

(1169)

IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL REGISTRY
AT LUSAKA

2016/CC/0013

SELECTED JUDGMENT NO. 34 OF 2017

(Constitutional Jurisdiction)

IN THE MATTER OF:

PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS

IN THE MATTER OF:

ARTICLE 128 (1) (b) OF THE
CONSTITUTION OF ZAMBIA

IN THE MATTER OF:

ARTICLE 18, 20, 23, 28, 43, 45, 46 OF
THE CONSTITUTION OF ZAMBIA
(AMENDMENT ACT)

IN THE MATTER OF:

SECTION 8, 9 (e) AND 47 OF THE
ELECTORAL PROCESS ACT NO. 35 OF
2016

IN THE MATTER OF:

THE RIGHT TO VOTE FOR PRE-TRIAL
REMANDEES

BETWEEN:

GODFREY MALEMBEKA (Suing as Executive Director
of PRISONS CARE AND COUNSELLING ASSOCIATION

PETITIONER

AND

THE ATTORNEY-GENERAL

1ST RESPONDENT

THE ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT



*Coram: Sitali, Mulenga and Munalula, JJC
on 29th September, 2016 and on 14th August, 2017*

For the Petitioner:

Mr. Paul Katupisha of Milner and Paul
Legal Practitioners

For the 1st Respondent:

Miss Murah Kampamba, State Advocate

For the 2nd Respondent:

Mr. Erick Kamwi, Legal Counsel

J U D G M E N T

Sitali, JC delivered the Judgment of the Court

Cases cited:

1. Haig v. Canada 105 DLR (4th) 577 (SCC) 613
2. Minister of Justice v. Hofmeyr (1993) SA 13
3. Kuta v Ministry of Justice, Legal and Parliamentary Affairs, Judgment No. SC 17/91
4. Woods v Minister of Justice, Legal and Parliamentary Affairs, (1995) SA 703 (ZSC)
5. Sauve v Canada (Attorney-General) [1993] 2 SCR 438, 1993 CanLII 92 (SCC)
6. Arnold Keith August and Veronica Peal Sibongile Mabuto v The Electoral Commission, the Chairperson of Electoral Commission, the Ministry of Home Affairs and the Ministry of Correctional Services (1999) SA CCT 8/99
7. Matilda Mutale v Emmanuel Munaile SCZ Judgment No. 14 of 2007
8. General Nursing Council of Zambia v Inutu Milambo Mbangweta (2008) ZR 108
9. Katongo v. Attorney General (1978) ZR 148
10. Communications Authority v. Vodacom Zambia Limited SCZ Judgment No. 21 of 2009

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Articles 1, 45 and Article 46
2. The Electoral Process Act No. 35 of 2016, sections 8, 9 (1) (e) and 47

Works referred to:

1. Report of the Technical Committee on Drafting the Zambian Constitution, 30th April, 2012.

2. **Final Draft Report of the Technical Committee on Drafting the
Zambian Constitution, October 2013.**
3. **“Article 25: Political Rights”, Manford Nowak, U.N. Covenant on
Civil and Political Rights: CCPR Commentary, 2nd revised edition,
page 563 at p. 569**

When we heard this matter, we sat with our sister Judge Mulenga. However, the learned Judge is out of the Country and so this is a judgment of the majority.

By amended Petition filed against the 1st and 2nd Respondents on 29th July, 2016, the Petitioner Godfrey Malembeka seeks the following reliefs:

- a) A declaration that sections 7 (1) (e) read together with section 19 (c) contravene Article 45 (1) (a), (b) and (c) and Article 46 of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and must be expunged from the statute book.
- b) A declaration that all remandees and pre-trial remandees and convicts whose cases are on appeal and are unable to procure bail and or are not admitted to bail be allowed to vote in any election.

- c) A declaration that for the purposes of pre-trial remandees to exercise their right to vote all prisons in Zambia be made polling centres.
- d) A declaration that a continued denial of pre-trial remandees and convicts on appeal of their convictions and sentences to vote offends their constitutional rights as enshrined in Articles 18 (2) (a), 23 (1), 45 (1) (a), (b) and (c) and 46.
- e) A declaration that the Republic of Zambia is a progressive democracy and part of the global community of progressive democracies that allow pre-trial remandees and convicts to vote and Zambia must be part of the progressive states in order to enhance the enjoyment of human rights and freedoms.
- f) An Order that each party should bear their own costs as the case is of public interest.
- g) Any other relief the Court may deem fit.

The petition is supported by an affidavit verifying facts and amended written submissions filed on 17th August, 2016.

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Although paragraph (a) of the Petitioner's claims, in the amended Petition refers to sections 7 (1) (e) and 19 (c) of the repealed Electoral Act No. 12 of 2006, this reference ought to have been amended to refer to sections 8 and 9 (1) (e) as read with section 47 of the Electoral Process Act No. 35 of 2016 as indicated on the face of the amended Petition. This position is confirmed by the Petitioner in his amended written submissions filed on 17th August, 2016 where he states that the Petitioner claims the following reliefs:

- a) A declaration that section 8, 9 (e) as read together with section 47 of the Electoral Act No. 35 of 2016 contravenes Article 45 (1) a), (b) and (c) and Article 46 of the Constitution of Zambia (Amendment) No. 2 of 2016 and must be expunged from the Statute Books.**

As the Petitioner was granted leave to amend the petition to refer to sections 8, 9 (1) (e) and 47 of the Electoral Process Act No. 35 of 2016, we shall consider the relief sought under paragraph (a) of the petition as referring to sections 8 and 9 (1) (e) read with section 47 of the Electoral Process Act No. 35 of 2016.

The background to the Petition as stated in the Petition and the affidavit verifying facts is that the Petitioner is the Executive

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Director of the Prisons Care and Counselling Association (PRISCCA) an organisation which promotes the welfare and rights of prisoners in Zambian prisons. That on 6th April, 2016 the Petitioner's lawyers, Milner and Paul Legal Practitioners, acting on behalf of the Petitioner wrote a letter to the 1st and 2nd Respondents requesting that the 1st Respondent should instruct the Ministry of Home affairs to issue national registration cards to eligible persons awaiting trial in prisons and convicted persons who had appealed against conviction but were not on bail and had no national registration cards.

The lawyers further requested the 2nd Respondent to register as voters, eligible pre-trial remandees (whom we shall refer to as persons awaiting trial) and convicted persons who had appealed against their conviction to enable them to vote in elections. The basis for making the request was that persons awaiting trial are innocent until proven guilty and must therefore be enabled to enjoy their fundamental right to vote without any hindrance in spite of the restriction of their freedom of movement.

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In a letter dated 11th April, 2016, the 2nd Respondent informed the Petitioner's lawyers that the voter registration exercise had closed on 29th February, 2016 and would not be re-opened for the purpose of registering voters for the 2016 general elections. By letter dated 13th April, 2016, the Petitioner's lawyers requested the 2nd Respondent to confirm whether persons awaiting trial and convicted persons who had appealed but were in prison were eligible to vote, and if so, whether they would be registered as voters for subsequent elections as registration of voters for the 2016 general elections had closed for the compilation of voters' registers.

In response, the 2nd Respondent informed the Petitioner through his lawyers that persons awaiting trial and convicted persons on appeal who were in lawful custody did not qualify to be registered as voters under section 7 (1) (e) and 19 (c) of the Electoral Act No. 12 of 2006 which was then in force and that the 2nd Respondent would therefore not register them as voters.

Dissatisfied with the 2nd Respondent's response, the Petitioner filed this petition seeking mainly, a declaration that sections 8 and 9 (1) (e) read with section 47 of the Electoral Process Act No. 35 of

2016 contravene Article 45 (1) (a), (b) and (c) and Article 46 of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 and must be expunged from the statute book.

At the hearing of the Petition, Mr. Katupisha, counsel for the Petitioner, relied on the Petitioner's amended submissions filed in support of the Petition which he augmented with oral submissions.

In the written submissions, Mr. Katupisha submitted that it is trite law that the Constitution is the supreme law of the land which cannot be subordinate to any other written law, regulation, precedent or practice. In that regard, Counsel cited Article 1 (1) of the Constitution which reads:

“1. (1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.”

Counsel proceeded to submit that according to sections 9 (1) (e) and 47 of the Electoral Process Act No. 35 of 2016 (which we will refer to henceforth as the Act), persons in lawful custody are

precluded from voting, regardless of whether the person is awaiting trial or is a convicted person. Counsel contended that an analysis of the provisions of the Act reveals that sections 9 (1) (e) and 47 of the Act infringe upon the constitutional right of persons in custody to vote in an election as the universal adult suffrage provided for in Article 46 of the Constitution does not disqualify a person in lawful custody from voting. These sections, Counsel argued, should be declared null and void so the Act can be amended.

Mr. Katupisha went on to submit that if Parliament sought to limit the unqualified right to vote which is entrenched in the Constitution, it would be obliged to do so in terms of a law of general application which would have to meet the requirements of reasonableness and justifiability. Counsel submitted that when deciding on this matter, this Court should ask itself if it is in fact reasonable and justifiable for Parliament to take away the right to vote from persons in lawful custody.

Counsel essentially contended that persons awaiting trial ought to be distinguished from convicted persons because in terms of Article 18 (2) (a) of the Constitution, a person who is charged with

a criminal offence is presumed to be innocent until he is proven guilty or has pleaded guilty. He contended that by making a blanket prohibition from voting of persons in lawful custody in accordance with section 47 of the Act, the section causes persons awaiting trial who are in custody to be discriminated against in comparison with accused persons who are charged with criminal offences but are out of lawful custody on bail pending trial.

Counsel further contended that since Zambia is a State party to international human rights instruments such as the Universal Declaration of Human Rights, the United Nations Convention on Civil and Political Rights and the African Charter on Human and Peoples' rights, all of which provide for the presumption of innocence as a basic constitutional right and also provide for safeguards against unfair treatment of suspects and detainees, Zambia should align her domestic legislation to these international human rights instruments. This, according to Counsel, should be done by allowing persons awaiting trial to vote in elections as their constitutional right which is conferred upon them by Article 46 of the Constitution as amended.

Counsel extended the argument to convicted persons who had appealed against their conviction and whose appeals were yet to be determined. It was Counsel's position that it is discriminatory to deny convicted persons who are in lawful custody the right to vote when convicted persons who have been granted bail pending appeal are able to vote. It was Counsel's argument that convicted persons who are in lawful custody have a constitutional right to vote as much as those who are released on bail.

To fortify his submissions Mr. Katupisha cited a number of cases from other jurisdictions in which Courts have ruled that persons in custody should be allowed to vote in elections as their basic constitutional right. Counsel cited the case of Haig v. Canada (1) in which Cory J said:

“All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the charter guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort

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should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.”

He also cited the case of Minister of Justice v. Hofmeyr (2) in which Hoexter J A said:

“... the extent and content of a prisoner’s rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common law rights...”

Counsel further relied on the Zimbabwean case of Kuta v Ministry of Justice, Legal and Parliamentary Affairs (3) in which Gubbay CJ said:

“Fortunately, the view no longer holds that in consequence of crime, a prisoner forfeits not only his liberty but all his personal rights, except those which the law in its humanity grants him.”

According to Counsel, Gubbay CJ, re-echoed the above observation in the case of Woods v Minister of Justice, Legal and Parliamentary Affairs (4) when he said:

“The view no longer holds firm in this jurisdiction and in many others that by reason of his crime a prisoner sheds all basic rights at the prison gates. Rather, he retains all the rights of a free citizen, save those withdrawn from him by law, expressly or by implication,

or those inconsistent with the legitimate penological objectives of the corrections system.”

Counsel went on to submit that in the case of Sauve v Canada (Attorney-General) (5) Arbour J.A. stated that:

“Incarceration conditions should be made, as far as possible, compatible with the fullest possible exercise of the right to vote rather than advanced as a reason to deny that right altogether.”

Finally, Mr. Katupisha cited the South African case of Arnold Keith August and Veronica Peal Sibongile Mabuto v The Electoral Commission, the Chairperson of Electoral Commission, the Ministry of Home Affairs and the Ministry of Correctional Services (6) in which the Constitutional Court made a declaration that all persons who were prisoners on the date of the election were entitled to vote in the election if they had registered as voters and ordered the respondents to make all arrangements necessary to enable the applicants and other prisoners to vote.

In conclusion, Mr. Katupisha submitted that Zambia should take the example of other democracies and allow persons awaiting trial and convicted persons whose appeals are pending determination to vote. Counsel submitted that this Court has the

constitutional responsibility to protect the rights of such persons and to ensure that their constitutional right to vote is not taken away from them by unconstitutional provisions of an Act of Parliament that is subordinate to the Constitution.

In augmenting the written submissions Mr. Katupisha submitted that the case of **Haig v. Canada (1)** which he had cited in his written submissions should persuade this Court to agree with the Petitioner that section 47 of the Electoral Process Act No. 35 of 2016 contravenes Articles 45 (1) (a) to (c) and 46 of the Constitution as amended. He submitted that in that case Corrie J. stated that all democratic Governments are founded upon the right to vote and that without the right to vote, democracy cannot exist.

He further emphasised the Zimbabwean case of **Kuta v. Ministry of Justice, Legal and Parliamentary Affairs, and Woods v. Minister of Justice, Legal and Parliamentary Affairs (3)** and submitted that a prisoner does not forfeit his human rights at the prison gate but goes in with his rights and that one fundamental right is the right to vote.

He urged us to grant the Petitioner the reliefs he seeks.

The 1st Respondent in its Answer to the petition essentially did not oppose the petitioner's claims. In the affidavit in support of the 1st Respondent's Answer to the petition, the 1st Respondent averred that the petition was not opposed to the extent that Article 46 of the Constitution of Zambia as amended permits every eligible citizen to vote. It was deponed that a prisoner's right to vote and to register as a voter could only be enjoyed in the next general elections as voter registration had closed on 29th February, 2016 in readiness for the certification of the register of voters on 31st July, 2016.

The 1st Respondent did not file any submissions in support of his case.

The 2nd Respondent also did not oppose the Petition. In its Answer to the Petition filed on 23rd June, 2016, it stated that the Electoral Commission of Zambia is a constitutional body that has the statutory mandate to delimit electoral boundaries, register voters and conduct elections and referendum, among other functions. The 2nd Respondent stated that it is guided by the Constitution and other laws in the performance of its functions.

The 2nd Respondent went on to state that it had undertaken the registration of voters country wide from 13th September, 2015 to 29th February, 2016. A provisional register had been prepared for certification on 31st July, 2016 before the general elections which were scheduled to be held on 11th August, 2016. The 2nd Respondent stated that it could not register new voters after the close of voter registration on 29th February, 2016 and further that it does not establish new polling stations in the run up to general elections. In its affidavit verifying facts, the 2nd Respondent reiterated the contents of its Answer and added that it had not established any polling station at any prison or detention centre. In response to the Petitioner's submissions, learned counsel for the 2nd Respondent, Mr. Kamwi relied on the written skeleton arguments which he had filed. He submitted that Article 46 of the Constitution as amended grants citizens of Zambia the franchise, which is the right to choose their leaders through democratic elections. Counsel submitted that the words expressed in Article 46 convey a clear and unambiguous meaning regarding the franchise. He cited the case of **Matilda Mutale v. Emmanuel Munaile and**

Electoral Commission (7), in which the Supreme Court guided that:

“The fundamental rule of interpreting statutes is that they must be construed according to the words expressed in the statutes. If the words of a statute are precise and unambiguous, then, no more can be necessary than to expound on those words in the ordinary and natural sense.”

Mr. Kamwi submitted that in other words, the literal rule should be adopted, as a matter of priority when interpreting statutes. Counsel submitted that the clear meaning of Article 46 is that the franchise is absolute. He added that Article 46 of the Constitution as amended is distinctly different from the repealed Article 75 of the Constitution which granted Parliament the power to limit the franchise and that Parliament exercised the said mandate to exclude convicts, persons remanded in custody and the mentally challenged from the franchise.

Counsel went on to submit that sections 9 and 47 of the Electoral Process Act No. 35 of 2016 contravene Article 46 of the Constitution and that the said provisions were enacted against the backdrop of the repealed Article 75 of the Constitution which

empowered Parliament to limit the franchise. Counsel also cited Article 1(1) of the Constitution of Zambia as amended and submitted that sections 9 and 47 of the Act are void to the extent that they deny the franchise to persons with mental disability, persons awaiting trial, persons detained in prisons and convicts.

Mr. Kamwi submitted, in conclusion, that the 2nd Respondent in its affidavit stated that no polling station was established at any prison and that the voter registration exercise had since closed. Mr. Kamwi submitted that the effect of that statement was that persons awaiting trial and convicts whose appeals had not been determined by the courts could not be registered as voters for the 2016 general elections. He stated that if the 2nd Respondent re-opened voter registration, it would have serious constitutional implications as the date of the general election was stipulated under Article 56 of the Constitution.

In the circumstances, counsel prayed that the reliefs sought by the Petitioner be granted for future elections.

We have duly considered the affidavit evidence and the submissions by the Petitioner and the 2nd Respondent. The Petition relates to the voting rights of persons incarcerated in prisons in Zambia.

The Petitioner challenges the constitutionality of sections 9 (1) (e) and 47 of the Electoral Process Act No. 35 of 2016 which sections respectively, disqualify a person who is in lawful custody from registering as a voter and from voting in an election if the person is incarcerated on the date of the election. The Petitioner thus seeks, in the first place, a declaration that sections 8 and 9 (1) (e) read together with section 47 of the Electoral Process Act No. 35 of 2016 contravene Article 45 (1) (a), (b) and (c) and Article 46 of the Constitution as amended and must be expunged from the statute book.

The Petitioner contends that by excluding persons in lawful custody from registration as voters as stated in section 9 (1) (e) and by disqualifying from voting, persons who are in lawful custody or whose freedom of movement is restricted under any written law, as stated in section 47 of the Act, the sections contravene Articles 45

(1) and 46 of the Constitution as amended which provide for universal adult suffrage. It is the Petitioner's position that section 47 makes no distinction between persons who are in lawful custody as persons awaiting trial and those who are convicted.

In determining this matter, we are alive to the fact that Article 267 of the Constitution as amended enjoins us to interpret the constitutional provisions in accordance with the Bill of Rights and in a manner that promotes the Constitution's purposes, values and principles; permits the development of the law; and contributes to good governance. The national values and principles which we must consider are set out in Article 8 of the Constitution as amended. In our view the national values and principles which directly apply in the present case are those stated in Article 8 (c), (d) and (e), namely, democracy and constitutionalism; human dignity, equity, social justice, equality and non-discrimination; and good governance and integrity. Further, we note that Article 45 (1) (a) and (b) requires that electoral systems provided for in Article 47 for the election of the President, Members of Parliament or councillors

shall ensure that citizens are free to exercise their political rights and universal adult suffrage based on the equality of the vote.

Having said that, the main issue for our determination is whether sections 8 and 9 (1) (e) of the Electoral Process Act No. 35 of 2016 read together with section 47 of the said Act contravene the provisions of Article 46 of the Constitution as amended. It is settled law that the Constitution is the supreme law of Zambia and forms the standard upon which all other laws are interpreted. Any written law which is inconsistent with the constitutional provisions is void to the extent of the inconsistency as stipulated in Article 1 (1) of the Constitution as amended.

In view of the provisions of Article 1 (1) of the Constitution, we have, in addressing the issue before us, examined the provisions of sections 8, 9 (1) (e) and 47 of the Act against the provisions of Article 46 of the Constitution as amended. Article 46 reads as follows:

“46. A citizen who has attained the age of eighteen years is entitled to be registered as a voter and vote in an election by secret ballot.”

In interpreting Article 46, we have borne in mind that constitutional provisions must be construed according to the plain and ordinary meaning of the words and that it is only when the plain or literal meaning leads to absurdity or inconsistency with other provisions of the constitution, when read as a whole, that other rules of interpretation will be resorted to. In the case of **General Nursing Council of Zambia v Inutu Milambo Mbangweta**

(8), the Supreme Court held that:

“The primary rule of construction or interpretation of statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.”

In the case of **Matilda Mutale v Emmanuel Munaile** **(7)** which was cited by Mr. Kamwi, it was held, inter alia, that:

“If the words of the statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural sense...”

Whereas the Supreme Court authorities we have cited above are not binding on this Court but are persuasive, the principles laid down therein are sound and we, thus, fully endorse them.

In the present case, the provisions of Article 46 are clear and unambiguous. A literal interpretation of the Article reveals that it clearly stipulates that a citizen who is eighteen years and above is entitled first, to be registered as a voter and secondly, to vote in an election. Unlike the repealed Article 75 of the Constitution, Article 46 contains no provision allowing for disqualifications from registration as a voter and from voting to be prescribed by Act of Parliament. Notwithstanding the universal adult suffrage granted to citizens under Article 46 of the Constitution as amended, Parliament limited the right of persons in custody to register as voters and to vote under the Electoral Process Act No. 35 of 2016. Under section 9 (1) of the Act the disqualifications for registration as a voter are stated as follows:

“9. (1) The Commission shall not register a person as a voter if that person –

- a) is not a citizen of Zambia;**
- b) is not in possession of a national registration card;**

- c) suffers from mental disability which makes the person unable to exercise their right to vote;
- d) is detained under the Criminal Procedure Code during the pleasure of the President;
- e) is disqualified from voting under section *forty-seven*;
- f) is under a sentence of death imposed by a competent court, or a sentence of imprisonment imposed by a court or substituted by a competent authority for some other sentence imposed by that court; or
- g) does not qualify to be registered as a voter as may be prescribed.

Persons in lawful custody are included in the list of disqualified person under section 9 (1) (e) of the Act.

Section 47 of the Act provides for disqualification from voting in the following terms:

“47. A person shall not be entitled to vote at an election if, at the date of the election, that person is in lawful custody or the person’s freedom of movement is restricted under any written law.”

Based on the provisions of section 9 (1) (e) and section 47 of the Act, persons in lawful custody and those whose freedom of movement has been restricted including persons awaiting trial and convicted persons whose appeals have not been determined are

precluded from registering as voters and consequently from voting. They are thus disenfranchised.

Prior to the amendment of the Constitution by the Constitution of Zambia (Amendment) Act No. 2 of 2016, persons in lawful custody or whose freedom of movement was restricted under a written law were precluded from registering as voters and from voting in an election, if they were in custody on the date of the election, pursuant to Article 75 of the Constitution. Article 75 provided as follows:

“75. (1) Every citizen of Zambia who has attained the age of eighteen years shall, unless he is disqualified by Parliament from registration as a voter for the purposes of elections to the National Assembly, be entitled to be registered as such a voter under a law in that behalf, and no other person may be so registered.

(2) Every person who is registered in any constituency as a voter for the purposes of elections to the National Assembly shall, unless he is disqualified by Parliament from voting in such elections on the grounds of his having been convicted of an offence in connection with elections or, on the grounds of his having been reported guilty of such an offence by the court trying an election petition or, on the grounds of his being in lawful custody at the date of the election, be entitled so to vote in that constituency in accordance with the provisions made by or under an Act of Parliament, and no other person may so vote.”(Emphasis added)

Article 75 was repealed and replaced by Article 46 of the Constitution as amended, which Article we have set out earlier in this judgment. Under Article 46, the right to vote which is guaranteed to citizens is not qualified save for setting the age limit at 18 years. Further, Parliament has not been given the power to impose limitations as to who is qualified to vote. This position regarding the franchise under Article 46 is a complete shift from the position that existed under Article 75 prior to 5th January, 2016 when the Constitution of Zambia (Amendment) Act No. 2 of 2016 came into effect.

A consideration of the first Report of the Technical Committee on Drafting the Zambian Constitution (the Technical Committee) who were the framers of Article 77 of the first draft Constitution on which Article 46 is based, reveals that the rationale for the complete shift regarding the status of the right to vote in Zambia is not stated. The Technical Committee recommended that the first draft Constitution should include a clause on the franchise which read as follows:

“77. A citizen who has attained the age of eighteen years is entitled to be registered as a voter and vote in any election by secret ballot.”

The Technical Committee observed at page 76 of the said Report that the Article guarantees every person who has attained the age of eighteen years to exercise his or her right to vote.

Regarding the rationale for the article, the Technical Committee stated on the same page of the Report as follow:

“The rationale for the article is that, there is need for the Constitution to provide guidance on the minimum voting age instead of leaving this to an Act of Parliament. In doing so, the Committee further observes that at eighteen (18) years, one will have matured and that the minimum age for voting in many countries is eighteen (18) years.”

Going by the above quotation, it is evident to us that the Technical Committee, in discussing the clause of the draft Constitution relating to the franchise, only addressed the age at which a citizen would qualify to vote. The Committee did not address whether or not the right to vote should be limited and, consequently, did not consider whether or not Parliament should be enabled to impose limitations on who could vote by Act of

Parliament. The Technical Committee, therefore, did not discuss the implication of the shift in the status of the right to vote which was qualified under the repealed Article 75, where Parliament could limit who could vote by Act of Parliament, to the present position under Article 46 of the Constitution as amended, where Parliament does not have power to limit who can vote.

It is clear to us from reading the provisions of section 9 (1) (e) and section 47 of the Act that these provisions were carried over from the provisions of sections 7 (1) (e) and 19 (c) of the repealed Electoral Act No. 12 of 2006 which disqualified persons in custody from registering as voters and from voting respectively, pursuant to Article 75 (1) and (2) of the Constitution prior to the amendment. Section 7 (1) (e) of the repealed Act read as follows:

**“7. (1) No person shall be qualified for registration as a voter and no person shall be registered as a voter, who –
(e) is disqualified from voting under section nineteen;”**

Section 19 of the repealed Act read as follows:

“19. No person shall be entitled to vote at a direct election who –

- (c) **at the date of the election is in lawful custody or the person's freedom of movement is restricted under any law in force in Zambia."**

However, in view of the change in the constitutional provision relating to the franchise as stated in Article 46 of the Constitution as amended, Parliament cannot disqualify a person from registering as a voter and from voting only because the person is in lawful custody or has their freedom of movement restricted under a written law at the date of the election.

As no provision was made in Article 46 allowing for Parliament to disqualify persons in lawful custody from registering as voters and from voting in an election, we hold that sections 9 (1) (e) and 47 of the Electoral Process Act, No. 35 of 2016 contravene Article 46 of the Constitution as amended and are, thus, void. We, therefore, grant the declaration that section 9 (1) (e) and 47 of the Act contravene Article 46 of the Constitution as amended and are void and should be expunged from the statute book. We, further, hold that Article 46 of the Constitution as amended has extended the right to vote to persons in lawful custody, or whose freedom is restricted under a written law in force in Zambia, who qualify to

register as voters and to vote as per constitutional provision.

Before leaving this issue, we observe that the Petitioner alleges that section 8 of the Act also contravenes Article 45 (1) (a) to (c) and Article 46 of the Constitution as amended when read together with sections 9 (1) (e) and 47 of the Act. However, section 8 (1) (a), (b) and (c) merely sets out qualifications for registration as a voter. The section provides that in order to be registered as a voter, a person must be a citizen, must be 18 years old and above and must possess a national registration card. The qualifications set out in section 8 (1) of the Act are not in anyway in conflict with Article 46 but are, in fact, in harmony with Article 46 which grants a citizen of the age of 18 years and above the right to be registered and vote in an election.

Neither are the provisions of subsections (2) to (4) of section 8 in conflict with Article 46. Section 8 (2) gives the Commission the power to register a person as a voter in the prescribed manner. Section 8 (3) provides for the issuance by the Commission of a voter's card to a person who is duly registered as a voter while

section 8 (4) prohibits a person from registering as a voter in more than one constituency.

Further, section 8 is also not in conflict with the principles of electoral systems and process set out in Article 45 (1) (a), (b) and (c). Thus, in our view, not one provision of section 8 whether read on its own or together with section 9 (1) (e) and 47 of the Act contravenes Article 45 (1) (a), (b) and (c) and Article 46 of the Constitution.

The Petitioner further seeks a declaration that all remandees or persons awaiting trial and convicts, whose appeals have not been determined, and who are in custody, be allowed to vote. He further seeks a declaration that for purposes of pre-trial remandees to exercise their right to vote, all prisons in Zambia be made polling centres. We shall consider these two reliefs together as they are related.

In addressing these claims, we wish to state that although the Petitioner limited his petition to securing the right to vote for persons awaiting trial and convicted persons whose appeals have not been determined, Article 46 does not exclude any category of persons in lawful custody from exercising the right to vote. In the

circumstances, we do not consider it appropriate for us to attempt to make a distinction between persons in lawful custody by pronouncing ourselves regarding which incarcerated persons ought to vote and which ones should be disenfranchised as proposed by the Petitioner.

We say so because Mr. Kamwi, learned Counsel for the 2nd Respondent, the Electoral Commission of Zambia, which has the constitutional mandate to conduct elections and to register eligible citizens as voters, did not oppose the petition but, in fact, urged us to grant the Petitioner the reliefs he seeks for future elections.

In view of this, we declare that persons in lawful custody and those whose freedom of movement is restricted under a written law are entitled to vote in future elections.

With regard to the third claim, we do not consider it appropriate for us to order that all prisons in Zambia should be made polling centres in order to enable persons in prisons to exercise their right to vote. This is because the decision regarding the location of polling centres is a decision that the 2nd Respondent is best placed to make based on their mandate. Suffice it to state

that since we have ruled that sections 9 (1) (e) and 47 of the Act are void as they contravene Article 46, and that persons in lawful custody or whose freedom of movement is restricted under a law in force in Zambia, are eligible to register as voters and to vote in future elections, it follows that the 2nd Respondent must take necessary measures to ensure that eligible persons in lawful custody, or whose freedom of movement is restricted by law, are enabled to register and to vote. We therefore decline to grant the prescriptive declaration that all prisons be made polling centres as prayed. Instead, we order that the 2nd Respondent should take all necessary measures to enable persons in lawful custody to vote.

The Petitioner also seeks a declaration that the continued denial of the right to vote to persons awaiting trial and convicts who have appealed against their conviction and sentence, offends their constitutional rights enshrined in Articles 18 (2) (a), 23 (1), 45 (1) (a), (b) and (c) and 46 of the Constitution.

Article 18 (2) (a) of the Constitution provides that:

(2) Every person who is charged with a criminal offence –

- (a) shall be presumed innocent until he is proved or has pleaded guilty.

Article 23 (1) of the Constitution provides as follows:

“23. (1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.”

It was the Petitioner’s position that the continued denial of the right to vote to persons awaiting trial, whilst in custody, is contrary to the presumption of innocence to which they are entitled under Article 18 (2) (a) of the Constitution and is discriminatory in terms of Article 23 (1). That it is, thus, contrary to Article 45 (1) (a), (b) and (c) and Article 46. He contends that this also applies to convicted persons who have appealed against conviction and sentence.

In terms of Article 28 (1) of the Constitution, the jurisdiction to enforce the provisions of Part III of the Constitution under which Article 18 and Article 23 fall, is vested in the High Court. This Court, in terms of Article 128 (1), has no jurisdiction to enforce the provisions of Articles 11 to 26 of the Constitution, which fall under Part III of the Constitution. We have previously guided that actions

relating to the enforcement of the rights and freedoms contained in Part III of the Constitution must be commenced in the High Court. Since, under this claim, the Petitioner seeks to enforce the right of persons awaiting trial to be presumed innocent under Article 18 (2) (a) of the Constitution, in relation to the right to vote, this is not the right Court before which to seek such a relief. The same applies to any relief sought in respect of Article 23 (1) of the Constitution. In view of this, we cannot entertain this claim. The claim therefore is dismissed.

Lastly, the Petitioner seeks a declaration that the Republic of Zambia is a progressive democracy and part of the global community of progressive democracies that allow pre-trial remandees and convicts to vote and that Zambia must be part of the progressive States in order to enhance the enjoyment of human rights and freedoms.

It is trite that the right to vote is one of the fundamental civil and political rights accorded to citizens and is recognised in national Constitutions and in various international and human rights treaties. These include the Universal Declaration of Human

Rights, 1948 and the International Covenant on Civil and Political Rights, 1966. At regional level, the African Charter on Human and Peoples' Rights, 1981 protects the right to vote and the right to participate in the governance of one's country, directly or through elected representatives.

As the learned Professor Manfred Nowak puts it:

“Citizens have not only the right but also the opportunity to take part in the conduct of public affairs. This sets up a duty on States Parties to guarantee with positive measures that all formally eligible persons have the actual opportunity to exercise their political rights ... it is not enough to extend formal voting eligibility to all citizens, including the aged, the sick, prisoners and pre-trial detainees, persons abroad, etc., when it is not simultaneously ensured that these citizens are truly able to make use of their right to vote.”(Emphasis by the learned author)

The Zambian Constitution does provide for the right to vote for its citizens in Article 46. That being the case, it is evident that Zambia is a progressive democracy. Although the Petitioner seeks a declaration to that effect, Counsel for the Petitioner did not, in his submissions, state what purpose a declaration to that effect would serve.

It is settled law that a declaration is a discretionary remedy that can only be made on proper principles and considerations. It will not be made where no useful purpose can be served. In **Katongo v. Attorney General (9)** it was held that:

“The power to make binding declarations is discretionary and that discretion must of course be exercised judiciously; it matters not that the applicant seeks no consequential relief. Such a remedy should be granted sparingly. Declaratory judgments should certainly be discouraged where any court is of the opinion that another remedy affords him sufficient redress.”

Further, in **Communications Authority v. Vodacom Zambia Limited (10)** the Supreme Court held that:

“A declaration is a discretionary remedy. A party is not entitled to it as of right. The discretion must be exercised judiciously. A court will not grant a declaration when no useful purpose can be served or when an obvious alternative and adequate remedy ... is available.”

We endorse the principles stated in the two case authorities we have cited. As no useful purpose will be served by declaring that Zambia is a progressive democracy and part of the global community of progressive democracies that allow pre-trial remandees and convicts to vote and Zambia must be part of the

progressive states, in order to enhance the enjoyment of human rights and freedoms, we decline to grant this declaration.

In sum, the Petitioner succeeds in his petition alleging that sections 9 (1) (e) and 47 of the Electoral Process Act contravene Article 46 of the Constitution as amended.

As the petition raised important constitutional issues and is public interest litigation, we order that each party will bear their own costs.



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



.....
M.M. MUNALULA,
CONSTITUTIONAL COURT JUDGE