

IN THE CONSTITUTIONAL COURT

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)



IN THE MATTER OF:

**ARTICLE 2 OF THE
CONSTITUTION OF ZAMBIA**

IN THE MATTER OF:

**ARTICLE 1 (5), ARTICLE 128(1)
(a) OF THE CONSTITUTION OF
ZAMBIA**

IN THE MATTER OF:

**THE INTERPRETATION OF
ARTICLE 52 (6) OF THE
CONSTITUTION OF ZAMBIA**

IN THE MATTER OF:

**ARTICLES 56, 57, 72(1) AND (2),
81 (1) AND (3), 105 (8), 106 (1),
(4) AND (5), 153 (6) AND 157 OF
THE CONSTITUTION OF ZAMBIA**

BETWEEN:

MICHAEL MBUYU MUTWENA

APPLICANT

AND

ATTORNEY GENERAL

RESPONDENT

CORAM: *Chibomba, PC, Sitali, Mulenga, Chisunka and Mulongoti,
JJC, On 4th August, 2021 and 19th January, 2022.*

APPEARANCES:

For the Applicant: ***In Person***

For the Respondent: ***Mr. Abraham Mwansa, S.C.– Solicitor
General;***

***Mrs. K.N. Mundia – Principal State
Advocate;***

*Mrs. K. Mumba – Assistant Senior
State Advocate;*

Ms. N. Nkanzi – State Advocate;

*Ms. V. Chalansi – State Advocate;
and*

Mrs. P. Kalisilira – State Advocate

J U D G M E N T

Chisunka, JC, delivered the Judgment of the Court

Legislation referred to:

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

Cases referred to:

1. *Steven Katuka, Law Association of Zambia v Attorney General, Ngosa Simbyakula and 63 Others CCZ Selected Judgment No. 29 of 2017*
2. *Daniel Pule and Others v Attorney General and Others 2017/CCZ/004*
3. *Letang v Cooper [1964] 2 All ER 929*
4. *Central Electricity Board v Halifax Corporation (1962) 3 ALL ER 715*
5. *William David Carlisle Wise v E.F. Hervey Limited (1985) ZR 179*
6. *Lloyd Chembo v Attorney General Selected Judgment No. 15 of 2018*
7. *Attorney General v Law Association of Zambia SCZ No. 3 of 2008*
8. *Zambia Democratic Congress v Attorney General SCZ Judgment No. 37 of 1999*
9. *Gouriet v Union of Post Office Workers and Others 3 All ER 70*

Introduction

1. The delay in delivering this Judgment is regretted but was due to unforeseen circumstances.
2. In this suit, which was commenced by Originating Summons dated 13th July, 2021, the Applicant submits eleven questions for this Court's determination as follows:

2.1. Whether according to Article 266 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia, as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth "the Constitution"):

a) there are two categories of presidential elections i.e. one that is held under a general election, pursuant to Article 56(1), and one that is held as a stand-alone presidential election, pursuant to Article 106(5) or 105(8);

b) there are two categories of parliamentary elections i.e. one that is held under a general election, pursuant to Article 56(1), and one that is held as parliamentary by-election, pursuant to Article 57(1); and

c) there are two categories of local government elections i.e. one that is held under a general election, pursuant to Article 56(1), and one that is held as a local government by-election, pursuant to Article 57(1) of the Constitution.

- 2.2. Whether there is a difference between a seat or office of a Member of Parliament, Mayor, Council Chairperson or Councillor that:
- a) is vacated as a result of dissolution of Parliament and subsequent expiration of the term of office, pursuant to Articles 72(1), 81(1) and (3), and 157(1); and
 - b) becomes vacant pursuant to Articles 72(2) and 157(2)?
- 2.3. Whether the obligation and power of the Electoral Commission of Zambia to call for by-elections, relating to the office of a Member of Parliament, Mayor, Council Chairperson or Councillor under Article 57, only becomes operative when the Speaker, Town Clerk or Council Secretary writes to the Electoral Commission of Zambia, pursuant to Article 72(8) and 158(1) respectively, informing them of a vacancy of such seat or office?
- 2.4. Whether a seat or office of Member of Parliament, Mayor, Council Chairperson or Councillor that is vacated as a result of the dissolution of Parliament and expiration of the term of office, pursuant to Articles 72(1), 81(1) and (3) and 157(1) can only be filled by way of a parliamentary or local government election held during a general election, and that it is not constitutionally tenable to hold a by-election for such a seat or office?

- 2.5. Whether a term of office for all Members of Parliament, Mayors, Council Chairpersons and Councillors, is according to Article 81(1) and 153(6) of the Constitution, supposed to collectively commence on the date that the Members of Parliament and Councillors are sworn into office after a general election, and further that there is no provision in the Constitution providing for a term of office for a Member of Parliament, Mayor, Council Chairperson and Councillor to commence by way of a by-election?
- 2.6. Whether the word 'election' that was used in Article 52(6) is with regards to elections under the category of a general election, on one hand, or the second category which comprises of a stand-alone presidential election, parliamentary by-elections and local government by elections, on the other hand or possibly both?
- 2.7. Whether a stand-alone presidential election, pursuant to Articles 106(5) and 105(8), can only be held if there is a vacancy in the office of President, and it is not constitutionally tenable to hold such stand-alone presidential election if there is no vacancy?
- 2.8. Whether parliamentary and local government by elections, pursuant to Article 57(1), can only be held if there is a vacancy in the office of a Member of

Parliament, Mayor, Council Chairperson or Councillor, and it is not constitutionally tenable to hold such by-election if there is no vacancy?

- 2.9. Whether the requirement to cancel elections as referred to in Article 52(6) and as it relates to presidential elections, is with respect to the stand-alone presidential election and not a presidential election held under a general election or any election which is supposed to be held under such general election is not amenable to cancellation or postponement by the Electoral Commission of Zambia?
- 2.10. Whether the requirement to cancel elections as referred to in Article 52(6), and as it relates to parliamentary and local government elections is with respect to the by elections and not the parliamentary and local government elections to be held under a general election or any election which is supposed to be held under such general election is not amenable to cancellation or postponement by the Electoral Commission of Zambia?
- 2.11. Whether pursuant to Article 52(6), the Electoral Commission of Zambia, with respect to an election under the general elections, only has the obligation and power to cancel nominations where there is death, resignation or disqualification of a candidate after close of nomination, and that they are further

constitutionally obligated to hold fresh nominations and maintain the date of such general elections, as set out in the Constitution for all elections that constitute a general election?

3. In the event that the Court determines the questions presented in his favour, the Applicant seeks and prays for the following relief:

- 3.1. A declaration that a vacated seat or office of a Member of Parliament, Mayor, Council Chairperson or Councillor occasioned by the expiration of the term of office and dissolution of Parliament or Council, pursuant to Articles 72(1), 81(1) and (3), and 157(1), is fundamentally different from a vacant seat, as defined in Article 72(2) and Article 157(2).
- 3.2. A declaration that a stand-alone presidential election, as provided for in Articles 106(5) and 105(8) can only be held if there is a vacancy in the office of the President.
- 3.3. A declaration that a by-election pursuant to Article 57(1) can only be held if there is a vacancy in the office of a Member of Parliament, Mayor, Council Chairperson or Councillor.
- 3.4. A declaration that where the office of a Member of Parliament, Mayor, Council Chairperson or Councillor is vacated as a result of the dissolution of Parliament or Council, and subsequent expiration

of the term of office pursuant to Articles 72(1), 81(1) and (3), and 157(1), such a seat or office can only be filled by way of voting for such Member of Parliament, Mayor, Council Chairperson or Councillor in a general election, and it is not constitutionally tenable to hold a by-election for such a seat.

3.5. A declaration that pursuant to Article 52(6) of the Constitution, the Electoral Commission of Zambia only has powers to cancel or postpone a stand-alone presidential election as provided for in Article 106(5) and 105(8), or parliamentary by-elections and local government by-elections as provided for in Article 57, and that all elections held under a general election are not amenable to cancellation or postponement by the Electoral Commission of Zambia.

3.6. A declaration that the Electoral Commission of Zambia, with respect to general elections, only has the obligation and power to cancel nominations where there is death, resignation or disqualification of a candidate after close of nomination, and that they are further constitutionally obligated to hold fresh nominations and maintain the date of such general election, as set out in the Constitution, for

all elections that are supposed to be held under a general election.

4. The Originating Summons is supported by an affidavit deposed to by the Applicant. Written Skeleton Arguments were also filed along with the Originating Summons canvassing arguments on the eleven questions posed for determination.

Basis for the Applicant's Case

5. The Applicant's basis for instituting this suit is contained in the affidavit in support and particularly paragraphs 5 to 9 wherein the Applicant states:
 - 5.1. That there has been an element of uncertainty as to whether or not the Electoral Commission of Zambia is obligated and actually has power to cancel any election including a general election, or whether such obligation and power only applies to by-elections.
 - 5.2. That, in addition, there has been some multidimensional speculation in the public domain to that effect.
 - 5.3. That a proper reading of the Constitution suggests that the Electoral Commission of Zambia only has powers to cancel or postpone a by-election and that they were not bestowed with powers, by the Constitution, to cancel or postpone a general election, or any of the elections to be held under the umbrella of a general election.

- 5.4. That if the foregoing uncertainty is not resolved, there is a high propensity that the Constitution will be wrongly interpreted and that will inevitably culminate into an illegal and unconstitutional decision, on the part of the Electoral Commission of Zambia.
- 5.5. That as a citizen of this Country, the Applicant has a constitutional duty and right to protect, preserve and defend the Constitution of the Republic of Zambia and therefore, he seeks the indulgence of this Court by way of interpretation of the Constitutional provisions that relate to the manner and circumstances under which an election may be cancelled.

The Applicant's Arguments

6. In the written skeleton arguments, the Applicant places emphasis on the need to read the Constitution in its totality in order to get the correct understanding of the nature, effect and scope of Article 52(6).
7. According to the Applicant, the Constitution of Zambia (Amendment) Act No. 2 of 2016 was assented to on 5th January, 2016, and became the Constitution of Zambia ("the Constitution"). Part of the rationale for the amendment was to enhance democracy and good governance and in this respect, the Applicant was granted the constitutional right and duty to defend, preserve and protect the Constitution in his capacity as a citizen, pursuant to Article 2(a) of the Constitution.

8. The Applicant observes that Article 52(6) was one of the new provisions introduced in the Constitution. That in the said Article 52(6) the word 'election' was used, specifically where it provides that "...the Electoral Commission of Zambia shall cancel the election..." and that it is imperative to ascertain which elections the framers of the Constitution were referring to, because if the Constitution is read in its totality, it becomes clear that there is more than one type or category of election that can be held.

9. Article 52(6) of the Constitution provides that:

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

10. The Applicant submits that this provision bestows powers on the Electoral Commission of Zambia to do two things:

- a) To cancel the nominations only relating to such elections and require the filing of fresh nominations – where there is death, resignation or disqualification of a candidate;
- b) To cancel elections, cancel nominations, require the filing of fresh nominations and set a new date for elections to be held within thirty days of the filing of fresh nominations – where there is death, resignation or disqualification of a candidate.

11. That predicated on the above, it is imperative to establish which 'election' the framers of the Constitution had in mind, because there is more than one type or category of elections. Further, Article 266 defines the word 'election' as:

"An election to the office of President, National Assembly or a council"

12. The Applicant further submits that according to the Constitution, there are only two circumstances under which each of the above mentioned elections may be held, which can also be referred to as categories of elections, and they are broken down as follows:
- a) with regard to the two categories of presidential elections; one is held under a general election pursuant to Article 56(1), and as defined in Article 266, and the other one is held as a stand-alone presidential election, pursuant to Article 106(5) or Article 105(8);
 - b) with regard to the two categories of parliamentary elections; one is held under a general election pursuant to Article 56(1), and the other one is held as a parliamentary by-election, pursuant to Article 57(1), and as defined in Article 266; and
 - c) further with regard to the two categories of local government elections, one is held under a general election, pursuant to Article 56(1), and the other one is held as a local government by-election, pursuant to Article 57(1) and defined in Article 266 of the Constitution.

13. The Applicant went to great lengths to try and demonstrate that there are two categories of elections, on the one hand, a general election, and on the other, elections that are not part of a general election, such as stand-alone presidential elections, parliamentary and local government by-elections. In summary the Applicant's arguments were to the effect that:

13.1. The phrase "shall cancel the election" that was used in Article 52(6) of the Constitution, if properly interpreted, means a stand-alone presidential election, parliamentary by-elections or local government by election, and that it does not apply to a general election for various reasons, among them, the fact that if a presidential election is not held under a general election it becomes a stand-alone election, and that particular election can only be held if there is a vacancy in the office of the president.

13.2. Similarly, if an election with respect to the office of a Member of Parliament, Mayor, Council Chairperson or Councillor is not held under a general election, and it is instead held on a separate day, it then becomes a by-election, and this can only be held where there is a vacancy in the office of a Member of Parliament, Mayor, Council Chairperson or Councillor.

13.3. If a presidential election that is supposed to be held under a general election is cancelled, it means it will not be possible to hold a stand-alone presidential election

because there is no vacancy in the office of the President as required by the Constitution.

- 13.4. Similarly, if a parliamentary election that was supposed to be held under a general election is cancelled, it will not be possible to hold a by-election with respect to that office because that seat or office was vacated at the dissolution of Parliament and the term of office expired, and that it is not vacant as required by the law. Further, that the requirement that a seat or office of a Member of Parliament must be vacant in order for the Electoral Commission of Zambia to hold a parliamentary by-election, also applies to local government by-elections.
14. The Applicant submits that if it were possible to cancel or postpone a presidential election that was supposed be held under a general election, there would be far reaching consequences that would flow out of that, in that, the two remaining elections, parliamentary and local government, cannot constitute a general election and that the stand-alone presidential election held on a separate day will equally not constitute a general election, and in the final analysis it would entail that there would be no general election held, and that would be a violation of Article 56(1), which mandatorily provides that there shall be a general election every five years.
15. The Applicant further submits that the interpretation of Article 52(6) to bring about harmony in the Constitution should be favoured over any other provision that might

culminate into one provision defeating the purpose of another, and inevitably, that entails that, the interpretation to the effect that a general election is not amenable to cancellation or postponement by the Electoral Commission of Zambia, is the most ideal and accurate interpretation thereof, and further that the Electoral Commission of Zambia only has the powers and obligations to cancel nominations, relating to general elections and require the filing of fresh nominations, but the general elections date, as set in the Constitution must be maintained.

16. The Applicant, in concluding the written submissions observes that it was not the intention of the framers of the Constitution that any election that is supposed to be held under a general election should be amenable to cancellation or postponement, pursuant to Article 52(6).
17. At the hearing, the Applicant informed the Court that this matter invited the Court to offer guidance with regards to the proper interpretation of Article 52(6). The Applicant stated that the central issue was the extent of the applicability of Article 52(6) and whether or not it extends to a general election.
18. The Applicant submitted that a general election is an important constitutional and national event and thus anything that borders on its cancellation, variation or postponement must be set out in express terms. It was his contention that since a constitutional provision cannot be

interpreted in isolation, it becomes imperative to consider Articles 56, 57 and 266 of the Constitution amongst others.

19. The Applicant further contended that a presidential election can only be held under a general election or as a stand alone presidential election pursuant to Articles 105(8) and 106(5). It was also contended that elections are not held in a vacuum. Rather, every election must be held pursuant to a specific provision and where there is no specific provision then it would be untenable to hold such an election.
20. According to the Applicant, a strict and proper reading of Article 52(6) reveals that a general election is beyond the reach of the Electoral Commission of Zambia as far as cancellation of elections is concerned. The Applicant's view is that the Electoral Commission of Zambia is only granted power to cancel or postpone a by-election pursuant to Article 57 or a stand-alone presidential election held pursuant to Article 105(8) or 106(5).
21. The Applicant argued that Article 52(6) could not be invoked to cancel any election held under a general election including the general election itself. The Applicant further argued that the words *election* and *general election* could not be used interchangeably. The Applicant submitted that Article 52(6) confers power on the Electoral Commission of Zambia to cancel elections and nominations, if the conditions precedent set out thereunder are met, namely, death, resignation or disqualification.

22. The Applicant argued that the interpretation must be done in line with the principle of proportionality in the sense that the public interest should supersede the interest of a single political party. In closing his oral arguments, the Applicant submitted that Article 52(6) does not give power to the Electoral Commission of Zambia to cancel a general election; or any election to be held under a general election; that Article 52(6) only applies to by-elections and stand-alone presidential elections.
23. When questioned by the Court as to whether the Applicant was inviting the Court to carry out an academic exercise and give an opinion on purely speculative circumstances, the Applicant's response was that there may be a decision made by the Electoral Commission of Zambia pursuant to Article 52(6) and thus, this Court ought to be proactive and give guidance in advance so that any future decision made pursuant to Article 52(6) may be made in conformity with the constitutional dictates.

The Respondent's Case

24. The Respondent's position is contained in the affidavit in opposition to the originating summons filed on 23rd July, 2021. The affidavit in opposition was sworn by Abraham Mwansa, the then Solicitor General of the Republic of Zambia. The affidavit in opposition discloses that:
- 24.1. The Electoral Commission of Zambia is mandated, pursuant to Article 52(6), to cancel an election to the office of President, National Assembly or a Council

following the death, resignation or disqualification of a candidate after the close of nominations and before the election date.

- 24.2. An election to the office of President, Member of Parliament and Councillor scheduled for and in a general election is amenable to cancellation by the Electoral Commission of Zambia where a presidential, National Assembly or local government election candidate dies, resigns or is disqualified after the close of nominations. Nominations for an election cancelled as such can take place within thirty days of cancellation, but before the scheduled elections.

The Respondent's Arguments

25. The Respondent filed written skeleton arguments on 23rd July, 2021. Relying on the authority of **Steven Katuka, Law Association of Zambia v Attorney General, Ngosa Simbyakula and 63 Others¹**, the Respondent submitted that words or provisions in the Constitution must not be read in isolation. The Constitution must be read as a whole in order to give effect to the objective of the Constitution. Further, that it is only when the ordinary meaning of the words leads to an absurdity that the purposive approach should be resorted to. The Respondent also relied on the case of **Daniel Pule and Others v Attorney General and Others²** wherein this Court stated as follows:

“...the purposive rule of interpretation is resorted to where the literal rule of interpretation results in absurdity or

where it is not possible to decipher what the Legislature intended from the words used in the statute itself.”

26. On the strength of the forgoing authorities, the Respondent submitted that the starting point in interpreting Article 52(6) of the Constitution is to consider its plain language in its entirety and adopting an interpretation that promotes the general legislative purpose. The Respondent argued that Article 52(6) gives the Electoral Commission of Zambia the authority to call for fresh nominations as well as to cancel ‘elections’ in the event of the death of a candidate after the nomination process or where a candidate resigns or gets disqualified in accordance with Articles 70, 100 or 153 of the Constitution. It was therefore, important to understand the meaning of ‘election’, ‘general election’ and ‘candidate’ as envisaged in Article 266 of the Constitution.
27. The Respondent submitted that a literal interpretation of Article 52(6) as read with Article 266 of the Constitution means that the Electoral Commission of Zambia can cancel the election to the office of President, Member of Parliament or a Councilor following the death, resignation or disqualification of a candidate after the close of nominations but before the election date. It was argued that the election referred to in Article 52(6) refers to any type of election for the office of President, Member of Parliament or a Council and is not limited to stand-alone Presidential elections, parliamentary and local government by-elections as argued by the Applicant. The Applicant submitted that the Electoral Commission of Zambia can also postpone or cancel elections

to the office of President, Member of Parliament or a Council scheduled in a general election and thereafter request for fresh nominations.

28. It was further argued by the Respondent that the Applicant's argument that the election referred to in Article 52(6) refers to stand alone presidential elections, parliamentary and local government by-elections and that the Electoral Commission of Zambia only has the power to call for fresh nominations but not cancellation of a general election is a narrow interpretation and does not reflect Parliament's intention. The Respondent also argued that the Applicant's narrow interpretation of Article 52(6) would mean that in the event that a presidential candidate died, resigned or was disqualified two to three days before the general election, the Electoral Commission of Zambia would not have sufficient time to reprint ballot papers to reflect the changes resulting from the death, resignation or disqualification of a candidate, and similarly, the affected political party would not have an opportunity to nominate an eligible candidate to replace the candidate who either died resigned or was disqualified.
29. In closing the written arguments, the Respondent submitted that the Electoral Commission of Zambia only has the power to cancel general elections where a presidential candidate dies, resigns or is disqualified after the close of nominations but before the election date. That where a candidate for a parliamentary or local government seat dies, resigns or is

disqualified after the close of nominations but before the general election, the general elections need not be cancelled as only the election for the affected constituency or council can be postponed.

30. During the hearing, and arising out of the questions put to the Petitioner by the Court as highlighted in paragraph 23 of this Judgment, the Respondent submitted that the originating process does not disclose a cause of action worth determining as there are no facts to support the originating process. He however, proceeded to argue that a 'candidate' is a presidential candidate, a parliamentary candidate and a local government candidate and according to Article 52(6) if any one of these candidates died, resigned or was disqualified then there would be no election, whether presidential, parliamentary or local government.
31. In reference to the question posed by the Applicant, that is, whether the Electoral Commission of Zambia can cancel an election, the Respondent submitted that a general election occurs when a presidential election, parliamentary election and local government elections are held on the same day and at the same time. In the event that a presidential candidate died, the only election that will not be held is the presidential election and therefore, those elections cannot be called a general election due to the absence of the presidential election.
32. In response to the Applicant's contention that a running mate ought to take over the reigns as presidential candidate where

the initial candidate dies, resigns or is disqualified, the Respondent submitted that there is no provision in the Constitution that permits a running mate to take over the nomination of a presidential candidate save for Article 105 which permits a running mate to take over if the president elect is unable to assume office. In concluding the Respondent's submissions, this Court was urged to adopt a literal interpretation of Article 52(6) of the Constitution.

33. The learned Solicitor General prayed that on the basis of his submissions, the Originating Summons should be dismissed.

The Applicant's Arguments in Reply

34. In reply to the Respondent's arguments, the Applicant, submitted that Article 52(6) empowers the Electoral Commission to cancel an "election" and not a "general election", and the two words aforesaid have different definitions under Article 266 of the Constitution meaning that they are two different things. Thus, attempting to qualify a general election as being amenable to Article 52(6) may only be done by way of a purposive interpretation by this Court and not a literal interpretation.

Evaluation and Decision

35. We have considered the originating summons, the affidavit in support, the affidavit in opposition, the affidavit in reply and the skeleton arguments filed by both parties together with the oral submissions and the authorities cited by the parties.

36. The Applicant has posed eleven questions for our determination. The Applicant also seeks declaratory relief. In our view the real question for determination is whether the issues formulated ought to be resolved in favour of the Applicant. The contention of the Respondent is that it should not and in any case the matter does not disclose a cause of action as it is not supported by facts and ought to be dismissed.
37. To answer this question and given the nature of the application, we deem it imperative to firstly inquire into whether or not the Applicant has disclosed a cause of action and the basis for commencing this action. We have taken this approach because determining whether or not the Applicant has disclosed a cause of action will invariably inform whether or not we ought to entertain the eleven questions that the Applicant seeks to be determined.

Whether the Originating Summons discloses a cause of action

38. In the English Court of Appeal case of ***Letang v Cooper***³ , Lord Diplock defined a cause of action as follows:

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.”

39. Further, in the case of ***Central Electricity Board v Halifax Corporation***⁴, the House of Lords considered the definition of a cause of action wherein Lord Reid opined that:

“....if the plaintiff alleges facts which, if not traversed, would prima facie enable him to recover, then he makes out a cause of action.”

40. In this jurisdiction Lord Diplock's and Lord Reid's definition of a cause of action was adopted by the Supreme Court in the cases of ***William David Carlisle Wise v E.F. Hervey Limited***⁵.
41. In view of the foregoing authorities, it is apparent that a cause of action encompasses facts or a combination of facts that a person must establish in order to demonstrate that he/she has not only a right to sue but also that a court has the requisite jurisdiction to hear the matter and grant relief sought.
42. A cause of action, therefore, arises from some act and where a legal relationship exists between the parties. It therefore, lies on an applicant to adduce the relevant facts which establish a cause of action. Typically, therefore a cause of action is made out if:
 - 42.1. there exists facts which would enable a person to obtain a court remedy against another person;
 - 42.2. the court has the requisite jurisdiction to entertain the matter; and
 - 42.3. the applicant is before a proper forum and has standing to sue.
43. In the present case, we are satisfied that the Applicant has, *prima facie*, a right to approach us for purposes of

interpreting the Constitution pursuant to Articles 2(a) and 128(1) (a) of the Constitution. We need therefore, to probe whether the Applicant has identified the facts necessary to establish a cause of action and whether we are clothed with the requisite jurisdiction to entertain this matter.

44. Despite the eleven questions posed by the Applicant, the essence of this matter rests on the power conferred on the Electoral Commission of Zambia to cancel an election pursuant to Article 52(6) of the Constitution.
45. The provision of the Constitution which the Applicant seeks interpretation of, namely Article 52(6), entails that the Electoral Commission of Zambia has powers to cancel an election where a candidate dies, resigns or becomes disqualified in accordance with the relevant provisions of the Constitution. Thus, for Article 52(6) to become operative, there must be a subsisting factual situation that occurs in terms of a death, resignation or disqualification of a candidate and subsequently, the Electoral Commission of Zambia must cancel the election on that basis.
46. The Applicant did not adduce the relevant facts on which he could base this matter and as such, there is no factual situation upon which the Applicant based this case. In any case, there is also no evidence of an intention on the part of the Electoral Commission of Zambia or the Respondent to cancel an election. We therefore, see no good reason for us to jump the gun and determine a matter in the absence of relevant facts and a cause of action as that would be

premature. Perhaps most importantly, there is also no evidence of a decision to cancel an election pursuant to Article 52(6) of the Constitution.

47. In the event that the power in Article 52(6) was exercised by the Electoral Commission of Zambia, the exercise of that power, when impugned, would provide the relevant factual basis sufficient to form a recognised cause of action and thus, potentially raise a reasonable constitutional question ripe for hearing and determination by this Court.
48. To put it another way, until the Electoral Commission of Zambia makes a decision to cancel an election pursuant to Article 52(6), then no factual situation would exist to invoke an interpretation of the said Article. The act of cancelling an election under Article 52(6) is what would provide the relevant factual foundation for this Court's intervention by way of interpretation of Article 52(6) of the Constitution.
49. As we stated in the case of **Lloyd Chembo v Attorney General**⁶, this Court does not exercise its jurisdiction in a vacuum. A person approaching this Court must assert a clear factual background that demonstrates a recognised cause of action. It is therefore, based upon the relevant factual background that a person may seek to invoke the jurisdiction of this Court pursuant to Article 128 of the Constitution, failing which would invariably result in this Court engaging in an academic exercise.

50. It is evident from paragraphs 5 and 6 of the Applicant's affidavit in support of originating summons, that the Applicant based this whole matter on speculation and uncertainty in the public domain and therefore, he wishes to obtain guidance on behalf of the public.
51. If we engage in determining the Applicant's eleven questions, which questions are moot and academic in nature, we would effectively be undertaking an academic exercise. This notwithstanding, the Applicant urged us to be proactive and interpret Article 52(6) before any factual circumstances or cause of action arises. The question that arises therefore, is whether this Court's jurisdiction extends to resolving matters that are academic?
52. The jurisdiction of this Court is outlined in Article 128 of the Constitution and the said Article does not confer jurisdiction on this Court to resolve matters that are purely academic in nature or are moot. In the case of **Attorney General v Law Association of Zambia**⁷, however, the Supreme Court stated that:

"It is a notorious fact that the elections are since gone. Even if the Petitioner was to be successful on the cross-appeal, it is quite clear that the order would serve no purpose apart from being unnecessary academic exercise. This Court frowns upon making academic orders."

"We find it undesirable to make an academic pronouncement on an interlocutory relief overtaken by events..... It would appear to us that the whole petition may, in the end, be rendered an academic exercise."

53. Similarly in the case of **Zambia Democratic Congress v Attorney General SCZ⁸**, the Supreme Court stated as follows:

“This appeal in our view is certainly academic. As a matter of practice, this court disapproves being engaged in academic exercises.”

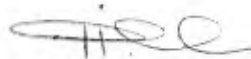
54. This Court shares the Supreme Court’s views and therefore, we equally disapprove of engaging in academic exercises, because they are hypothetical, serve no practical purpose or significance and invariably, amount to a waste of judicial resources. It is important to note that in the case of **Lloyd Chembo** we disapproved of entertaining matters that tend to waste judicial resources. It is our considered view that since this matter only raises abstract questions that do not arise from any existing facts, we find that the Applicant’s eleven questions are not justiciable and are not ripe for determination by this Court.
55. We, therefore, take the considered view that since there are no facts in this case that establish a cause of action, we shall not engage in an academic exercise. Ours is to resolve real and actual constitutional issues based on fact and affecting real persons. We adopt the view of Lord Diplock in the case of **Gouriet v Union of Post Office Workers and Others⁹**, when he enunciated that:

“...the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the

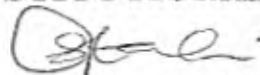
parties represented in the litigation before it and not those of anyone else."

Conclusion

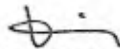
56. For the foregoing reasons this Court will not deploy its interpretative jurisdiction to engage or entertain academic arguments nor to providing relief in the form of advisory opinions. Consequently, we decline to entertain this case because it is premature, speculative, academic in nature and not ripe for judicial determination.
57. Taking all of the above into account, we are of the settled view that this action lacks merit, and is accordingly, dismissed.
58. Each party to bear their own costs.



.....
H. CHIBOMBA
PRESIDENT
CONSTITUTIONAL COURT




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



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



.....
M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE



.....
J. Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE