certificate; or

- b) Entered for and wrote the GCE as an external candidate.
- 6.7 In cross-examination, EW1 testified that a GCE becomes equivalent to a school certificate if the subjects and grades that define a school certificate are met through the GCE i.e. if the number of subjects passed equates with the number of subjects that defines the school certificate together with the grades and combination of subjects. It was EW1's evidence that the 1st Respondent's GCE exhibited at page 101 of the consolidated record of proceedings of 11th March, 2020 does not equate to a school certificate.
- 6.8 In terms of the documents exhibited at pages 102 to 106 and 130 of the consolidated record of proceedings of 11th March, 2020, EW1 stated that he could not speak to those documents as to whether or not they are equivalent to a school certificate as they were not academic qualifications issued by the Examinations Council of Zambia.
- 6.9 When referred to page 131 of the consolidated record of proceedings of 11th March, 2020 EW1 identified the statement of results issued by the Examinations Council of Zambia to the 1st

Respondent. He stated that the number of passes recorded at page 131 as read with those at page 101 of the record of proceedings of 11th March, 2020 could not be equated to a school certificate. He justified his testimony by stating that a school certificate requires a minimum of five subjects including English Language with at least two of them being credits or better. That the statement of results at page 131 as read with the GCE at page 101 of the record of proceedings of 11th March, 2020 only has four subjects, English being repeated and therefore short of the minimum of five subjects required.

- 6.10 EW1 reiterated his understanding of the definition of the term 'grade twelve (12) certificate' in the context of Article 70(1) (d) of the Constitution that a grade twelve (12) certificate and school certificate are one and the same. That the term 'grade twelve (12) certificate' is reflective of the fact that one only qualifies to sit for the examination that leads to its award after fulfilling twelve (12) years of schooling including three years of senior secondary school. He explained that the examination one sits for to obtain a 'grade twelve (12) certificate' is called school certificate examination. He explained that the 'grade twelve (12) certificate'

name is a common name used but that the official name is a school certificate. EW1 referred the Court to exhibits at pages 11 and 12 of his testimony filed into Court on 2nd July, 2020. The exhibit at page 11 is a sample of GCE and the exhibit at page 12 is a sample of a school certificate.

6.11 During further cross-examination, EW1 stated that he was not aware that a definition of a grade twelve (12) certificate was given in the Electoral Commission of Zambia Act No. 5 of 2019. EW1 also stated that the Constitution under Article 70(1) (d) does not specifically mention a school certificate but it talks about a grade twelve (12) certificate or its equivalent. In addition, EW1 stated that no regulations were issued by the Examinations Council of Zambia in relation to the definition of a grade twelve certificate following the amendment to the Constitution in 2016. He however, testified that his evidence was based on the documents that govern the operations of the Examinations Council of Zambia as to the award of a GCE and School certificate and that these were filed into Court together with his written testimony.

6.12 When asked further in cross-examination as to what standard of education a GCE is, EW1 stated that a GCE is of the same

standard as a school certificate but that a GCE only becomes equivalent to a school certificate if the number of subjects and grades that are required for the award of a school certificate are met.

- 6.13 In re-examination, EW1 re-emphasized that the GCE examination runs on the same standards as the school certificate and that the difference was that the GCE examination allows an individual to enter for one (1), two (2) or more subjects, whereas for the school certificate examination, the minimum number of subjects one is allowed to enter for is six (6). Further, that a GCE can be awarded to a candidate who passes a minimum of one (1) subject but the school certificate is only awarded to a candidate who has passed a minimum of six (6) subjects including English language and at least one (1) of the six (6) subjects should be at credit level. Alternatively, that where a candidate passes five (5) subjects including English Language the candidate should have at least credits or better in two (2) other subjects. The other difference highlighted between the two certificates was that a candidate who qualifies for the award of a school certificate must have exhibited twelve (12) years of continuous learning and be in possession of

a grade nine (9) certificate at the end of Junior Secondary School, whilst a candidate sitting for the GCE need not have completed twelve (12) years of schooling.

- 6.14 The second expert witness was Mrs. Miriam Chiyaba who at the time of trial was the Director and Chief Executive Officer of the Zambia Qualifications Authority (ZQA) (hereinafter referred to as **EW2**). EW2's evidence in chief was based on the report filed into Court on 2nd July, 2020 whose subject was: *The meaning of grade twelve certificate and its equivalent.*"
- 6.15 In addition to the filed report, EW2 testified before Court that ZQA is mandated to develop and implement the national qualifications framework which effectively governs qualifications in Zambia. That in line with the said mandate, ZQA developed ten levels of qualifications starting from Grade seven (7) through to Doctorate with level descriptors at each level which basically defines a candidate's competencies at each particular level. She testified that the national qualifications framework was determined in consultation with appropriate authorities to ensure a single integrated qualification framework which meets international comparable standards.

- 6.16 In respect to the issue before Court, EW2 testified that ZQA has recognized the school certificate which is awarded at grade twelve (12) as meeting the competencies for a school certificate to be awarded and any equivalent has to have the level descriptors or competencies that are demonstrated at that particular level.
- 6.17 Under cross-examination, EW2 stated that her task before Court was simply to give clarity on the meaning of grade twelve certificate and any qualifications that are equivalent to it.
- 6.18 EW2 further testified that in order to ascertain whether the 1st Respondent's tertiary, craft or vocational qualifications were equivalent to a grade twelve (12) certificate one has to assess the level descriptors assigned to the qualifications in order to determine whether it meets the level descriptors.
- 6.19 It was EW2's testimony that the certificate in military training awarded to the 1st Respondent and exhibited at page 102 of the consolidated record of proceedings of 11th March, 2020 was not an academic qualification and therefore could not be equated to a grade twelve (12) certificate as it did not meet the level

descriptors, the duration of the course having been six months. She stated that the same could be said of the certificate of achievement and the certificate in computer course issued to the 1st Respondent by the Ministry of Youth, Sport and Child Development and Nakachinga Resource Centre respectively. It was EW2's further evidence that for any qualification to be recognized, it must be issued by an appropriate authority as defined by the Zambia Qualifications Authority Act. She stated that the Ministry of Youth, Sport and Child development, the Lundazi Provincial Teacher's Resource Center and the Zambia National service were not appropriate authorities as envisaged by the Zambia Qualifications Authority Act.

- 6.20 When referred to the certificate in music issued to the 1st Respondent by as Associated Board of Royal Schools exhibited at page 103 of the consolidated record of proceedings of 11th March, 2020, EW2's evidence was that an assessment done on the said document revealed that the said certificate was equivalent to a Junior Secondary School Certificate (Grade Nine (9)).

6.21 EW2 testified that if a GCE is to meet level descriptors for an award of a school certificate prescribed in level 2(b) of ZQA framework, a candidate must have a pass in at least six (6) subjects including English language or at least five (5) subjects one (1) of which must be a credit or better.

7.0 SUBMISSIONS BY PARTIES

7.1.0 SUBMISSIONS BY THE PETITIONER

7.1.1 The Petitioner filed submissions in support of his case on 22nd July, 2020, whose "preamble" stressed the fact that "the petition herein is not challenging the 1st Respondent's election under section 96 of the Electoral Process Act No. 35 of 2016 but that the proceedings in this Court were commenced pursuant to Order 4 rule 1 of the Constitutional Court Rules, Statutory Instrument Number 37 of 2016 and are premised on the provisions of Article 70 (1) (d) as read with Article 72 (2) (b) of the Constitution."

7.1.2 In terms of this Court's jurisdiction to hear and determine the petition, the Petitioner placing reliance on the provisions of Article 128 (1) of the Constitution, argued that this Court has original and final jurisdiction to hear and determine a matter relating to the

violation or contravention of the Constitution. Additionally, that Articles 1 and 2 of the Constitution provide that an act or omission that contravenes the Constitution is illegal. Premised on these provisions, it was the Petitioner's contention that the continued stay in Parliament by the 1st Respondent whilst being fully aware that he does not possess a grade twelve (12) certificate, or its equivalent is illegal.

- 7.1.3 It was submitted that from the evidence adduced by the Petitioner, his two witnesses as well as the subpoenaed witnesses namely Dr. Chilala and Mrs. Chiyaba, it was clear that the 1st Respondent does not possess a grade twelve (12) certificate or its equivalent. Further that the alleged tertiary, vocational, craft and apprenticeship certificates presented at nomination by the 1st Respondent could not equate to a grade twelve (12) certificate.
- 7.1.4 It was the Petitioner's submission that a Member of Parliament whether nominated or otherwise who does not have a grade twelve (12) certificate or its equivalent cannot sit in Parliament, as doing so constituted an illegal act and a contravention of the Constitution. That we should find and hold that the 1st Respondent

does not hold the qualification prescribed under Article 70(1) (d) of the Constitution.

7.2.0 SUBMISSIONS BY THE 1ST RESPONDENT

7.2.1 On 6th August, 2020 the 1st Respondent filed his final submissions, the gravamen of which was that the petition herein was incompetently before Court as it did not comply with the timeframe within which a petition can be launched as stipulated under Article 52(4) of the Constitution. Further, that the very fact that the petition hinges on the 1st Respondent's qualifications at the time of lodging his nominations entails that the petition offends the constitutional time limits as set out under the said Article 52(4) of Constitution.

7.2.2 It was submitted that in the case of **SIBONGILE ZULU v THE ATTORNEY GENERAL¹** the High Court had given the interpretation of Article 70 (1) (d) of the Constitution which is subject of this petition. That the **SIBONGILE ZULU¹** case established that a vocational training/apprenticeship could be equated to a grade twelve (12) certificate. The 1st Respondent listed in particular, his certificate in computer and the certificate in

music *inter alia* as vocational and apprenticeship certificates which are equivalent to a grade twelve (12) certificate.

- 7.2.3 That at the time of nomination in 2016, the 1st Respondent was in possession of and presented vocational and apprenticeship certificates which were equivalent to a grade twelve (12) certificate in accordance with the interpretation given in the **SIBONGILE ZULU¹** case.
- 7.2.4 Counsel for the 1st Respondent therefore submitted that the petition herein is destitute of merit and ought to fail. He thus urged us to dismiss the petition with costs.

7.3.0 SUBMISSIONS BY THE 2ND RESPONDENT

- 7.3.1 It was submitted that Article 52 of the Constitution provides that the challenge of the nomination should be made within seven (7) days of the close of the nomination. Further, that Article 73 of the Constitution also prescribes the procedure for challenging the election of a Member of Parliament and prescribes the High Court as the court of first instance and the Constitutional Court as an appellate court.

- 7.3.2 It was submitted that in relation to the petition herein, the jurisdiction of this Court could only stretch as far as providing interpretation on what amounts to “a grade twelve (12) certificate or its equivalent” as provided under Article 70(1) (d) of the Constitution.
- 7.3.3 That nominations for the 2016 parliamentary elections were guided by the interpretation of Article 70 (1) (d) of the Constitution by the High Court decision in the **SIBONGILE ZULU¹** case.
- 7.3.4 It was submitted that by the interpretation of Article 70 (1) (d) of the Constitution rendered in the case of **SIBONGILE ZULU¹** the 1st Respondent had met the required threshold for filing nomination papers for the Lundazi Central Constituency.
- 7.3.5 As regards the assertion that the 2nd Respondent has continued to contravene Article 70(1)(d) of the Constitution by allowing the 1st Respondent to continue holding a parliamentary seat when he does not meet the minimum academic qualifications as prescribed, it was submitted that in line with Part IX of the Electoral Process Act, the 2nd Respondent has no further role to play after the declaration of election results and that the only way

to challenge the outcome of a parliamentary election is through a petition in the High Court in accordance with section 97(1) of the Electoral Process Act.

- 7.3.6 The 2nd Respondent urged us to dismiss with costs the petition herein as it lacked merit.

8.0 ANALYSIS AND DETERMINATION OF PETITION BEFORE COURT

- 8.1 We have carefully considered the petition, answers and respective affidavits before us, the oral testimonies given by the witnesses as well as the written submissions filed into Court by Counsel for the respective parties. From the said documents, the main issue that arises for our determination is as follows:

Whether or not the 1st and 2nd Respondents contravened and have continued to contravene Articles 70(1) (d) and 72(2) (b) of the Constitution.

- 8.2 We wish to state at the outset that the Petitioner is essentially alleging a breach of Article 70 (1) (d) of the Constitution. He stated that he does not challenge the nomination or election of the 1st Respondent but alleges that the 1st Respondent and 2nd

Respondent contravened and continue to contravene the provisions of Article 70 (1) (d) because the 1st Respondent did not possess a grade twelve (12) certificate or its equivalent at the time of nomination.

8.3 In determining the above issue, we have considered the factual basis of the case before us. As always, we will first preview the legal basis on which the claims have been made.

8.4 The starting point is Articles 70(1) and 72(2) (b) of the Constitution. Article 70 (1) establishes the qualifications for eligibility as Member of Parliament. It provides as follows:

Subject to clause (2), a person is eligible to be elected as a Member of Parliament, if that person-

- (a) ***is a citizen;***
- (b) ***is at least twenty-one years old;***
- (c) ***is a registered voter;***
- (d) ***has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent; and***
- (e) ***declares that person's assets and liabilities, as prescribed. (Emphasis added)***

8.5 Article 72(2) (b) further provides as follows:

(2) The office of Member of Parliament becomes vacant if the member—

(b) becomes disqualified for election in accordance with Article 70;

8.6 Our understanding of Article 70 (1) is that the provision speaks to the eligibility of a person intending to contest in a parliamentary election, such that a candidate is only eligible to contest for elections as Member of Parliament if he meets all of the requirements set out under Article 70(1) of the Constitution.

8.7 Article 70(1) (d) explicitly states that a person is eligible to be elected as Member of Parliament if that person has obtained a minimum academic qualification of a grade twelve (12) certificate or its equivalent. The use of the words “has obtained” taken literally, means that the said candidate’s qualifications must have been in existence at the time of nomination. This provision therefore does not apply to qualifications obtained post-nomination period.

8.8 In determining the alleged breach, it is cardinal to establish whether or not the 1st Respondent was at the time of his

nomination and subsequent election in possession of the minimum academic qualifications of a grade twelve (12) certificate or its equivalent. This question is considered two-fold as follows:

- i. *Was the 1st Respondent in possession of a grade twelve certificate at the time of nomination and election in 2016?*
- ii. *Was the 1st Respondent in possession of an equivalent to a grade twelve certificate at the time of nomination and election in 2016?*

8.9 We have taken time to examine the evidence on record. The evidence adduced by the Petitioner and his witnesses was to the effect that the 1st Respondent does not have a grade twelve (12) certificate or its equivalent. The evidence of the Petitioner (PW1) in fact is that the 1st Respondent was at the time of his nomination, not in possession of a grade twelve (12) certificate or its equivalent. PW2 stated in his evidence that in the course of his investigations, he did visit the 2nd Respondent who confirmed that the documents submitted by the 1st Respondent at the time of

nomination included the 1st Respondent's tertiary qualifications without a grade twelve (12) certificate. PW3 further testified that the only document submitted by the 1st Respondent at the time of nomination was the Zambia National Service military training certificate.

8.10 The 1st Respondent on the other hand insisted that he is a holder of a grade twelve certificate and /or its equivalent. In his affidavit in opposition, the 1st Respondent listed his qualifications at the time of nominations in 2016 as follows:

- i) *General Certificate of Education of 2013;*
- ii) *Zambia National Service Military certificate;*
- iii) *Computer course certificate;*
- iv) *Theory in music certificate; and*
- v) *Theological tutor's certificate.*

8.11 It was averred in the 1st Respondent's affidavit in opposition that the 2nd Respondent, through its returning officer, received all the five certificates and categorized them in two parts namely: The grade twelve certificate was placed under part 'A' while the

Tertiary qualifications were placed under part ‘B’. That the returning officer returned the GCE certificate to him on the basis that the tertiary qualifications he had submitted were sufficient.

- 8.12 The 1st Respondent further averred that his qualifications were supported by the High Court judgment in the case of **SIBONGILE ZULU v THE ATTORNEY GENERAL**¹ which he stated clarified the position on the minimum academic qualification of a grade twelve (12) certificate or its equivalent. In addition, the 1st Respondent averred that in 2019, his academic qualifications were upgraded to four (4) subjects being English, biology, religious education and civic education.
- 8.13 In his oral testimony, the 1st Respondent testified that he first sat for grade twelve (12) examinations in 1990 where he obtained unsatisfactory grades in all nine subjects. That he sat again for GCE examinations in 2013 and recorded a pass in one subject, which to him meant that he had a grade twelve certificate. The 1st Respondent’s purported grade twelve certificate entitled “General Certificate of Education” was exhibited at page 101 of the consolidated record of proceedings of 11th March, 2020.

- 8.14 From the evidence on record, it is not in dispute that the 1st Respondent was at the time of his nomination in 2016, a holder of a General Certificate of Education (GCE) obtained in 2013 which he exhibited at page 101 of the consolidated record of proceedings of 11th March, 2020 in addition to other tertiary qualifications exhibited in the same consolidated record of proceedings.
- 8.15 We note that the 1st Respondent in seeking to persuade this Court to find that he does in fact possess a grade twelve certificate or its equivalent in accordance with Article 70(1) (d), did exhibit at page 131 of the consolidated record of proceedings a statement of results of 2019 where he obtained four passes. It was suggested that the combined effect of the two certificates is that the 1st Respondent possesses a grade twelve certificate. As earlier stated, our position is that the wording of Article 70(1) (d) is clear by its use of the words "has obtained" which means that a candidate's qualifications must have been in place at the time of nomination and election.
- 8.16 The question that we need to resolve, therefore, is whether the said GCE exhibited at page 101 amounts to a grade twelve

certificate as envisaged by Article 70 (1) (d) of the Constitution and whether the craft, vocational and apprenticeship qualifications which he presented at the time of the alleged breach, at nomination and subsequent election, were equivalent to a grade twelve (12) certificate.

8.17 We have examined the wording of Article 70(1) (d) of the Constitution whose import is that a person vying for the office of Member of Parliament must have obtained as a minimum academic qualification, a grade twelve certificate or its equivalent.

8.18 Whereas Article 70 (1) (d) of the Constitution stipulates that a person is eligible to be elected as a Member of Parliament if that person, *inter alia*, has obtained, as a minimum academic qualification, a grade twelve (12) certificate or its equivalent, the Constitution does not stipulate what a grade twelve certificate is made up of. A perusal of Article 266 of the Constitution indeed confirms that the term “grade twelve certificate or its equivalent” is not defined.

8.19 In the absence of such definition in Article 70 or elsewhere, we examined the existing laws on the subject matter seeking to see

whether any law clearly defined what constituted a grade twelve (12) certificate or its equivalent at the time of nomination. In that regard, we examined the provisions of the Examinations Council of Zambia Act, Chapter 137 of the Laws of Zambia which established the Examinations Council of Zambia (E.C.Z) whose functions are, *inter alia*, to conduct examinations and to award certificates and diplomas to candidates who pass examinations conducted by the Council; the Education Act No. 23 of 2011 which *inter alia* regulates the provision of accessible, equitable and qualitative education; and the Zambia Qualifications Authority Act No. 13 of 2011 which *inter alia* established the Zambia Qualifications Authority and provides for the development and implementation of a national qualifications framework. The national qualifications framework was published in the Zambian Government Gazette as Gazette Notice No. 527 of 2016 on 22nd July, 2016. This was after the nomination date for the general elections of 11th August, 2016.

8.20 A perusal of the above three Acts reveals that what constituted a grade 12 certificate or its equivalent as at 31st May, 2016 was not defined. This apparently led to the filing of the High Court case of

SIBONGILE ZULU v THE ATTORNEY GENERAL¹ seeking an interpretation of Article 70 (1) (d) of the Constitution.

8.21 The High Court judgment in the case of **SIBONGILE ZULU¹** considered and gave the meaning of a grade twelve certificate and qualifications equivalent to a grade twelve certificate. In light of the fact that the 1st Respondent's nomination was based on qualifications that were considered equivalent to a grade twelve certificate, it is cardinal to consider what the High Court determined to be equivalent to a grade twelve certificate.

8.22 The High Court Judge in that case gave his opinion of the meaning of the term 'equivalent' as follows:

"In my assertion, the Legislature envisaged that there would be instances where not all candidates would have undergone the same official curriculum offered but could have undergone other additional training. What I decipher is that an equivalent would be another certification but equal in value or effect to the secondary or high school education. It could well correspond to a grade twelve certificate. For

example, vocational training, apprenticeships could equate to a grade twelve 12 certification or even be higher.”

8.23 The High Court judge thus concluded that:

“The smallest quantity or measure required to satisfy Article 70(1) (d) is a certificate evidencing that a person completed an educational programme of the twelfth grade or its equivalent.”

8.24 Both Counsel for the 1st and 2nd Respondents therefore contended that since the High Court had occasion to pronounce itself on the subject, the qualifications possessed by the 1st Respondent at the time of nomination were equivalent to a grade twelve certificate in line with the said judgment.

8.25 The question is, did the High Court have the appropriate jurisdiction to interpret Article 70 (1) (d) of the Constitution? In answering this question we have found it necessary to consider the background to the filing of the **SIBONGILE ZULU¹** case in the High Court.

8.26 The Constitution of Zambia (Amendment) Act No. 2 of 2016 which among other things, established the superior courts of the

Republic of Zambia came into being on 5th January, 2016. Among the superior courts established under Article 127 of the Constitution was this Court with its jurisdiction as stipulated under Article 128 (1) to *inter alia* interpret the Constitution subject only to Article 28.

- 8.27 It is on record that the originating process seeking interpretation of Article 70 of the Constitution in the **SIBONGILE ZULU¹** case, was filed in the Kabwe High Court on 11th March, 2016. Judgment in that case was rendered on 10th May, 2016.
- 8.28 It should be noted that at the time the **SIBONGILE ZULU¹** case was commenced on 11th March, 2016 the processes and procedures of this Court had not been prescribed as required by Article 120 (3) of the Constitution.
- 8.29 Noticing that the procedures, rules and processes for this Court were not in place, the Chief Justice invoking powers conferred on her under Article 136 (2) (e) of the Constitution, promulgated, Practice Direction No. 1 of 2016 which provides as follows:

"Practice Direction No. 1 of 2016

Following the enactment of the Constitution of Zambia Act No. 1 of 2016 and the Constitution of Zambia (Amendment) Act No. 2 of 2016 on 5th January 2016, there has been established the Court of Appeal and the Constitutional Court. Article 120 (3) of the Constitution of Zambia (Amendment) Act requires that the processes and procedures of the Court of Appeal and the Constitutional Court be prescribed to make them effective. Thus, the two Courts so established will only be operational once Acts of Parliament in respect of the said Courts are enacted.

The attention of practitioners is therefore drawn to the following Practice Directions which shall apply to matters, pending the operationalization of the Court of Appeal and the Constitutional Court;

a) Existing Matters Before 5th January, 2016

.....
.....

b) Constitutional Matters

Whilst it is acknowledged that the Constitution of Zambia (Amendment) Act has pursuant to Article 127 established the Constitutional Court, in view of its ineffectiveness on account of lack of office bearers, processes and procedures, the old regime of law whereby constitutional matters were filed before the High Court will continue until

such a time that the Constitutional Court is operationalized and functional.”

- 8.30 The High Court at Kabwe therefore was competent to hear and determine constitutional matters including the interpretation of Article 70 (1) (d) of the Constitution by virtue of Practice Direction No. 1 of 2016.
- 8.31 What then was the effect of the **SIBONGILE ZULU¹** judgment at the time of nomination in the 2016 general elections? In answering this question we have considered the provisions of Article 119 of the Constitution which vests judicial authority in the courts established by the Constitution. That Article provides as follows:

“(1) Judicial authority vests in the courts and shall be exercised by courts in accordance with this Constitution and other laws.

(2) The courts shall perform the following judicial functions:

(a) hear civil and criminal matters; and

(b) hear matters relating to, and in respect of, this Constitution.”

8.32 Thus, when the High Court interpreted Article 70 (1) (d) of the Constitution in the **SIBONGILE ZULU¹** case, it had the Constitutional mandate to do so and executed that function in accordance with Article 119 (2) (b) of the Constitution and practice direction No. 1 of 2016. The High Court's interpretation of Article 70 (1) (d) of the Constitution was therefore authoritative and binding.

8.33 The High Court in the **SIBONGILE ZULU¹** case stated that a tertiary certification by definition is higher than a secondary education. The High Court stated thus:

"In this context I accept the submissions highlighted by the learned Attorney-General that a qualification higher than secondary education or its equivalent renders a person eligible to contest elective office under the impugned provisions of the Constitution, and I so find. In my view a higher qualification includes any certification awarded by a tertiary institution or educational institution offering skills training."(Emphasis added)

- 8.34 The Respondents rightly argued that the said judgment was not appealed against and was therefore the authoritative position on Article 70 (1) (d) of the Constitution and is still subsisting until this Court interprets Article 70 (1) (d). A further argument was that the final judgment in the **SIBONGILE ZULU**¹ case was binding and the Electoral Commission of Zambia was bound by it therefore the tertiary, vocational, craft and apprenticeship certificates were accepted as equivalent of a grade twelve certificate at the time, based on that judgment.
- 8.35 The 1st and 2nd Respondents therefore submitted that as the law stood on the interpretation of Article 70 (1) (d) of the Constitution, the 1st Respondent did not breach the provisions of the Constitution when he presented his GCE and tertiary qualifications during nominations for the Lundazi Central Constituency Parliamentary seat in 2016.
- 8.36 Based on the High Court judgment, the Electoral Commission of Zambia on 13th May, 2016 issued the following press release exhibited at page 81 of the consolidated record of proceedings dated 12th July, 2019:

"PRESS RELEASE

(For immediate release)

VALIDATION OF GRADE 12 CERTIFICATE

Following the judgment of the High Court on the interpretation of the Grade 12 certificate, the public is hereby notified that for the purposes of the forthcoming General elections, a Grade 12 certificate shall include the school certificate or its equivalent and the General Certificate of Education (GCE). In addition, any academic qualification higher than a Grade 12 certificate shall be accepted by the Returning Officer.

To this effect, the Examinations Council of Zambia has been advised to extend the validation of certificates to the General Certificate of Education (GCE) and other qualifications issued by the Institution, in order to confirm the authenticity of the qualification.

Qualifications obtained from tertiary institutions such as trade certificate, diploma or university degree will be verified by the Zambia Qualifications Authority or the Institution that issued the certificate.

Aspiring candidates should ensure that they obtain supporting letters from institutions validating their certificates, which should be presented together with the nomination papers and verified certificates on the Nomination Day.

*Crispin N. Akufuna
Public Relations Manager
For/DIRECTOR
ELECTORAL COMMISSION OF ZAMBIA”*

- 8.37 As can be observed from the above press release, the Electoral Commission of Zambia accepted the tertiary, vocational, craft and apprenticeship certificates as being equivalent to a grade twelve certificate during the nominations for the 2016 general elections based on the judgment in the **SIBONGILE ZULU¹** case. In other words, the 2nd Respondent processed nominations for the National Assembly in the 2016 general elections with regard to what constituted a grade 12 certificate or its equivalent for purposes of Article 70 (1) (d) on the basis of the High Court judgment in the **SIBONGILE ZULU¹** case.
- 8.38 That being the case, in determining this petition, we cannot disregard the central role which the **SIBONGILE ZULU¹** judgment played in the electoral process of 2016 as it provided the legal basis by which qualifications equivalent to a grade 12 certificate were assessed and accepted by the 2nd Respondent.

8.39 On the authority of the High Court Judgment, the 1st Respondent's certificates were accepted as being equivalent to a grade twelve (12) certificate for purposes of the 1st Respondent's nomination for the Lundazi Central constituency parliamentary elections of 11th August, 2016, namely:

- (a) Zambia National Service Military certificate;
- (b) Computer course certificate;
- (c) Theory in music certificate; and
- (d) Theological tutor's certificate.

8.40 We have considered the evidence presented by the parties which show that the 1st Respondent's nomination was based on the other qualifications that were deemed equivalent as notified by the 2nd Respondent.

8.41 It is trite that an order or judgment of a Court of competent jurisdiction binds the parties to that action who are obligated to obey it unless and until it is vacated, set aside on appeal or otherwise. In the persuasive English case of **HADKINSON v HADKINSON**² it was held that:

"It was the unqualified obligation of every person against, or in respect of whom, an order had been made by a court of competent jurisdiction, to obey it unless and until that order was discharged."

8.42 Thus the 2nd Respondent which is vested with power to conduct nominations and elections had an obligation to obey the pronouncement of the High Court judgment that a craft, vocational or apprenticeship certificate could equate to a grade twelve certificate. This was the correct response as courts have the constitutional mandate to interpret the law and their decisions therefore cannot be ignored or disregarded until they are vacated or set aside on appeal or otherwise.

8.43 It is therefore our finding that the 1st and 2nd Respondents did not contravene the provisions of Article 70 (1) (d) of the Constitution based on the interpretation of what amounted to an equivalent of a grade twelve (12) certificate by the High Court in the **SIBONGILE ZULU¹** case at that time. The 1st Respondent's certificates presented at the nomination in May, 2016 cannot be retrospectively evaluated in the light of the School Certificate and General Certificate of Education Examinations – Examination

Regulations of 2018 or the Zambia Qualifications Framework which were gazetted on 22nd July, 2016 as they were not in force at that time. The Examination Regulations and the Zambia Qualifications Framework were therefore not the premise on which academic qualifications which were equivalent to a grade twelve (12) certificate were accepted by the 2nd Respondent during the nominations in the 2016 general elections.

8.44 We wish to add that the Constitution as the supreme law of Zambia has provided a mechanism for settling electoral disputes which relate to the nomination and election of candidates. To that effect Article 52 (4) of the Constitution provides that a person may challenge the nomination of a candidate within 7 days of nomination before an appropriate court or tribunal, as prescribed. Further, Article 73 (1) of the Constitution provides that a person may file an election petition before the High Court to challenge the election of a Member of Parliament. Thus, during the nomination and election processes, candidates and the general public are put on alert to timely challenge, before the appropriate court or tribunal, a nomination or election of a

candidate as nomination and election documents are available to the public.

8.45 We are alive to the fact that this Court has jurisdiction to deal with any matter that alleges a violation or contravention of the Constitution in terms of its mandate under Article 128 (1) (b) of the Constitution. However, we note that in some cases, such as this one, there is a thin line between an election petition and a constitutional petition. This is because the basis upon which the Petitioner has brought this constitutional petition alleging that the 1st Respondent is not qualified to hold office as Member of Parliament because he does not possess as a minimum academic qualification, a grade twelve certificate or its equivalent, could have formed the basis to challenge his nomination and his subsequent election as Member of Parliament before the High Court.

8.46 We say so because the Petitioner in his affidavit evidence clearly stated that the 1st Respondent submitted the four certificates in issue and that the 1st Respondent was given a provisional

nomination by the 2nd Respondent on nomination day. However, in view of the Sibongile Zulu judgment, the Petitioner did not challenge the validity of the nomination or subsequent election of the 1st Respondent.

- 8.47 We would be failing in our duty as a Court which is mandated to interpret the Constitution if we do not comment on PW3's testimony that he accepted the 1st Respondent's nomination as a provisional nomination subject to the 2nd Respondent's validation.
- This was based on instructions issued by the 2nd Respondent. PW3's evidence was that he did not reject the 1st Respondent's nomination due to an instruction from the 2nd Respondent that candidates who did not have a grade twelve certificates but had other tertiary certificates should be accepted and then indicate on the nomination form that it was provisionally valid. Further, PW3 stated that he therefore announced that the 1st Respondent's nomination was provisional and needed to be validated by the 2nd Respondent.

- 8.48 Needless for us to state, the Constitution does not provide for a provisional nomination for purposes of election as Member of Parliament nor does any other written law do so. By instructing returning officers to accept a candidate's tertiary certificates and indicate the word provisional on their nomination forms subject to validation by the 2nd Respondent, the 2nd Respondent added a needless step. Its mandate was to either out-rightly accept or reject the nomination based on the qualifications submitted by the candidate. We do not expect the 2nd Respondent to repeat such conduct in future elections.
- 8.49 Before we conclude our judgment, in light of the fact that the issue of interpretation of Article 70 (1) (d) is now before us, we would like to put the record straight as regards what comprises a grade twelve certificate or its equivalent going forward. We have considered the evidence of the two expert witnesses we had summoned for this purpose.
- 8.50 The evidence given by the expert witness from the Examinations Council of Zambia, Dr. Michael M. Chilala (EW1), clarified what amounts to a school certificate by stating that a school certificate is an academic certificate awarded to a person who has earned it

by satisfying one of the following two conditions in one and the same school certificate examinations:

- i) Has obtained a pass in at least six (6) subjects, including English language, one of which should be a credit or better; or
- ii) Has obtained a pass in at least five (5) subjects, including English language, two of which must be credits or better.

8.51 EW1 testified in the following terms:

"The examinations one sits to obtain the grade twelve certificate is the school certificate examinations and therefore the actual and official name of the grade twelve certificate is a school certificate."

8.52 EW1 further testified that:

"The name 'grade twelve certificate' is reflective of the fact that one only qualifies to sit the examinations that leads to its award after fulfilling twelve years of schooling, including three years at senior secondary school level."

- 8.53 EW1 clarified that the terms grade twelve certificate and school certificate are used interchangeably albeit that they are one and the same thing.
- 8.54 EW1 testified that the Examinations Council of Zambia have in place regulations which distinguish a school certificate from the general certificate of education. These regulations were exhibited at pages 36 to 53 of his bundle of documents filed into Court on 2nd July, 2020 and entitled "**School Certificate and General Certificate of Education Examinations – Examination Regulations of 2018.**" A perusal of the said regulations particularly at page 45 of the bundle of documents (which is page 10 of the regulations) highlights the conditions for the award of a school certificate and the conditions for the award of a General Certificate of Education (GCE).
- 8.55 The conditions for the award of a School Certificate are highlighted as follows:
- "i) *All the requirements for the school certificate must be satisfied at one sitting and the same examinations.*

- ii) *To qualify for the school certificate, candidates must reach a satisfactory general standard as judged by performance as follows:*
- a) *Pass in at least six subjects, including English Language, with credits in at least one of them; or*
 - b) *Pass in five subjects, including English language, with credit in at least two of them.*
 - c) *Candidates who fail to meet the conditions for the award of a school certificate shall be issued with a statement only.”*

8.56 The conditions for the award of a General Certificate of Education (GCE) are highlighted as follows:

- “a) *Candidates who obtain grade one to eight in at least one subject will qualify for the award of a General Certificate of Education if -*
- i. *they already hold a school certificate of education; or*
 - ii. *they entered and wrote the examinations but did not qualify for the award of a school certificate; or*

iii. they entered and wrote the General Certificate of Education Examinations as external candidates."

8.57 From the foregoing, and considering the expert evidence on record, what we decipher is that the term "grade twelve certificate" used under Article 70(1) (d) of the Constitution is synonymous to the term "school certificate" when the relevant existing laws are read with necessary modification in accordance with section 6 of the Constitution of Zambia Act No. 1 of 2016. This is so as the examinations one sits for to obtain a "grade twelve certificate" is called school certificate examinations. Section 6 (1) of the Constitution of Zambia Act No. 1 of 2016 provides as follows:

"Subject to the other provisions of this Act, and so far as they are not inconsistent with the Constitution as amended, existing laws shall continue in force after the commencement of this Act as if they had been made in pursuance of the Constitution as amended, but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution as amended."

- 8.58 It is also clear that the Examinations Council of Zambia, which as we observed earlier on, is the institution mandated to conduct examinations and award certificates or diplomas to candidates who pass examinations conducted by it, has drawn a distinction between a school certificate and a general certificate of education. From the evidence adduced by EW1, a general certificate of education can only equate to a school certificate when the number of subjects passed and the grades attained satisfy the requirements for obtaining a school certificate.
- 8.59 It can be observed that prior to the constitutional amendment of 2016, no provision in the Constitution provided for any academic qualifications to be met by candidates wishing to contest the office of Member of Parliament. The rationale for proposing a minimum academic qualification as enacted under Article 70(1) (d) was to have members of Parliament who would be able to effectively debate and make meaningful contributions to the proceedings and business in Parliament. The **Final Report of the Technical Committee on drafting of the Zambian Constitution - 2013** gave the rationale for introducing the minimum academic qualification

at page 374 which stated *inter alia* that it was necessary to have a minimum academic qualification in order to –

“.....guide political parties and other stakeholders to nominate people who would be able to debate effectively and make meaningful contributions in Parliament.”

- 8.60 It is clear that by introducing the minimum academic qualification, the intention of the Legislature was to set a scholarly accomplishment condition or eligibility by a person who completed a secondary school education programme and was awarded a school certificate so as to ensure that persons elected into Parliament debate effectively and make meaningful contributions on behalf of the people they represent.
- 8.61 Coming to the word “equivalent” in Article 70(1) (d), the same has not been defined under the Constitution. We therefore seek recourse to the definition given in the Concise Oxford Dictionary at page 483 which defines the term “equivalent” as follows:

“Being equal in value, amount, function, meaning etc.....having the same or similar effect.”

8.62 The evidence of EW1 in clarifying what amounts to an equivalent to a grade twelve (12) certificate (school certificate) was that the term 'equivalent' from the Examinations Council of Zambia's perspective meant the following:

- "(a) Any ordinary or 'O' level School Certificate, which was awarded by the University of Cambridge after 1983, or by any other recognized foreign examining body is an equivalent to the school certificate awarded by the Examinations Council of Zambia;*
- (b) The GCE, when the number of subjects passed, and grades satisfy the requirements for the award of a school certificate."*

8.63 The verbatim evidence adduced by the expert witness from the Zambia Qualifications Authority (EW2) was that:

"In order to determine a qualification that is equivalent to a grade twelve (12) certificate, the ZQA in line with the provisions of the ZQA Act evaluates qualifications and standards and that any qualifications with level descriptors comparable with those at level 2B i.e. Senior Secondary

Education Certificate (Grade twelve) of the Zambia Qualification Framework is determined to be equivalent or comparable to a grade twelve certificate if it is so evaluated."

- 8.64 We have considered the evidence tendered by the two expert witnesses. Our understanding of the term "equivalent to a grade twelve certificate" as envisaged under Article 70(1) (d) of the Constitution is that it relates to qualifications that are comparable in value, amount, meaning and functions and are neither inferior nor superior to the school certificate. In our view, this could well be academic qualifications obtained in other jurisdictions but which are equivalent to a school certificate in Zambia. The issue of equivalence can thus be determined by the Examinations Council of Zambia and the Zambia Qualifications Authority using competences at level 2B of their level descriptors, as they have done in this case.
- 8.65 We do not think it was the Legislature's intention when referring to the term 'equivalent' to compare qualifications that are not similar in value, meaning or even function.

8.66 Having now interpreted what amounts to a grade twelve certificate or equivalent, we wish to reiterate for emphasis, that our decision or interpretation of what constitutes a grade twelve certificate or equivalent cannot apply to the 1st Respondent retrospectively. This is because as we already said, at the time of his nomination and subsequent election, there was a binding High Court decision upon which the Respondents acted.

8.67 As we cautioned in the case of **HENRY KAPOKO v THE PEOPLE**³, the decisions of this Court are not intended to turn the justice delivery system on its head. In that case we stated as follows:

We are also mindful that the stability of our legal system is paramount. The Constitution enjoins us under Article 267 to develop the law as we interpret it. We are alive to the fact that the decisions of this Court should never turn the justice delivery system on its head, our decisions should generate incremental improvements in both substantive and procedural justice, but they must not jeopardize what has worked well in the past.

8.68 We reiterate those sentiments.

8.69 For the reasons we have stated earlier in this judgment, the Petitioner's claim regarding the alleged contravention of Article 70 (1) (d) of the Constitution by the Respondents fails and is therefore dismissed. Having dismissed the Petitioner's main claim, the second claim is moot.

9.0 CONCLUSION AND ORDERS

9.1 The 1st and 2nd Respondents did not contravene Article 70(1) (d) of the Constitution as regards the 1st Respondent's nomination and subsequent election based on the prevailing interpretation of Article 70(1) (d) of the Constitution at time in the **SIBONGILE ZULU¹** case.

9.2 The term "grade twelve (12) certificate" used in Article 70(1) (d) of the Constitution is synonymous to the term 'school certificate' when read with necessary modification in accordance with section 6 of Constitution of Zambia Act No. 1 of 2016.

9.3 The word "equivalent" to a grade twelve (12) certificate as envisaged in Article 70 (1) (d) of the Constitution relates to

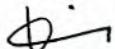
qualifications that are comparable in value, amount, meaning and functions and are neither inferior nor superior to a school certificate. The qualifications may include academic qualifications that have been obtained in other jurisdictions but which are equivalent to a school certificate in Zambia.

- 9.4 A General Certificate of Education (GCE) is equivalent to a grade twelve (12) certificate as envisaged under Article 70(1) (d) of the Constitution if the number of subjects passed and the grades obtained satisfy the requirements for obtaining a school certificate.
- 9.5 A tertiary, vocational, craft, trade or apprenticeship certificate is not equivalent to a grade twelve certificate (school certificate) as it is not comparable in value, amount, meaning and functions to a grade twelve (12) certificate.

9.6 Considering that this petition raised very serious constitutional issues, we order that each party bears own litigation costs.



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



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



.....
M. MUSALUKE
CONSTITUTIONAL COURT JUDGE

DISSENTING JUDGMENT OF CHIBOMBA, P.C

Dissenting Judgment of Chibomba P.C.

Case cited:

1. Sibongile Zulu v The Attorney General (2016) HB 24 (*unreported*)
2. Steven Katuka (Suing as Secretary General of the United Party for National Development) v Law Association of Zambia, Attorney General, Ngosa Simbyakula and 63 Others Selected Judgment No. 29 of 2016

Legislation referred to:

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

[1.0] INTRODUCTION

[1.1] I have read the majority judgment. I must state that although I agree with the analysis as regards what constitutes a grade twelve (12) certificate or its equivalent as well as the major question posed for determination by the Court, I do not agree with the findings and conclusion of finding the

Respondents not culpable on the basis of the High Court's decision in the **Sibongile Zulu v The Attorney General¹** case on the interpretation of Article 70 (1) (d) of the Constitution.

[2.0] BACKGROUND

[2.1] As a starting point, it should be borne in mind that, the Petitioner, came to this Court seeking an order that the 1st and 2nd Respondents contravened and have continued to contravene Articles 70 (1) (d) and 72 (2) (b) of the Constitution. And that on the basis of the said order, this Court should declare the Lundazi Central Constituency seat vacant and that fresh elections be held within 90 days. Article 70 (1) (d) provides for eligibility of a person intending to contest a Parliamentary election; that, such a candidate is only eligible to contest for Parliamentary elections if he has obtained as a minimum, an academic qualification of a grade 12 certificate or its equivalent as set out in the Article 70 (1) (d). Article 72 (2) (b) provides for vacancy of the office of Member of Parliament where a person is disqualified for elections in accordance with Article 70 (1) (d).

[2.2] In determining this matter, the major question posed is whether or not the 1st and 2nd Respondents contravened and have continued to contravene

Articles 70 (1) (d) and 72 (2) (b) of the Constitution. This question has been critically analysed and considered in two-fold, that is;-

1. **Was the 1st Respondent in possession of a grade 12 certificate at the time of nomination and election in 2016; and**
2. **Was the 1st Respondent in possession of an equivalent to a grade twelve (12) certificate at the time of nomination and election in 2016.**

[2.3] In determining the above questions, the Majority decision has analysed and interpreted what amounts to a grade twelve (12) certificate or its equivalent. I totally agree with the analysis and interpretation given by the majority on what amounts to a grade 12 certificate or its equivalent as stipulated in Article 70 (1) (d) of the Constitution. I also agree with the rationale as espoused in the Majority judgment in paragraphs 8.6 which establishes that Article 70 (1) talks about the eligibility of a person wishing to contest for elections as Member of Parliament if such a person has obtained a minimum academic qualification of a grade twelve (12) certificate or its equivalent and that this means that such a candidate must have had these qualifications at the time of nomination and not post nomination period. That as such, it must be established that at the time of nomination and subsequent

election, the 1st Respondent had a minimum academic qualification of a grade twelve (12) certificate or its equivalent.

[2.4] Both questions posed in paragraph 8.8 and according to the analysis given therein, it has been found that the 1st Respondent was not in possession of a grade twelve (12) certificate or its equivalent at the time of nomination and subsequent election. And that the tertiary certificates that the 1st Respondent produced at nomination stage were not equivalent to a grade twelve (12) certificate.

[2.5] I however do not as aforesaid agree with conclusion and order at paragraph 9.1 that the 1st and 2nd Respondents did not contravene Article 70 (1) (d) of the Constitution as regards the 1st Respondent's nomination and subsequent election based on the prevailing interpretation of Article 70 (1) (d) of the Constitution at the time in the **SIBONGILE ZULU¹** case. I do not also agree with the position taken by the Majority that the interpretation of Article 70 (1) (d) arrived at, cannot apply to the 1st Respondent on ground that the interpretation cannot be applied retrospectively, for the reasons given hereunder.

[2.6] The sum total of the Petitioner's case was that the 1st Respondent who is the Member of Parliament for Lundazi Central Constituency lacked a grade

twelve (12) certificate or its equivalent and has therefore been in contravention of Article 70 (1) (d) and that this Court is empowered under Article 72 (2) (b) to disqualify him from holding the said office.

[2.7] The 1st Respondent denied contravening the Constitution arguing that he had the requisite qualifications that were equivalent to a grade twelve (12) certificate at the time of his nomination and election. In support of this position, he cited the **Sibongile Zulu**¹ case which according to him, interpreted Article 70 (1) (d) prior to the holding of the 2016 elections and which found that tertiary qualifications could amount to a grade twelve (12) certificate.

[2.8] The 2nd Respondent equally relied on the **Sibongile Zulu**¹ case but went further to argue that the Petitioner in the case in *casu* was in essence challenging the nomination and election of the 1st Respondent and should therefore have done so before the High Court under the provisions of Articles 52 and 73 respectively and within the time limits set by the law. Further that the 2nd Respondent's role ended with the election of the 1st Respondent.

[2.9] The majority judgment has found that the 1st and 2nd Respondents did not contravene Article 70(1) (d) on ground that the 2nd Respondent was bound by the interpretation of Article 70 (1) (b) made in the **Sibongile Zulu**¹ case by

the High Court. Further that there is a thin line between the provisions of Article 52 and those of Article 128 in relation to election matters such as the one at hand.

[3.0] ANALYSIS

[3.1] Having considered the Petitioner's and the 1st and the 2nd Respondents' arguments and the reasoning behind the Majority position, I am not persuaded by either the Respondents' argument nor the position taken by the Majority that our interpretation of Article 70 (1) (d) on what constitutes a grade twelve certificate or its equivalent cannot apply to the 1st Respondent on ground that the interpretation cannot be retrospectively applied. The **Sibongile Zulu**¹ case should not override, suspend or oust the authoritative interpretation of Article 70 (1) (d) that has been made by this Court. The implication of such a holding would be that a contravention of the Constitution does not arise until this Court so declares. In my view, 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*.

[3.2] Further the Majority decision in its analysis in paragraphs 8.29 and 8.30 have explained in the historical background, that the High Court was

competent to hear and determine Constitutional matters including the interpretation of Article 70 (1) (d) of the Constitution by virtue of Practice Direction No. 1 of 2016. I agree with this background. However, my considered view is that the **Sibongile Zulu**¹ Judgment did not qualify any person for election as a Member of Parliament. It directed would be candidates to present their qualifications before the 2nd Respondent in a manner evidencing that he or she had completed the required educational programme or its equivalent. The High Court put it thus:

“The only hurdle for any person to jump to satisfy the impugned articles is to produce a certificate evidencing that one has completed an educational program or its equivalent to the Electoral Commission of Zambia...”

[3.3] The High Court Judge went further to place the responsibility on the 2nd Respondent to verify the qualifications presented. The Court stated:

“However, the Electoral Commission of Zambia in accepting nominations has recourse to administratively consult with other relevant agencies including the Examination Council of Zambia, the Zambia Qualifications Authority and Zambia Police Service to ascertain the authenticity of the documents presented.”

[3.4] It is my firm position that the High Court decision in the **Sibongile Zulu**¹ case cannot and should not be the basis for allowing a person who was not eligible to stand for election on account of not having the requisite qualification, to continue in office as Member of Parliament. Doing so would render the import of Article 70 (1) (d) and the rationale for its enactment nugatory.

[3.5] It cannot be over emphasized that this Court, as a court of original and final jurisdiction, which has been mandated with the delicate task of interpreting the Constitution, must be conscientious in the manner it interprets the Constitution because our interpretation becomes the law. As espoused in the case of **Steven Katuka v The Attorney General and Ngosa Simbyakula and 63 Others**², 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 breathe life...grow and develop the Constitution in order to meet the demands of an ever-developing society. I reiterate this in the case in *casu*.

[3.6] The next point I wish to highlight and address is the Majority decision's finding in paragraph 8.49 wherein it is stated that:

“Needless for us to state, the Constitution does not provide for a provisional nomination for purposes of election as Member of Parliament nor does any other written law do so. By instructing returning officers to accept a candidate’s tertiary certificates and indicate the word provisional on their nomination forms subject to validation by the 2nd Respondent, the 2nd Respondent added a needless step. Its mandate was to either out-rightly accept or reject the nomination based on the qualifications submitted by the candidate. We do not expect the 2nd Respondent to repeat such conduct in future elections.”

[3.7] Whilst agreeing with the position articulated above, I do not agree with the finding and conclusion in paragraphs 8.49 and 8.67 that the adding of this needless step by the 2nd Respondent did not invalidate the 1st Respondent’s nomination based on Article 70 (1) (d) and the interpretation of what constitutes a grade twelve certificate or its equivalent cannot apply to the 1st Respondent retrospectively because of the High Court decision upon which the Respondents acted; because to me, reading into the Constitution a step that is not provided for should not be taken lightly and the impact or consequences of this needless step must be considered in the light of what transpired. This is that it resulted into an unqualified candidate slipping

through the nomination process and getting elected as Member of Parliament and therefore continuing to hold office of Member of Parliament for which he is not qualified to hold. This has the effect of diluting the purpose and import of Article 70 (1) (d) of the Constitution and the very rationale for its enactment which the Majority Judgment has aptly highlighted. The 2nd Respondent's mandate as enshrined in Article 52(2) of the Constitution is to duly reject the nomination of a candidate who does not meet the qualifications set in Article 70(1) (d) of the Constitution.

[3.8] Further, the High Court in the **Sibongile Zulu**¹ case did in fact place responsibility on the 2nd Respondent to verify the documents presented by would be candidates so as to ensure that the same were either grade twelve certificates or equivalent to grade twelve certificate. The High Court Judge put it thus:

“However, the Electoral Commission of Zambia in accepting nominations has recourse to administratively consult with other relevant agencies including the Examination Council of Zambia, the Zambia Qualifications Authority and Zambia Police Service to ascertain the authenticity of the documents presented. Their role is limited to validating that a person has undertaken high school education or secondary school education or its equivalent.”

[3.9] Further, PW3's evidence was also that:

"upon receipt of the 1st Respondent's nomination, the words "provisional nomination" were endorsed on the 1st Respondent's nomination form in accordance with instructions issued by the 2nd Respondent, which meant that the 1st Respondent did not meet the academic qualification for a Member of Parliament and that the 1st Respondent was accordingly advised to have his nomination validated by the 2nd Respondent."

[3.10] It was also PW3's evidence that: *"as Returning Officer, he had the power to reject nominations but that he did not reject the 1st Respondent's nomination as there was an instruction from the 2nd Respondent in a letter written by Mr. Chella Chomba which directed the returning officers to accept nominations from candidates who did not possess a grade twelve (12) certificate but possessed other qualifications."*

[3.11] The reading into the Constitution itself words that they had no power to add as found by the majority Judgment by the 2nd Respondent, the institution mandated by the Constitution and electoral laws to conduct elections in this country, should not be taken lightly. Further the Sibongile

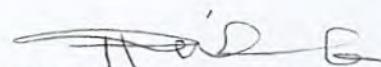
Zulu¹ Judgment as outlined earlier in my dissent did in fact place a responsibility on the 2nd Respondent to verify the qualifications of candidates with the relevant authorities including the Examination Council of Zambia and the Zambia Qualifications Authority to ensure that the vocational, craft and apprenticeship certificates proffered by a would be candidate were a grade twelve certificate or its equivalent. In its own Press Release quoted at paragraph 8.36 of the majority Judgment, the 2nd Respondent did direct would be candidates to verify their certificates for equivalence to a grade twelve certificate with the Examination Council of Zambia and other relevant institutions before filing their nomination papers. It has not been shown that the 2nd Respondent complied with the guidance given by the High Court in the **Sibongile Zulu**¹ case or that it adhered to its own Press Release quoted above. I find solace in the evidence of EW1 who testified before us and in the High Court on what a grade twelve or its equivalent constitutes; that had the 1st Respondent's tertiary certificates in question been subjected to scrutiny by the Examination Council of Zambia at the nomination stage as guided by the High Court Judgment in question, the 1st Respondent would not have slipped through the nomination process.

[3.12] For the foregoing reasons, it is therefore my firm position that both the 1st Respondent and the 2nd Respondent contravened Article 70 (1) (d) of the

Constitution on ground that, in the case of the 1st Respondent, the certificates that he produced at nomination stage as found in paragraph 9.5, are not equivalent to a grade twelve certificate (school certificate) as they are not comparable in value, amount, meaning and functions to a grade twelve (12) certificate. And in respect of the 2nd Respondent, by reading a step that the law did not provide for and thereby allowing an unqualified person to slip through the nomination process, election and to occupy an office which the 1st Respondent was not qualified to occupy.

[4.0] CONCLUSION AND ORDERS

[4.1] Based on the above findings, I would have ordered that since the 1st Respondent did not meet the requirements of Article 70 (1) (d), his nomination, subsequent election and continued occupation of office as Member of Parliament is contrary to Article 70 (1) (d) and he should thus be disqualified from continuing to hold office, pursuant to Article 72 (2) (h) of the Constitution.



H. Chibomba
PRESIDENT CONSTITUTIONAL COURT

DISSENTING JUDGMENT OF MULONDA , JC

Dissenting Judgment of Mulonda, JC

- [1] I have carefully read the majority judgment. While I agree with the conclusions at paragraphs 9.2 to 9.5 of the majority decision, I disagree with the position they take in not declaring the Lundazi seat vacant by operation of the law in view of the overwhelming expert evidence that graced the record in the matter to the effect that the 1st respondent does not have the requisite grade twelve (12) certificate or its equivalent within the contemplation of Article 70 (1) (d) of the Constitution as amended by the Constitution (Amendment) Act No. 2 of 2016 (*hereinafter referred to as the Constitution*).
- [2] The majority have rendered a detailed account to justify why the High Court at Kabwe was clothed with Constitutional jurisdiction at the material time. I must state that I have no difficulty with the reasoning upon which the account rests. That notwithstanding I have the following opinion to render.

[3] In dissenting, I begin with the genesis of the petition. The Court was moved by the petitioner pursuant to Article 128 (1) (b) of the Constitution which provides that the Constitutional Court has original and final jurisdiction to hear –

(b) a matter relating to a violation or contravention of this Constitution.

[4] Before the petition could be heard, the 1st respondent raised preliminary issue to the effect that the matter was statute barred, that the matter was before the wrong court and a challenge to the election of a member of Parliament brought outside the permitted limitations. We heard the application and ruled as follows:

[5] At paragraph 5.6 page R35 of the Ruling we stated as follows:

It is clear from the reading of Article 128 of the Constitution that this Court has original and final jurisdiction to hear a matter relating to a violation or contravention of the Constitution.

Specifically, Article 128 (1) (b) provides as follows:

Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear –

(b) a matter relating to a violation or contravention of this Constitution.

[6] At paragraph 5.7 page R35, we stated that:

Further Article 128 (3) of the Constitution puts it oppositely as follows:

- (3) Subject to Article 28, a person who alleges that –
- (a) an Act of Parliament or statutory instrument;
 - (b) an action, measure or decision taken under law; or
 - (c) an act, omission, measure or decision by a person or an authority;
- Contravenes this Constitution, may petition the Constitutional Court for redress (*Emphasis mine*).

[7] At paragraph 5.8, page R36, we opined that:

'This means that a person who alleges that there is a contravention of the Constitution, may petition this Court for redress. (*Emphasis mine*) It then follows that any allegations of the contravention of the Constitution brought before this Court must be fully interrogated.' "

Further under paragraph 5.9 of the same page, we stated that:

... Our mandate is that when an allegation of the violation or contravention of the Constitution is presented before court, the allegation must be heard and determined.

[8] In line with this position that reposes the responsibility of defending the Constitution in the Court which I still hold, we proceeded to hear the matter on its merits. To that end we on our own motion on 8th July, 2020 subpoenaed two (2) expert witnesses from the Examinations Council of Zambia and the Zambia Qualifications Authority respectively pursuant to the provisions of section 13 of the Constitutional Court Act

No. 8 of 2016 for purposes of clarifying what constitutes a grade twelve (12) certificate and its equivalent within the contemplation of Article 70 (1) (d) of the Constitution. I will for emphasis sake recount the expert evidence as outlined in the majority decision, which I adopt as my own follows:

[9] Dr. Michael Muyambwala Chilala who at the time of trial was the Director and Chief Executive Officer of the Examinations Council of Zambia (ECZ) was called as expert witness number one (1) (EW1).

[10] EW1 "explained what" constitutes a "School Certificate" and the difference with a "General Certificate of Education" (GCE). His opinion was that a grade twelve (12) certificate is an academic qualification awarded to a person who has earned it by satisfying one of the following two conditions at one sitting for school certificate examinations:

- a) has obtained a pass in at least six (6) subjects, including English Language, one (1) of which should be a credit or better; or
- b) has obtained a pass in at least five (5) subjects, including English Language, two (2) of which should be a credit or better.

[11] EW1 explained that the examination one sits to obtain a grade twelve (12) certificate is the school certificate examination and therefore the

actual name of the grade twelve (12) certificate is school certificate. In sum, he testified that 'grade twelve (12) certificate' is reflective of the fact that one only qualified to sit after (12) years of schooling, including three (3) years at senior secondary school level.

[12] As regards the term 'equivalent' to a grade twelve (12) certificate, EW1 gave examples of qualifications that are equivalent to a grade twelve (12) certificate as follows:

- (a) Any ordinary or 'O' Level school certificate, which was awarded by the University of Cambridge before 1983, or by any recognized foreign examination body is equivalent to the school certificate awarded by the Examination Council of Zambia.
- (b) The GCE, when the number of subjects passed and grades satisfy the requirements for the award of a school certificate.

[13] As regards the GCE, EW1 explained that a candidate is awarded a GCE if the candidate obtains grades one to eight in at least one subject if the candidate:

- a) Entered for and wrote school certificate examinations but did not satisfy the requirement for the award of a school certificate; or
- b) Entered for and wrote the GCE as an external candidate.

- [14] In cross-examination, EW1 testified that a GCE becomes equivalent to a school certificate if the subjects and grades that define a school certificate are met through the GCE, i.e. if the number of subjects passed equates with the number of subjects that defines the school certificate together with the grades and combination of subjects. It was EW1's evidence that the 1st respondent's GCE exhibited at page 101 of the consolidated record of proceedings of 11th March, 2020 does not equate to a school certificate.
- [15] In terms of the documents exhibited at pages 102 to 106 and 130 of the consolidated record of proceedings of 11th March, 2020, EW1 stated that he could not speak to those documents as to whether or not they are equivalent to a school certificate as they were not academic qualifications issued by the Examinations Council of Zambia
- [16] When referred to page 131 of the consolidated record of proceedings of 11th March, 2020 EW1 identified the statement of results issued by the Examinations Council of Zambia to the 1st respondent. He stated that the number of passes recorded at page 131 as read with those at page 101 of the record of proceedings of 11th March, 2020 could not be equated to a school certificate. He justified his testimony by stating that a school certificate requires a minimum of five subjects including

English Language with at least two of them being credits or better. That the statement of results at page 131 as read with the GCE at page 101 of the record of proceedings of 11th March, 2020 only has four subjects, English being repeated and therefore short of the minimum of five subjects required.

- [17] EW1 reiterated his understanding of the definition of the term 'grade twelve (12) certificate' in the context of Article 70 (1) (d) of the Constitution that a grade twelve (12) certificate and school certificate are one and the same. That the term 'grade twelve (12) certificate' is reflective of the fact that one only qualifies to sit for the examination that leads to its award after fulfilling twelve (12) years of schooling including three years of senior secondary school. He explained that the examination one sits for to obtain a 'grade twelve (12) certificate' is called school certificate examination. He explained that the 'grade twelve (12) certificate' name is a common name used but that the official name is a school certificate. EW1 referred the Court to exhibits at pages 11 and 12 of his testimony filed into Court on 2nd July, 2020. The exhibit at page 11 is a sample of GCE and the exhibit at page 12 is a sample of a school certificate.

- [18] During further cross-examination, EW1 stated that he was not aware that a definition of a grade twelve (12) certificate was given in the Electoral Commission of Zambia Act No. 5 of 2019. EW1 also stated that the Constitution under Article 70 (1) (d) does not specifically mention a school certificate but it talks about a grade (12) certificate or its equivalent. In addition, EW1 stated that no regulations were issued by the Examinations Council of Zambia in relation to the definition of a grade twelve certificate following the amendment to the Constitution in 2016. He however, testified that his evidence was based on the documents that govern the operations of the Examinations Council of Zambia as to the award of a GCE and school certificate and that these were filed into Court together with his written testimony.
- [19] When asked further in cross-examination as to what standard of education a GCE is, EW1 stated that a GCE is of the same standard as a school certificate but that a GCE only becomes equivalent to a school certificate if the number of subjects and grades that are required for the award of a school certificate are met.
- [20] In re-examination, EW1 re-emphasized that the GCE examination runs on the same standards as the school certificate and that the difference was that the GCE examination allows an individual to enter for one (1),

two (2) or more subjects, whereas for the school certificate examination, the minimum number of subjects one is allowed to enter for is six (6). Further, that a GCE can be awarded to a candidate who passes a minimum of one (1) subject but the school certificate is only awarded to a candidate who has passed a minimum of six (6) subjects including English Language and at least one (1) of the six (6) subjects should be at credit level. Alternatively, that where a candidate passes five (5) subjects including English Language the candidate should have at least credits or better in two (2) other subjects. The other difference between the two certificates was that a candidate who qualified for the award of a school certificate must have exhibited twelve (12) years of continuous learning and be in possession of a grade nine (9) certificate at the end of Junior Secondary School, whilst a candidate sitting for the GCE need not have completed twelve (12) years of schooling.

- [21] The second expert witness was Mrs. Miriam Chiyaba who at the time of trial was the Director and Chief Executive Officer of the Zambia Qualifications Authority (ZQA) (hereinafter referred to as EW2). EW2's evidence in chief was based on the report filed into Court on 2nd July, 2020 whose subject was: *The meaning of grade twelve certificate and its equivalent.*

- [22] In respect to the issue before Court, EW2 testified that ZQA has recognized the school certificate which is awarded at grade twelve (12) as meeting the competencies for a school certificate to be awarded and any equivalent has to have the level descriptors or competencies that are demonstrated at that particular level.
- [23] Under cross-examination, EW2 stated that her task before Court was simply to give clarity on the meaning of grade twelve certificate and any qualifications that are equivalent to it.
- [24] EW2 further testified that in "order to ascertain whether the" 1st respondent's tertiary, craft or vocational qualifications were equivalent to a grade twelve (12) certificate one has to assess the level descriptors assigned to the qualifications in order to determine whether it meets the level descriptors.
- [25] It was EW2's testimony that the certificate in military training awarded to the 1st respondent and exhibited at page 102 of the consolidated record of proceedings of 11th March, 2020 was not an academic qualification and therefore could not be equated to a grade twelve (12) certificate as it did not meet the level descriptors, the duration of the course having been six months. She stated that the same could be said

of the certificate of achievement and the certificate in computer course issued to the 1st respondent by the Ministry of Youth, Sport and Child Development and Nakachinga Resource Centre respectively. It was EW2's further evidence that for any qualification to be recognized, it must be issued by an appropriate authority as defined by the Zambia Qualifications Authority Act. She stated that the Ministry of Youth, Sport and Child Development, the Lundazi Provincial Teacher's Resource Center and the Zambia National Service were not appropriate authorities as envisaged by the Zambia Qualifications Authority Act.

- [26] When referred to the certificate in music issued to the 1st respondent by the Associated Board of Royal Schools exhibited at page 103 of the consolidated record of proceedings of 11th March, 2020, EW2's evidence was that an assessment done on the said document revealed that the said certificate was equivalent to a Junior Secondary School Certificate Grade Nine (9).
- [27] EW2 testified that if a GCE is to meet level descriptors for an award of a school certificate prescribed in level 2 (b) of the ZQA framework, a candidate must have a pass in at least six (6) subjects including English Language or at least five (5) subjects one (1) of which one must be a credit or better.

[28] As rightly stated in the majority judgment that:

"From the evidence on record, it is not in dispute that the 1st respondent was at the time of his nomination in 2016, a holder of a General Certificate of Education (GCE) obtained in 2013 which he exhibited at page 101 of the consolidated record of proceedings of 11th March, 2020 in addition to other qualifications exhibited in the same consolidated record of proceedings."

[29] I agree with the majority that the question that needs to be resolved, therefore, is whether the "said GCE amounts to a grade twelve certificate as envisaged by Article 70 (1) (d) of the Constitution and whether the craft, vocational and apprenticeship qualifications presented are equivalent to grade twelve (12) certificate.

[30] I further agree with the majority that the import of Article 70 (1) (d) of the Constitution is that a person vying for the office of Member of Parliament must have obtained as a *minimum academic qualification, a grade twelve certificate or its equivalent.*

[31] Further the majority state that Article 70 (1) (d) of the Constitution stipulates that a person is eligible to be elected as a Member of Parliament if that person, *inter alia*, has obtained, as a minimum

academic qualification, a grade twelve (12) certificate or its equivalent, that the Constitution does not stipulate what a grade twelve certificate is made up of. They state that a perusal of Article 266 of the Constitution indeed confirms that the term 'grade twelve certificate or its equivalent' is not defined.

[32] The majority examined the absence of such definition in Article 70 or elsewhere in the existing legislation with a view to establish whether any law clearly defined what constituted a grade twelve certificate or its equivalent at the time of nomination. In that regard, the provisions of the Examinations Council of Zambia Act, Chapter 137 of the Laws of Zambia which established the Examinations Council of Zambia (ECZ), the Education Act No. 23 of 2011 which *inter alia* regulates the provision of accessible, equitable and qualitative education; the Zambia Qualifications Authority Act No. 13 of 2011 which *inter alia* established the Zambia Qualifications Authority and provides for the development and implementation of a national qualifications framework were also reviewed.

[33] I agree with the majority when they state that a perusal of the above three Acts reveals that what constituted a grade twelve (12) certificate or its equivalent as at May, 2016 was not defined.

In the absence of statutory provisions which clearly stipulated what constituted a grade 12 certificate or its equivalent, two expert witnesses were summoned to explain what comprises a grade 12 certificate or its equivalent.

- [34] The majority judgment states that:

"The evidence given by the expert witness from the Examinations Council of Zambia, Dr. Michael M. Chilala (EW1) clarified what amounts to a school certificate by stating that a school certificate is an academic certificate awarded to a person who has earned it by satisfying one of the following two conditions in one and the same school certificate examinations;

- i) *Has obtained a pass in at least six (6) subjects, including English Language, one of which should be a credit or better; or*
- ii) *Has obtained a pass in at least five (5) subjects, including English Language, two of which must be credits or better."*

- [35] EW1 testified in the following terms:

"The examinations one sits to obtain the grade twelve certificate is the school certificate examinations and therefore the actual and official name of the grade twelve certificate is a school certificate."

- [36] EW1 further testified that:

"The name 'grade twelve certificate is reflective of the fact that one only qualifies to sit the examinations that leads to its award after fulfilling twelve years of schooling, including three years at senior secondary school."

- [37] EW1 testified that the Examinations Council of Zambia have in place regulations which distinguish a school certificate from the general certificate of education. These regulations were exhibited at pages 36 to 53 of his bundle of documents filed into Court on 2nd July, 2020 and entitled "**SCHOOL CERTIFICATE AND GENERAL CERTIFICATE OF EDUCATION EXAMINATIONS – EXAMINATION REGULATIONS OF 2018.**" A perusal of the said regulations particularly at page 45 of the bundle of documents (which is page 10 of the regulations) highlights the conditions for the award of a school certificate and the conditions for the award of a General Certificate of Education (GCE).

- [38] The conditions for the award of a School Certificate are highlighted as follows:

- i) *"All the requirements for the School Certificate m*

- ii) *To qualify for the school certificate, conditions must reach a satisfactory general standard as judged by the performance as follows:*
- a) *Pass in at least six subjects, including English Language, with credits in at least one of them; or*
 - b) *Pass in five subjects, including English Language, with credit in at least two of them.*
 - c) *Candidates who fail to meet the conditions for the award of the school certificate shall be issued with a Statement only.”*

[39] The conditions for the award of a General Certificate of Education (GCE) are highlighted as follows:

- “(a) *Candidates who obtain GRADE ONE TO EIGHT in at least one subject will qualify for the award of a General Certificate of Education if:*
- i) *They already hold a School Certificate of Education; or*
 - ii) *They entered and wrote the Examinations but did not qualify for the award of a School Certificate; or*
 - iii) *They entered and wrote the General Certificate of Education Examinations as external candidates.”*

[40] As rightly stated by the majority the term ‘grade twelve certificate’ used under Article 70 (1) (d) of the Constitution is synonymous to the term ‘school certificate’ when the relevant existing laws are read with

necessary modification in accordance with Section 6 of the Constitution of Zambia Act No. 2016.

[41] I agree with majority when they state that:

"It is also clear that the Examinations Council of Zambia, which as observed earlier is the institution mandated to conduct examinations and award certificates or diplomas to candidates who pass examinations conducted by it, has drawn a distinction between a school certificate and a general certificate of education. From the evidence adduced by EW1, a general certificate of education can only equate to a school certificate when the number of subjects passed and the grades attained satisfy the requirements for obtaining a school certificate."

[42] They proceed to state that:

"It can be observed that prior to the constitutional amendment of 2016, no provision in the Constitution provided for any academic qualifications to be met by candidates wishing to contest the office of Member of Parliament. The rationale for proposing minimum academic qualification as enacted under Act No. 70 (1) (d) was to have members of Parliament who would be able to effectively debate and make meaningful contributions to the proceedings and business in Parliament. The Final Report of the Technical committee on drafting of the Zambian Constitution, 2013

gave the rational for introducing the minimum academic qualification at page 374 which stated inter alia that it was necessary to have a minimum academic qualification in order to –

..... guide political parties and other stakeholders to nominate people who would be able to debate effectively and make meaningful contributions in Parliament.

[43] *It is clear that by introducing the minimum academic qualification, the intention of the Legislature was to set a scholarly accomplishment condition or eligibility by a person who completed a secondary school education programme and was awarded a school certificate so as to ensure that persons elected into Parliament debate effectively and make meaningful contributions on behalf of the people they represent.”*

[44] In view of the foregoing, it is my firm view that the 1st respondent's General Certificate of Education (GCE) exhibited at page 101 of the consolidated record of proceedings does not amount to a grade twelve certificate as envisaged under Article 70 (1) (d), as it does not satisfy the conditions set for the award of a school certificate otherwise known as a 'grade twelve certificate.'

[45] As to the question whether or not the 1st respondent possessed qualifications equivalent to a grade twelve certificate, I agree with the majority observation that although the Constitution uses the term 'equivalent', the same has not been defined under the Constitution. That the **CONCISE OXFORD DICTIONARY** at page 483 defines the term 'equivalent' as follows:

"Being equal in value, amount, function, meaning, etc having the same or similar effect."

[46] The majority judgment states that:

"The evidence of EW1 in clarifying what amounts to an equivalent to a grade twelve (12) certificate (school certificate) was that the term 'equivalent' from the Examination Council of Zambia's perspective meant the following:

"(a) ***Any ordinary or 'O' level School Certificate , which was awarded by the University of Cambridge after 1983, or by any other recognized foreign examining body is an equivalent to the school certificate awarded by the Examinations Council of Zambia.;***

(b) *The GCE, when the number of subjects passed, and grades satisfy the requirements for the award of a school certificate.”*

[47] *The verbatim evidence adduced by the expert witness from the Zambia Qualifications Authority IEW2) was that:*

“In order to determine a qualification that is equivalent to a grade twelve (12) certificate, (the ZQA in line with the provisions of the ZQA Act evaluates qualifications and standards and that any qualifications with level descriptors comparable with those at 2B i.e. Senior secondary Education Certificate (Grade Twelve) of the Zambia Qualification Framework is determined to be equivalent or comparable to a grade twelve certificate if it is so evaluated.”

[48] It was EW2's evidence that the four tertiary qualifications submitted by the 1st respondent at the time of nominations, namely, the Certificate in Military Training, the Tutor's Certificate in Theology, the Grade three (3) Certificate in Music and the Certificate in computer course could not equate to a grade twelve certificate as they were not academic qualifications. Further, that the said qualifications when evaluated, did not meet the level descriptors at senior secondary education under 2B, the duration of the course having been six months.

[49] I agree with the majority when they state as follows:

"We have considered the submissions by the two expert witnesses called before Court. Our understanding of the term 'equivalent to a grade twelve certificate' as envisaged under Article 70 (1) (d) of the Constitution is that it relates to qualifications that are comparable in value, amount, meaning and functions and are neither inferior nor superior to the school certificate. In our view, this could well be academic qualifications obtained in other jurisdictions but which are equivalent to a school certificate in Zambia. The issue of equivalence can thus be determined by the Examinations Council of Zambia and the Zambia Qualifications Authority using competencies at level 2B of their level descriptors, as they have done in this case."

- [50] The expert evidence that graced the Court's record as shown, went uncontroverted and does establish that the 1st respondent does not possess a grade twelve (12) certificate nor its equivalent. In view of this adverse finding against the 1st respondent which the majority judgment impliedly acknowledges in paragraph 9.2 to 9.5 of its conclusion, the question I pose to myself is whether the Sibongile Zulu decision can continue to hold in view of the evidence that the 1st respondent does not possess the requisite academic qualifications.

[51] My starting point is Article 1 (2) and (3) of the Constitution that provide that :

- (2) *An act or omission that contravenes this Constitution is illegal.*
- (3) *This Constitution shall bind all persons in Zambia, state organs and state institution.*

[52] Further, the Constitution in Article 267 (1) provides that;

This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that:

- (a) *promotes its purposes, values and principles.*

[53] The provisions cited above are very clear on the consequences of a contravention of any Constitutional provision and the binding character of these provisions respectively. As alluded to above, any contravention of the Constitution is illegal and the provisions of this Constitution are binding by construct on ALL (Emphasis mine) Black's Law Dictionary, Ninth Edition, defines the word contravention as:

An act violating a legal condition or obligation.

[54] The findings of fact following the expert evidence tendered that the 1st respondent does not possess a grade twelve (12) certificate or its equivalent answer to the two definitions of contravention and breach

respectively. Therefore a contravention or breach of Article 70 (1) (d) disqualifies the 1st respondent from being a Member of Parliament.

[55] Article 72 (2) (h) of the Constitution provides that:

The office of Member of Parliament becomes vacant if the member

(b) *is disqualified as a result of a decision of the Constitutional Court.*

[56] It is my considered opinion that the 1st respondent not being in possession of a grade twelve (12) certificate or its equivalent as reflected and confirmed in paragraphs 9.2 to 9.5 of the conclusion in the majority decision, stands disqualified in terms of Article 70 (1) (d) of the Constitution and cannot continue to seat in Parliament as to do so will not only be illegal under Article 1 (2) of the Constitution but a dereliction of duty on our part as a Court within the meaning of Article 128 (1) (b) of the Constitution.

[57] Under the circumstances, I would have ordered that the 1st respondent should not continue to seat as a member of Parliament as this goes against the purposes of Article 70 (1) (d) of the Constitution as reflected in the Final Report of the Technical Committee on Drafting of the

Zambian Constitution, 2013 and as provided for under Article 267 (1) (b) which enjoins the Court to interpret the Constitution in a manner that promotes its purposes, values and principles.



.....
P. Mulonda

CONSTITUTIONAL COURT JUDGE