

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

2016/CC/0033

IN THE MATTER OF: ARTICLES 1, 101, 103 and 105 OF THE
CONSTITUTION OF ZAMBIA (AMENDMENT) ACT
NO.2 OF 2016

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 104
(3) OF THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO. 2 OF 2016

BETWEEN:

HAKAINDE HICHILEMA
GEOFFREY BWALYA MWAMBA

FIRST PETITIONER
SECOND PETITIONER

AND

THE ATTORNEY GENERAL

RESPONDENT



Coram: Sitali, Mulenga, Mulonda, Munalula and Musaluke JJC on 10th December,
2019 and 30th January, 2020

For the Petitioners: Mr. J. Chimankata of Messrs Simeza Sangwa and
Associates

For the Respondent: Mr. A. Mwansa, S.C. Solicitor General, from the
Attorney General's Chambers

JUDGMENT

Munalula, JC delivered the Judgment of the Court.

Cases:

1. Stephen Katuka and Others v Attorney General and Others (2016) 2 Z.R. 226
2. Abiud Kawangu v Elijah Muchima Appeal No. 8 of 2017
3. Zambia National Commercial Bank Plc v Martin Musonda and Others Selected
Judgment No. 24 of 2018
4. Male Mabirizi and Others v The Attorney General, Supreme Court of Uganda,
Constitutional Appeal No. 2, 3 and 4 of 2018

Legislation referred to:

The Constitution of the Republic of Zambia, Chapter 1 of the Laws of Zambia as
amended by the Constitution of Zambia (Amendment Act) No. 2 of 2016

Works Referred to:

Oxford Advanced Learners Dictionary, 8th Edition, Oxford University Press; 2010
Black's Law Dictionary, 8th Edition, Thomson West, 2004

We begin by noting with concern the manner in which the preliminary issues raised in this matter were prosecuted resulting in a substantial delay between the filing of the Petition and the hearing of the main matter on 10th December, 2019. In mitigation, we have expedited the delivery of the Judgment which follows.

The 1st and 2nd Petitioners commenced this matter jointly pursuant to Articles 1, 101, 103 and 105 of the Constitution of Zambia as amended by Act No. 2 of 2016 (henceforth "the Constitution"). The Petition was accompanied by an Affidavit Verifying Facts Relied Upon. The Petitioners alleged therein that Mr. Edgar Chagwa Lungu, the incumbent President of the Republic of Zambia at the time of the 2016 Presidential and General Elections, should not have continued to perform the functions of President during the period that an election petition challenging his election was pending before this Court as doing so was in breach of Article 104 (3) of the Constitution.

The brief history of the matter is that on 11th August, 2016, the Republic of Zambia held general elections that resulted in President Lungu (henceforth "the incumbent") being declared the President-Elect on 15th August, 2016 by the Chairperson of the Electoral Commission of Zambia. Thereupon, the Petitioners proceeded to move the Constitutional Court by filing a Presidential Election Petition on 19th August, 2016 under cause number 2016/CC/31 wherein they alleged that the incumbent was not validly elected and that certain provisions of the Constitution and other laws had not been complied with.

The said Presidential Election Petition under cause number 2016/CC/31 was dismissed on 5th September, 2016 and the incumbent was sworn into office on 13th September, 2016. It is undisputed that between 19th August, 2016 and 5th September, 2016, the incumbent and not the Speaker of the National Assembly (henceforth "the Speaker") performed the functions of the office of the President of the Republic of Zambia.

After the dismissal of the Petition, the Petitioners filed an amended Petition dated 5th October, 2016 alleging the following breaches of the Constitution, and we quote:

- i. By virtue of what is stated in paragraphs 1 to 15 of this Petition, that is by the First Respondent performing and continuing to perform the

executive functions of the Republic after the filing of the Presidential Election Petition on 19th August, 2016, the First Respondent breached and continued to breach the provisions of Article 104 of the Constitution of Zambia.

- ii. By virtue of what is stated above, that is by the Speaker of the national Assembly failing and continuing to fail to perform the executive functions of the Republic, after the filing of the Presidential Election Petition on 19th August, 2016 the Speaker breached and continued to breach the provisions of Article 104 of the Constitution of Zambia.

The following reliefs were sought and we quote again:

- a. An a (sic) declaration that the first Respondent breached the provisions of Article 104 (3) of the Constitution for performing and continuing to perform the functions of the office of President from 19th August to 13th September, 2016; and
- b. A declaration that the Speaker of the National Assembly breached the provisions of Article 104 (3) of the Constitution by failing to perform the functions of the office of President, during the period 19th August, to 13th September, 2016; and
- c. An Order that the Respondents herein bear the costs of and occasioned by this cause.

The Petitioners filed skeleton arguments in support of the Petition which they relied upon entirely. It was the Petitioners' contention that the provisions of Article 104 demand that the Speaker assumes the duties and functions of the President of the Republic pending final determination of the Presidential Election Petition. That Article 104 (3) is applicable where a petition is filed under Article 103. It was argued that, after the acknowledgement of the Presidential Election Petition filed pursuant to Article 103 of the Constitution, the incumbent should have fully complied

with Article 104 (3) by allowing the Speaker to perform the executive functions of the Republic as stipulated in Article 92.

The Petitioners submitted that their arguments were based on the purpose behind Articles 103, 104 and 105 of the Constitution as envisaged by the drafters of the Constitution. They then traced the provision to the Mung'omba Constitution Commission, whose rationale for requiring an outgoing President/president-elect to hand over power during the pendency of an election petition against them was explained at length. The Report of the Technical Committee Drafting the Zambian Constitution was also relied upon to show the intention of the Framers of the Constitution in drafting Article 104 (numbered Article 102 in their Report). The sum of their submissions was that it is inappropriate for a president in office whose election was the subject of a petition to continue performing the executive functions. Further, that the president-elect should not be sworn into office until the petition against him or her was determined. On the said premises, the Petitioners prayed that the incumbent be held to have breached Article 104(3) of the Constitution when he continued to perform the functions of the Republican Presidency during the period that the Presidential Election Petition was ongoing. They further sought a declaration that the Speaker's failure to act as President was also a breach of the same provision.

The Respondent's Answer did not dispute the facts as stated but contended that neither the incumbent nor the Speaker of the National Assembly contravened the Constitution. Further, that under cause number 2016/CC/31, provisions other than Article 103 were relied upon, namely, Articles 1, 2, 5, 9, 45, 46, 47, 48, 59, 50, 54, 60, 90, 91, 93, 101, 102, 104, 118 and 267 of the Constitution. The Respondent averred that the appropriate provision that the Petitioners should have commenced their petition number 2016/CC/31 under, was Article 101 and not Article 103 as the Petition was challenging the decision of the Returning Officer declaring the incumbent as validly elected. That the petitions envisaged under Articles 101 and 103 of the Constitution are distinct and mutually exclusive and Article 104(3) only comes into play when the petition is properly filed under Article 103(1) and not under Article 101(4). As such, there was no breach of the Constitution by the incumbent or the Speaker.

The Respondent relied on filed skeleton arguments in opposition, which were augmented orally. In the said oral submissions, the Solicitor General, Mr. Mwansa S.C contended that since the Presidential Election Petition under cause number 2016/CC/31 was based on various other provisions apart from Article 103 of the Constitution, a strict observance of Article 103 was not applicable. That since the Petition challenged the

declaration by the returning officer that the incumbent as validly elected, the Petitioners should have relied solely on Article 101. Mr. Mwansa S.C further submitted that the provisions of Articles 101, 102 and 103 are sequential with Article 102 dealing with the disqualification of a presidential candidate for a run-off. That Articles 101 and 103 invoked by the Petitioners are mutually exclusive and the petitions envisaged under the two respective provisions are different. Thus the petition under Article 101 (4) is made after an initial ballot as was the case in Petition number 2016/CC/31 whereas under Article 103 (1), the petition filed therein is not one filed after the initial ballot. Hence there being no mention of the words "initial ballot" in Article 103 shows that the reference to the same in Article 101 (4) must be given effect and must not be treated as mere surplusage. That the petition filed under Article 101 (4) does not fall within the domain of Article 104 which relates only to petitions that are filed under Article 103 (1) as provided by Article 104 (3).

The Respondent contended that there was no breach of the Constitutional provisions in question under the circumstances and that reference to Article 103 under cause number 2016/CC/31 was a deliberate move by the Petitioners to mislead the court as the Presidential Election Petition that was brought fell squarely within the provisions of Article 101.

That based on the foregoing, the substantive reliefs sought *in casu* are unjustified. That costs of the Respondent be borne by the Petitioners.

In his oral reply, Mr. Chimankata maintained that Article 103 was one of the Articles relied upon in cause number 2016/CC/31 amongst other Constitutional provisions. The Court was invited to take judicial notice of its record so as to establish that indeed Article 103 was collectively relied upon in the presidential election petition in issue. He argued that Article 101 does not oust the invocation of Article 103 and that Articles 101, 102 and 103 are independent of each other with each having specific subject matters that they deal with. That provisions of the Constitution must be interpreted collectively not sequentially as to interpret them sequentially is not legally tenable.

We have carefully perused the pleadings as well as the written and oral submissions made by both parties. We are grateful to counsel for the robust arguments put forth. The issue as we see it is whether the provisions of Article 104 (3) can be said to have been contravened by the Speaker and the incumbent when the incumbent performed the executive functions of the office of Republican President during the period that the Presidential Election Petition was ongoing.

We wish at the outset, to dispose of the point relating to the provisions relied upon to move the Court in the Presidential Election Petition cause number 2016/CC/31. A perusal of the Presidential Election Petition record number 2016/CC/31 shows that the Petition therein was founded on both Article 101 (4) and 103 (1) among many other Articles cited. We therefore agree with the Respondent that a strict observance of Article 103 is not applicable.

We now turn to the substance of the Petition *in casu* wherein the Petitioners allege that the Presidential Election Petition under cause number 2016/CC/31 filed immediately after the announcement of the presidential election results of 2016 pursuant to Article 103 *inter alia* of the Constitution necessitated the application of Article 104 (3) but that this was not done. The Respondent refutes any wrongdoing and instead contends that resort to Article 103 in Presidential Election Petition cause number 2016/CC/31 was incorrect and Article 101 which was also relied upon in the said cause was the appropriate provision for moving the Court. That being the case, the provisions of Article 104 (3) could not come into play. Given the disputed interpretation approach which arose at the hearing and the similarity between Article 101 (4) and Article 103 (1), we will begin by setting out the relevant interpretation principles.

The Respondent submitted that Articles 101 and 103 are distinct and mutually exclusive. That consideration of Article 102, shows that the provisions must be read sequentially. That whether provisions of legislation can be seen to be sequential or otherwise, will depend on the wording of the particular legislation as well as other factors surrounding the provisions. That most legislative provisions cannot be read in isolation from the other provisions in a piece of legislation and at times, other pieces of legislation may need to be incorporated in order to fully understand the given meaning.

In response the Petitioners argued that Articles 101, 102 and 103 must be interpreted collectively and not sequentially as the latter approach is not legally tenable. Further, the provisions are independent of each other. Counsel for the Petitioners also made detailed arguments pertaining to the history of similar provisions in past constitutional review commission reports with the aim of establishing the purpose behind the provisions.

In our considered view, this case is not an exception to what we have said before. We have stated in a number of decided cases including **Stephen Katuka and Others v Attorney General and Others**¹ and **Abiud Kawangu v Elijah Muchima**² that resort to other canons of interpretation will only be made in instances where it is established that there is some

ambiguity arising from the natural meaning of the words used in the legislation. The primary rule of interpretation being that words must be given their natural and ordinary meaning. There are other principles. We said in **Zambia National Commercial Bank Plc v Martin Musonda and Others**³ that when interpreting the Constitution, all the relevant provisions bearing on the subject for interpretation should be considered together as a whole in order to give effect to the objective of the Constitution. Further afield, Judge Stella Arach-Amoko stated at page 48 of her Judgment in the Ugandan case of **Male Mabirizi and Others v The Attorney General**⁴ that:

The entire Constitution has to be read together as an integrated whole with no particular provision destroying the other but rather each sustaining the other. No one provision of the Constitution is to be considered alone but that all the provisions bearing upon a particular subject are brought into view and to be interpreted so as effectuate the greater purpose of the instrument. *(sic)*

Even though this case is not binding on this Court and is of mere persuasive value, we are of the firm view that the principle it espouses is sound and we adopt it as our own. The principle answers the question raised by the parties' submissions as to whether Articles 101, 102, 103 and 104 ought to be read sequentially or collectively. We therefore see no need to dwell further on the argument that if one provision follows another,

such sequencing contradicts the principle that the provisions should be read as a whole. In short, reading the provisions as a whole may necessitate sequential ordering or later provisions may refer back to earlier provisions. This Court must first give the words in the relevant portions of Articles 101, 103 and 104 their ordinary and grammatical meaning and it is only where that interpretation leads to absurdity that we should look further. The provisions must also be read as a whole and in a manner that is sensible and in keeping with other related provisions of the Constitution.

Before considering Articles 101 and 103, it is essential that we lay the foundation. Article 104 (3) is the subject of this petition and it reads:

104. (1) The President-elect shall be sworn into office and assume office in accordance with Article 105.

(2) Subject to clauses (3) and (4), where the Returning Officer declares a presidential candidate as President-elect, the incumbent shall continue to perform the executive functions until the President elect assumes office, except the power to-

(a) make an appointment; or

(b) dissolve the National Assembly.

(3) Where an election petition is filed against the incumbent, under Article 103 (1), or an election is nullified, under Article 103(3) (b), the Speaker shall perform the executive functions, except the power to-

(a) make an appointment; or

(b) dissolve the National Assembly.

(4) Subject to Article 105 and except where the incumbent is the President-elect, the incumbent President shall, on the assumption of office by the President-elect, begin and complete the procedural and administrative handing over of the executive functions, to the President-elect, within

fourteen days from the day the President elect assumes office. (*emphasis added*)

We wish to agree with the position taken by both parties that Article 104 (3) is restrictive and can only be invoked where the issues in contention in a presidential election petition fall within the confines of the petition contemplated under Article 103 (1) or there is a nullification under Article 103 (3) (b). It is not a blanket provision. We say so because the sub-part of the Constitution under which Articles 101, 102, 103 and 104 fall is headed "Election of President" and includes Article 106 which we believe is key to an understanding of the impugned Articles. Article 106 (2) provides that the President shall hold office from the date the President-elect is sworn into office and ending on the date the next President-elect is sworn into office. Further Article 104 (2) provides that the incumbent shall continue to perform the executive functions other than to make an appointment or dissolve Parliament from the time that the President-elect is declared until the said President-elect assumes office. By limiting the powers of the incumbent president under Article 104 (2) and directing the Speaker under 104 (3) to perform the executive functions other than to make an appointment or to dissolve Parliament during the pendency of an

election petition under Articles 103 (1) or 103 (3) (b) there is a "disruption" of the sitting President's performance of the executive function.

Although Article 104 (3) is intended to prevent an abuse of office during a period of uncertainty, it also has a punitive aspect to it. It is therefore an extraordinary step which can only be invoked as provided by the Constitution. As such, whilst Article 104 generally governs the transition period before the President-elect assumes office, Article 104 (3) restricts itself to the situation covered by Articles 103 (1) and 103 (3) (b) where an election petition is filed against the incumbent in his or her capacity as President-elect. Specifically, Article 104 (3) provides that the Speaker's performance of the executive function arises when an election petition is filed against the incumbent under Article 103 (1) and where this Court nullifies the election of the President-elect and the Vice President-elect under Article 103 (3) (b). There is no cross reference to Article 101 and an election petition filed under it. In our considered view, this is because while there is justifiable reason to make such provision under Article 103, not so under Article 101 where the challenge to the declaration of the incumbent as President-elect does not stem from a run-off election caused by the failure of the incumbent to garner more than 50% of the valid votes cast nor from the nullification of the declaration that he or she is the

President-elect. The Petition under Article 101 is against a candidate who received more than 50% of the valid votes cast and was duly declared President-elect by the Electoral Officer.

To fully comprehend the *initial* petition, relevant portions Article 101 must be read as a whole. It states in part:

101. (1) A President shall be elected by registered voters in accordance with Article 47 (1) and this Article.

(2) The Returning Officer shall declare the presidential candidate who receives more than fifty percent of the valid votes cast during the election as President-elect.

(3) If at the initial ballot a presidential candidate does not receive more than fifty percent of the valid votes cast, a second ballot shall be held within thirty-seven days of the initial ballot, where the only candidates shall be the presidential candidates who obtained-

(a) the highest and second highest number of valid votes cast in the initial ballot; or

(b) an equal number of the valid votes cast in the initial ballot, being the highest votes amongst the presidential candidates that stood for election to the office of President.

(4) A person may within seven days of the declaration made under clause (2), petition the Constitutional Court to nullify the election of a presidential candidate who took part in the initial ballot

.....

(6) The Constitutional Court may, after hearing an election Petition-

(a) declare the election of the presidential candidate valid;

(b) nullify the election of the presidential candidate; or

(c) disqualify the presidential candidate from being a candidate in the second ballot.

.....

(8) The presidential candidate who obtains the majority of the valid votes cast in the second ballot shall be declared President elect. (*emphasis added*)

The petition under Article 101 stems from a decision made by the returning officer declaring a presidential election candidate as having been validly elected after the initial ballot, as evidenced by the reference to sub-Article (2) in sub-Article (4). The decision of the returning officer declaring an outright winner as well as the fact that this is an initial ballot distinguishes the presidential election petition under Article 101 (4) from the one envisaged under Article 103 (1). The Articles do in that sense build upon each other because a run off ballot or a post nullification ballot leads to a Petition under Article 103 (1).

Further, Article 101 (4), is distinct from Article 103 (1) because it confines a petition under Article 101(4) to the *initial ballot*. The word *initial* is defined at page 772 of the Oxford Advanced Learners Dictionary as "happening at the beginning of; first". Black's Law Dictionary at page 153 defines a *ballot* as "*a system of choosing officers by a recorded vote; a vote in a series of one or more votes that is not conclusive until one candidate attains the necessary majority.*" Thus that Article 101(4) contemplates the possibility of a second ballot being held if the petition under Article 101 (4) is successful and there is a nullification and /or a disqualification. A

second ballot is also contemplated by Article 101 (2) in the form of a run-off because the 50% plus threshold was not met at the first ballot to result in an outright winner. And with a subsequent ballot emerges the possibility of a subsequent petition which must be provided for.

We are further fortified in finding that the petition envisaged in Article 103 (1) is different from a petition under Article 101 (4) because of the placement of Article 102 which separates the two of them. Article 102 reads:

102. (1) If a presidential candidate—

- (a) resigns for a reason other than health;
- (b) becomes disqualified as specified in Article 100; or
- (c) is disqualified by a decision of the Constitutional Court in accordance with Article 101;

the presidential candidate shall not take part in the second ballot and the candidate who scored the third highest number of valid votes cast in the initial ballot shall be a presidential candidate in the second ballot, together with the remaining presidential candidate that had initially qualified for the second ballot.

(2) If a presidential candidate—

- (a) dies; or
- (b) resigns due to ill-health;

before the taking of a second ballot, the running mate to that presidential candidate in the initial ballot shall assume the place of that presidential candidate.

(3) The presidential candidate who assumed the place of the previous presidential candidate in accordance with clause (2) shall appoint a running mate.

(4) Where both presidential candidates—

- (a) resign;
- (b) become disqualified under Article 100;
- (c) become disqualified by a decision of the Constitutional Court under Article 101; or
- (d) die;

before the taking of the second ballot, fresh nominations shall be filed with the Electoral Commission, as prescribed. *(emphasis added)*

Article 102 provides guidance as to the standing of the candidates taking part in a run-off/ second ballot in the event that the initial ballot does not produce an outright winner with over 50% of the valid votes cast. That is where by virtue of Article 101 (3) a second ballot must be held within 37 days of the initial ballot. Article 102 directs among other things the manner in which the initial presidential candidates can lose their candidature and how other candidates may replace them in the run-off/ second ballot before the said ballot takes place. It follows that provision must be made for the potential petition stemming from the run-off ballot envisaged in Article 101 (3), after that said ballot is concluded. The same applies after the declaration of the winner of a second ballot held as a result of Article 101 (6) (b) and/ or (c). A person may file an election petition which falls under Article 103 (1). Thus Article 102 closes on the point of fresh nominations being filed in the event that both candidates who qualified for the run-off are unavailable for reasons that include disqualification by a decision of this Court under Article 101 whereas Article 103 opens with the filing of the Petition. Article 103 reads:

103(1) A person may, within seven days of the declaration of a President-elect, petition the Constitutional Court to nullify the election of the President-elect on the ground that—

(a) the person was not validly elected; or

(b) a provision of this Constitution or other law relating to presidential elections was not complied with.

(2) The Constitutional Court shall hear an election petition relating to the President-elect within fourteen days of the filing of the petition.

The Constitutional Court may, after hearing an election
Petition-

(a) declare the election of the President-elect valid; or

(b) nullify the election of the President-elect and Vice-
President-elect.

(4) A decision of the Constitutional Court under clause (3) is final.

(5) Where the election of the President-elect and Vice- President-elect is
nullified by the Constitutional Court, a presidential election shall be held
within thirty days from the date of the nullification. *(emphasis added)*

Article 103 contains multiple indications that it is providing for a subsequent petition stemming from a subsequent ballot. They include its location in the sequencing of the sub-part under which it falls; the nullification of the election of both the president-elect and the vice president-elect; and a shorter waiting period between the nullification by the Court and the holding of the presidential by-election. Thereafter, Article 104 (3) conveniently following Article 103 states quite clearly that where the Petition filed under Article 103 (1) is against the incumbent or the nullification of the election is under Article 103 (3) (b) the Speaker shall perform the executive functions as provided.

After all due consideration, we find that the Constitution does envisage two separate instances when the Constitutional Court can be moved challenging the presidential election results. However, resort to either provision is predicated upon the occurrence of specific events. Under Article 101 (4), the following events must have occurred in order for one to move the Court: Firstly, there must have been an initial election in accordance with Article 47 (1) and Article 101 (1) of the Constitution. Secondly, the Returning Officer must have declared that a presidential candidate has been validly elected with over 50% of the valid votes cast. Thirdly, the said presidential candidate must have taken part in the said initial ballot. Under Article 103 (1), the initial ballot must have failed to yield an outright winner thus necessitating a run-off as provided in Article 101 (2). Alternatively the second ballot could arise from a nullification and/or disqualification rendered by this Court under Article 101 (6). Secondly, the second ballot must have taken place and a President-elect declared as provided in Article 101 (8) and 103 (1).

As shown above, we see no provision for the Speaker to perform the functions of the Republican Presidency after the initial ballot in the event that there is a presidential election petition under Article 101 (4) of the Constitution. We thus agree with the Respondent that the two provisions,

Article 101 (4) and 103 (1), in so far as they relate to presidential election petitions, cannot be used interchangeably according to one's preference for a particular outcome as each provision can only be invoked after the occurrence of certain events which we have already stated. To say otherwise would lead to an absurd result where regardless of the circumstances litigants could move this Court under either one of the provisions.

After taking judicial notice of cause number 2016/CC/31 we find that the petition that ought to have been filed after the ballot in 2016 was that contemplated under Article 101 (4) challenging the decision that was made under sub-Article (2). This is so because only one ballot, the initial ballot, was conducted. As there was no second ballot to support resort to Article 103 (1), reference to it was misplaced. The provisions of Article 104 (3) did not arise and both the incumbent and/or the Speaker cannot be held to have been in contravention of any Constitutional provisions when the incumbent continued to perform the executive functions of the office of Republican President during the impugned period. The Petition stands dismissed.

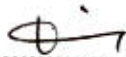
Both parties sought an order for costs. We have considered the issue. Although costs generally follow the event, there is no award to the

Respondent in this case because of the importance of the constitutional question raised. Each party shall bear their own costs.



A.M. Sitali

CONSTITUTIONAL COURT JUDGE



M.S. Mulenga

CONSTITUTIONAL COURT JUDGE



P. Mulonda

CONSTITUTIONAL COURT JUDGE



Prof M M. Munalula

CONSTITUTIONAL COURT JUDGE



M. M. Musaluke

CONSTITUTIONAL COURT JUDGE