IN THE CONSTITUTIONAL COURT OF ZAMBIA **2016/CC/0006**
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

IN THE MATTER OF: **PART III OF THE CONSTITUTION OF ZAMBIA, CAP 1, PROTECTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS; AND ARTICLES 11, 20, 21, 23 AND 79; AND ARTICLE 18 OF THE CONSTITUTION OF ZAMBIA ACT NO. 1 2016 AND ARTICLE 98(1), (2), (3) AND (4) OF THE CONSTITUTION OF ZAMBIA ACT NO. 2 OF 2016**

AND

IN THE MATTER OF: **THE REFERENDUM ACT, CHAPTER 14 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF: **ARTICLES 46(1), (2) AND (3), 71 AND 88(6) OF THE CONSTITUTION OF ZAMBIA, CAP. 1 AND 81(1), (3), (5), 116 AND 117 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016**

AND

IN THE MATTER OF: **ARTICLES 233(2) AND 254(2)**

BETWEEN:

GODFREY MIYANDA **PETITIONER**

AND

THE ATTORNEY GENERAL **RESPONDENT**

Coram: *Sitali, Mulenga and Mulembe, JJC in open court on the 18th August 2016 and 9th March 2017.*

For the Petitioner: *In Person*

For the Respondent: *Ms. C. Mulenga, Acting Deputy State Advocate*

JUDGMENT

Mulembe, JC, delivered the Judgment of the Court.

Cases referred to:

1. **Sibong'ile Zulu v. Electoral Commission of Zambia and The Attorney General, 2016/HB/24**
2. **Stephen Katuka and Law Association of Zambia v. The Attorney General and Ngosa Simbyakula and 63 Others, Selected Judgment No.29 of 2016 (Constitutional Court)**
3. **Rev. Christopher Mtikila v. Attorney General (10 of 2005)[2006] TZHC 5**
4. **Kesavananda Bharati v. State of Kerala (1973) 4 S.C.C 225**
5. **Executive Council of the Western Cape Legislature v. President of the Republic 1995 10 BCLR 1289 (CC)**
6. **State Citizenship VfSlg. No.2455/1952 (Constitutional Court, Austria)**
7. **Premier of Kwazulu-Natal v. President of the Republic of South Africa (1996) SA 769 (CC)**
8. **Marbury v. Madison 5 U.S. 137 (1803)**
9. **Siwale and Others v. Siwale (1999) ZR 84**
10. **Still Water Farms Limited v. Mpongwe District Council and Others (Supreme Court Appeal No. 90 of 2001)**
11. **Village Headman Mupwanya and Another v. Mbaimbi, SCZ Appeal No. 41 of 1999**

Legislation referred to:

1. **Constitution of Zambia Act No. 1 of 2016**
2. **Constitution of Zambia (Amendment) Act No. 2 of 2016**
3. **Constitution of Zambia, Chapter 1 of the Laws of Zambia**
4. **Referendum Act, Chapter 14 of the Laws of Zambia**
5. **Referendum (Amendment) Act No. 5 of 2015**
6. **The Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order, Statutory Instrument No. 35 of 2015**
7. **Lands Act, Chapter 184 of the Laws of Zambia**

Other Materials referred to:

1. **Constitution of the Republic of South Africa 1996**
2. **Constitution of Turkey 1982**
3. **Concise Oxford English Dictionary, 12th Edition, Oxford University Press, New York, 2011**
4. **Black's Law Dictionary, 9th Edition, West Publishing Co., St. Paul (USA), 2009**

5. **Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories, Oxford University Press (2007)**

The Petitioner, Brigadier-General Godfrey Miyanda, filed his petition on 11th April, 2016. However, the Court could not hear the petition at the time. Upon the promulgation of the Constitutional Court Rules, the Constitutional Court only became operational on 27th May, 2016. This petition, therefore, is deemed to have been filed on 27th May, 2016, when the Rules came into force. With leave of the Court, the Petitioner filed an amended petition on 15th June, 2016.

From the outset, we find it necessary to state that this petition raises a myriad of issues. Though in large measure they all relate to the meaning or application of the Constitution, it is also notable that the Petitioner raises unrelated subjects for the Court's consideration.

The Petitioner opens his claims by stating that on 5th January, 2016, the President of the Republic, His Excellency Edgar Chagwa Lungu, assented to the **Constitution of Zambia Act**[1]and the **Constitution of Zambia (Amendment) Act**[2]which, he claimed, were inconsistent with the **Constitution of Zambia**.[3] He also

alleged that some decisions or omissions by the President and his Cabinet were inconsistent with the law.

The Petitioner claimed that the purported adoption of the Constitution by the people as alleged in the words *"We the people...do hereby solemnly adopt and give ourselves this Constitution"*in the preamble to Act No. 2 of 2016 was not true as no referendum was conducted to adopt the amended Constitution before or by the time of assent. He further claimed that the amendment of the preamble which, in his view, changed the character of the nation and State of Zambia without recourse to a referendum, was unconstitutional, illegal, null and void.

The Petitioner further claimed that the decision by the President to hold a referendum under the **Referendum Act**[4] together with the 2016 General Elections was inconsistent with the said Act, based on improper considerations and not reasonably justifiable in a democratic state. The Petitioner went on to assert that the decision by the President directing the Electoral Commission of Zambia (ECZ) to formulate the Referendum Question was wrong, amounted to an abdication of the President's mandatory duty under the

Referendum Act, in bad faith and intended to deceive and mislead voters. He further contended that the amendments introduced by the **Referendum (Amendment) Act**[5] were not consistent with the purposes and intent of the Referendum Act and denied many Zambians their constitutional right to participate and vote in the 11th August, 2016 Referendum and was not reasonably justifiable in a democratic state.

It was also the Petitioner's contention that the new definitions in Article 266 of the Constitution as amended of the terms *"Bill of Rights"*, *"discrimination"* and *"rights and freedoms"* were*ultra vires* Article 79(3) of the Constitution of Zambia, illegal, null and void.

The Petitioner went on to state that the President's announcement in Petauke sometime in February or March 2016, at what the Petitioner termed a "partisan gathering," that he would dissolve Parliament in May 2016, was unconstitutional and inconsistent with Article 81(5), (6) and (7) of the Constitution as amended.He also claimed that repeated angry pronouncements by the President, while the National Assembly was in session, that he would not assent to a bill regarding the Grade 12 qualification before any such

bill was presented was intended to intimidate Members of Parliament and inconsistent with Article 66 of the Constitution and an abuse of the President's discretionary power of assent.

The Petitioner also raised what he thought were inconsistencies within the Constitution. He claimed that Article 50 placed a fetter on the right to access media, was vague and contravened Article 20 of the Constitution; that Article 105(8)(a) was inconsistent with the principle of separation of powers in allowing the Speaker to act as President; that Articles 233(2) and 254(2) were also inconsistent with the doctrine of separation of powers as regards the President's jurisdiction over traditional land and that the said provisions did not protect land for indigenous people. It was the Petitioner's further claim that Article 149(1), in as far as it purports to give Parliament unlimited powers to change boundaries in Zambia without the direct participation of citizens, was a threat to indigenous land rights and to national unity.

The Petitioner also claimed that Articles 70(1)(d), 100(1)(e) and 153(4)(c) were prospective and did not disqualify persons who had previously qualified to aspire to the positions of councilor, Member

of Parliament and President; were discriminatory, based on improper considerations, inconsistent with the letter and spirit of the Constitution and not reasonably justifiable in a democratic State.

The Petitioner further stated that the tenure of ministers and deputy ministers was stipulated in Articles 46 and 71 of the **Constitution of Zambia**[3]and Articles 46(1), (2) and (3) and 81(1) of the Constitution as amended and that the decision by the President to allow their continued stay in office until 11th August, 2016 was unconstitutional and illegal. He also claimed that section 18(2) of Act No. 1 of 2016 contravened Articles 11 and 21 of the **Constitution of Zambia**[3]; and that Article 98(4) as read with sub-Articles (1), (2) and (3) contravened Article 11.

At this point, it is imperative for us to state that as is clear from the foregoing, the Petitioner brought out many issues and, as a consequence, presented multiple reliefs for the consideration of this Court, a total of twenty. We, therefore, find it convenient to state them ahead in this judgment as we indicate our opinion on each one.

In his Affidavit in Support, Brigadier-General Miyanda averred, *inter alia*, that upon reading the **Constitution of Zambia Act**[1] and the **Constitution of Zambia (Amendment) Act**[2], he had observed that some provisions in the Constitution as amended and what he termed "some decisions, intentions or omissions" by the Executive were in breach of, or inconsistent with, the **Constitution of Zambia**[3]. He deposed that in October 2015 the Speaker invited Government and the public to make submissions to the *Parliamentary Committee on Legal Affairs, Governance, Human Rights, Gender Matters and Child Affairs* and he made written and oral submissions on or about 30th November, 2015. He further averred that before the National Assembly concluded its deliberations on National Assembly Bills Number 16 and 17 of 2015, he submitted a petition through the Chairperson of the Committee aforesaid but he received no response. General Miyanda also deposed that before the President of the Republic of Zambia assented to Acts Numbers 1 and 2 of 2016, he sent another petition in December 2015 and a follow-up letter, which also received no feedback. The Petitioner urged the Court to interpret and determine

what he alleged to be breaches, inconsistencies, decisions or omissions on the part of the Executive as indicated in his petition.

And in a Supplementary Affidavit, General Miyanda averred, *inter alia*, that over the years he had published statements or papers on various topics, some of which he intended to use in these proceedings. He deposed that sometime in May, 2016, the Zambia National Broadcasting Corporation (ZNBC) carried a news item where the President's Special Assistant for Press announced that the Republican President had signed a statutory instrument to dissolve Parliament and that, further to the announcement, Parliament adjourned *sine die* on 13th May, 2016. He indicated that when he went to the Government Printer to buy the latest statutory instruments, he was informed that there was none on the dissolution of Parliament.

In his Skeleton Arguments, the Petitioner reiterated most of what was contained in his petition regarding what he claimed to be inconsistencies with, and contraventions of, the Constitution of Zambia.He submitted that on a proper construction, the words *"We the people...do hereby solemnly adopt and give ourselves this*

Constitution" purported that the Zambian people had participated in the adoption of the Constitution as amended, which, he contended, was not true as there had been no referendum in which the people of Zambia directly participated. He requested this Court to construe the word "adopt" as it was not defined in the amending legislation.

The Petitioner also submitted that the words *"multi-ethnic, multi-racial, multi-religious and multi-cultural"* in the preamble and wherever they appeared in the Constitution as amended had changed the character and ownership of the State and nation of Zambia without the sanction of the people through a referendum. This, he alleged, was inconsistent with the spirit and letter of the Independence Constitution of Zambia and, hence, unconstitutional, null and void.

The Petitioner contended that the purported amendments to Part III of the Constitution through definitions introduced in Article 266 as stated in his petition were unconstitutional, illegal, null and void. In regard to amendments to the **Referendum Act**[4], he argued that Section 2 still subsisted and the President was obliged to comply

with it. It was his contention that the President ought to have published a statutory instrument in March 2015 when he directed that a referendum be held and that **The Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order, Statutory Instrument No. 35 of 2016**[6] was an afterthought to cover up for the omission of disregarding section 2 of the **Referendum Act**[4]. The Petitioner further argued that the Referendum Question formulated by the Electoral Commission of Zambia and published on 23rd May, 2016 in the said Statutory Instrument, was convoluted and did not meet the criterion of a single-issue question as eloquently put by the Minister of Justice in the final sitting of Parliament. He submitted that it was unreasonable to expect voters to answer "yes" or "no" to, as he called it, a multiple-choice type of question and contended that the President ought to have formulated the question instead of delegating the task to the Electoral Commission of Zambia. He further stated that the President was negligent in not ordering that a National Census be conducted prior to the holding of the referendum scheduled for 11th August, 2016 as, he argued, it was a condition precedent to the holding of a National Referendum under

the **Referendum Act**[4] to ensure a credible and transparent determination of the arithmetical threshold leading to a definitive tally of votes to be cast.

The Petitioner argued that the announcement by the President's Special Assistant for Press in Kampala, Uganda, that the President would dissolve Parliament in May 2016 was unconstitutional as no such power existed in the Constitution as amended. The Petitioner reiterated his position on the President's views on any proposed bill on the Grade 12 qualification clause as stated in Articles 70(1)(d), 100(1)(e) and 153(4)(c) and also on the maintenance of Cabinet and Deputy Ministers "beyond their contractual term of engagement."

Further in his skeleton arguments, the Petitioner repeated the contents of his petition in regard to Article 50 of the Constitution, that it violated Article 20(1) as read with Article 11 in Part III. He also restated his views on Articles 105(8)(a), 233(2) and 254(2), that these articles were not consistent with the doctrine of separation of powers. Further, the Petitioner restated what was in his petition regarding Articles 149(1) on the creation or merging of provinces. The same approach was taken in relation to section 18(2) of the

Constitution of Zambia Act[1], Article 98(4) of the **Constitution of Zambia (Amendment) Act**[2] as read with sub-articles (1), (2) and (3), on how, in the Petitioner's view, those provisions contravened Article 11(a) of Part III of the Constitution.

The Respondent, in the Answer, submitted that, contrary to the Petitioner's assertion, the words *"multi-ethnic, multi-racial, multi-religious and multi-cultural"* were not in contravention of the Constitution as the people of Zambia acted vicariously through their duly and lawfully elected representatives in Parliament. The Respondent also argued that the power to call for a referendum was within the President's prerogative and that he was empowered under the Constitution to perform his functions with dignity and leadership in all acts necessary or expedient for the discharge of the functions of government. The same points were reiterated in the Respondent's Affidavit in Opposition deposed by one Mwenda Hamanyati.

In the skeleton arguments, the Respondent stated that the Petitioner had challenged a plethora of provisions of the **Constitution of Zambia (Amendment) Act**[2]. On the Petitioner's

assertion that there had been no referendum to adopt the Constitution by the people of Zambia, the Respondent contended that the people of Zambia had acted through their elected representatives. Further, that the power to call a referendum in section 2(1) of the **Referendum Act**[4]was within the prerogative and discretion of the President, not mandatory. Inexplicably, the Respondent referred to the repealed Article 44(1) of the **Constitution of Zambia**[3], which provided:

> **"As Head of State, the President shall perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of the executive functions of Government subject to the overriding terms of this Constitution and the Laws of Zambia which he is constitutionally obliged to protect, administer and execute."**

We note that this Article 44 has largely been re-enacted in Article 92(1) of the Constitution as amended.

In regard to the Petitioner's contention that the holding of the referendum and the general elections at the same time was in bad faith, contrary to public policy and not justifiable in a democratic State, and that amendments contained in the **Referendum (Amendment) Act**[5] were not consistent with the purposes and intent of the Referendum Act, the Respondent stated that regard must be had to the mode of voting as stipulated in the **Referendum**

Act. The two options are simply "yes" or "no". According to the Respondent, the decision was made prudently with due regard to expediency and pragmatism. The Respondent argued that conducting the referendum at the same time as the general elections was to ensure that as many eligible voters as possible participated in the referendum as well. The Respondent submitted that the net effect of the **Referendum (Amendment) Act**[5] was that it enabled registered voters and persons not registered as voters to vote in the referendum.

On the Petitioner's contention that Article 50 of the Constitution as amended violated Article 20 in Part III, the Respondent rebutted this argument by submitting that, in fact, Article 50 was in furtherance of the objectives of Article 20 on freedom of expression as it allowed a political party or a candidate access to the media, particularly during election campaigns.

On Article 105(8)(a) of the Constitution being, as alleged by the Petitioner, inconsistent with the separation of powers, the Respondent's contention was that the provision was to be invoked when both the President-elect and Vice-President-elect were unable

to assume office. The Speaker would then assume executive functions and a presidential election would follow in sixty days. The Respondent referred also to Article 105(9), which places a fetter on the Speaker by excluding from his exercise of executive functions, the power to make appointments and to dissolve the National Assembly.The Respondent argued that the mentioned provisions were intended to facilitate transition of executive power in the event of failure by both the elected President and Vice-President to assume power, albeit for a specified period. There was nothing, the Respondent asserted, in those provisions that militated against the doctrine of separation of powers.

To counter the Petitioner's submission on Articles 70(1)(d), 100(1)(e) and 153(4)(c) of the Constitution as amended, the Respondent referred the Court to the High Court's decision in the case of **Sibong'ile Zulu v. Electoral Commission of Zambia and The Attorney General**[1] and that the same was still before the courts.

In reply, the Petitioner opposed all the Respondent's arguments. Notably, he objected to the Respondent's contention that the people of Zambia vicariously "adopted" the Constitution as amended

through their elected representatives. The Petitioner maintained his position that "adopt" meant that Zambians took part in the adoption of the Constitution directly. The Petitioner also disagreed with the Respondent that section 2(1) of the **Referendum Act**[4]conferred discretionary power on the President. He argued that the word "may" should be construed as "shall" and that the Respondent's argument that the President had relied on his prerogative power was incoherent; that the incoherence lay in the fact that the Respondent did not indicate which prerogative power the President relied on while at the same time claiming that the President relied on provisions in the Referendum Act. The Petitioner maintained his position that once the President had deemed it necessary or desirable to present a question to the people, he "shall" order that a referendum be held.

On Article 44 (repealed) of the Constitution, the Petitioner disagreed that it gave power to the President to order a referendum. He argued that it was a mere guide to the President in the management of State affairs and to provide leadership while observing the rule of law. The Petitioner also stated that the Electoral Commission of

Zambia was not autonomous and that section 2 of the **Referendum Act**[4]reserved power to formulate the Referendum Question in the President. He further contended that by not conducting a census, there would be no threshold by which to determine the outcome of the referendum. He stated that it was in the public domain that there had been no census conducted in Zambia for over ten years, during which time many citizens had come of age for referendum purposes. On holding the referendum at the same time as the general elections, the Petitioner maintained that the purposes, intent and outcome of a general election were different from those of a referendum. An election, he opined, is a partisan event, whereas a referendum required citizens to put their national interest first.

In regard to Article 50 of the Constitution as amended, the Petitioner maintained his position and further argued that the Respondent's assertion that Article 50 was in furtherance of Article 20 was an admission that Article 20 had been amended in breach of Article 79(3) of the Constitution.

On Article 105(8)(a), the Petitioner disagreed with the Respondent's assertion that the provision was for transition purposes. His view

was that whoever is appointed to act as president has the full powers of that office, save for making new appointments and dissolving the National Assembly. There was no guarantee, he submitted, that during the transition period there would be no emergencies, including war, that may require the acting president to execute the powers to respond to the emergencies.

At the hearing, the Petitioner, General Miyanda, relied on his amended petition, affidavit in support and supplementary affidavit in support. He submitted that Article 128 of the Constitution gave this Court jurisdiction to hear matters such as he had raised.

In large measure, the Petitioner reiterated and augmented what was contained in his petition and skeleton arguments. On the preamble, the Petitioner reiterated his views, emphasizing that inclusion of phrases like "*multi-racial*" did not receive the direct sanction of the people and should be struck down.

The Petitioner emphasized that his petition was not against the amendments that were put to a referendum but the process itself. On Article 79(3), the Petitioner stated that it provided protection and should not be changed anyhow. He submitted that there was

no question for the referendum as the question given did not qualify. The question, he contended, bordered on deceiving people because, where they voted no, they may have voted against good things, whilst where they voted yes, that would have included bad issues. It was his further contention that the census is a condition precedent to add credibility to the referendum and to account for eligible voters. He intimated that he wished his petition had been heard before 11thAugust, 2016, so that the Court would have stopped the referendum to allow for more awareness creation and for lack of a national census.

On the dissolution of Parliament, the Petitioner restated his position and wondered whether, constitutionally, it was for the President to dissolve the National Assembly or it dissolved itself and he invited the Court to pronounce on that aspect.

The Petitioner repeated his contention that the President had abused his discretionary power by announcing that he would not assent to a bill to amend the Grade 12 clause in the Constitution, even before seeing the actual bill. He submitted that the President

was supposed to receive bills, examine them and then make up his mind.

On the Speaker performing executive functions as stipulated in Article 105(8)(a) of the Constitution as amended, the Petitioner restated his argument against the provision and added that one arm of government should not prevail over the others, submitting that the executive, legislature and judiciary have specific functions.The Petitioner reminded the Court that it was a matter of public knowledge that he had acted as president before, as shown by the copy of the *Instrument of the Delegation of Presidential Powers* he supplied and that a person acting had all the powers of president save for the exceptions as provided in the Constitution. He submitted that a "caretaker", as he put it, should not exercise the powers of the Commander-in Chief.

On vesting all land in the President, including traditional land, the Petitioner argued that the provision was not in the interests of the people. That since 1964, there was land reserved for the indigenous people and it should not be taken away. He argued that chiefs were not aware that Articles 233(2) and 254(2) of the

Constitution exist. The Petitioner urged the Court to find that the mentioned provisions do not protect the natives. He submitted that before independence, land was taken over by foreign powers and put in laws that safeguarded the interests of the settlers. It was his contention that the right to land that was given to every Zambian must not be taken away. The Petitioner expressed concern that the Constitution now provided that the President can alienate land to anybody without a provision of limiting such alienation to State land; that there was no protection for the native people because people with money would go into the villages and buy all the land from the native owners.

On the Grade 12 clause as provided in Articles *70(1)(d)*, 100(1)(e) and 153(4), General Miyanda submitted that despite the High Court's decision in the **Sibongile Zulu** case, the provisions were prospective and not retrospective. He contended that the office of a politician was not a professional career and people should not be denied the opportunity to serve. Leadership in this sense, he argued, was like being a messenger, carrying a message from the people and the representatives should be allowed to articulate

issues in their own language as, he argued, was the case at the United Nations. It was the Petitioner's view that the previous position of not requiring such qualifications was in line with the independence struggle.

Submitting on Section 18(2) of Act No. 1 of 2016, the Petitioner advanced the view that dissolution of political parties takes away their rights to assemble and associate. He argued that there can be rules to regulate political parties but they should not go to dissolution except for activities that are inimical to the State and are so proven in a court of law. And submitting on Article 98 of the Constitution, General Miyanda argued that there were limits to which the President can be protected from prosecution. It was his contention that persons who occupy that high position must behave themselves. By way of example, he wondered how the situation would be where the occupant of the office of president shot someone dead – whether they cannot be touched because of the immunity in Article 98.

In response, learned Counsel for the Respondent, Ms. Mulenga, also relied on the answer, affidavit in opposition, and skeletons

arguments filed into court. Ms. Mulenga began her submission by stating that, contrary to the Petitioner's argument, the amending words in the preamble were not unconstitutional nor did they change the character of the State and nation of Zambia. She stated that the enactment was done through the people's elected representatives in Parliament. Counsel contended that the words were progressive as Zambia was multiracial, multi-religious and multi-cultural. Counsel also countered the Petitioner's argument that the definition of "Bill of Rights" was *ultra vires* Article 79(3) of the Constitution, arguing that the definition simply captured what Bill of Rights connotes.

On the referendum, Ms. Mulenga submitted that it was within the Republican President's prerogative to call for a referendum under section 2(1) of the Referendum Act. She proceeded to argue that **The Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order, Statutory Instrument No. 35 of 2015**[6] enabled the participation of both registered voters and persons entitled to register as voters, thus ensuring that no eligible citizen was

disenfranchised. She submitted that holding the referendum and general elections simultaneously paid due regard to prudence and afforded citizens an opportunity to participate. Further on the referendum, Counsel submitted that the Petitioner had not demonstrated in what manner the Referendum Question was convoluted or how it did not meet the criteria of a single issue. Counsel implored the Court to take judicial notice of the fact that numerous sensitization activities and efforts were made through various fora in regard to the referendum.

On dissolution of Parliament, Ms. Mulenga argued that Article 81(5) was not a stand-alone provision but was tied to Article 81(4), where Parliament is dissolved because the Executive cannot effectively govern due to lack of cooperation from the Legislature. Counsel stated that Parliament was dissolved simply because, constitutionally, the five-year mandate had run out, in accordance with Article 81(3) of the Constitution.

On the Petitioner's claim that the President angrily stated that he would not assent to a bill seeking to amend the Grade 12 clause, Counsel submitted that Article 66 provides procedure for assent to

bills and the Petitioner's allegation was misleading, as there was nothing in the petition showing that a bill had been submitted and rejected.

On Article 105(8)(a) in regard to performance of executive functions by the Speaker, Ms. Mulenga argued that the provision facilitates the transition of executive powers in the event of failure to assume office by the President-elect or Vice-President-elect and does not in any way infringe on the principle of separation of powers. Instead, she submitted, the powers are transitional as an election should be held within sixty days so that there is no collapse in the governance of the country.

Submitting on Articles 233 and 254 of the Constitution, Counsel advanced the view that the provisions did not imply power on the part of the President to alienate traditional land. Article 233, she said, establishes the Lands Commission to administer, manage and alienate land on behalf of the President as prescribed by law. She further argued that there was no implication in Article 254(2) that native Zambians would be dispossessed of their land through alienation as alleged by the Petitioner. There was nothing in the

Constitution or supporting legislation were traditional land or the power of chiefs to alienate land had been taken away. Article 254(2) provides:

> **"The President may, through the Lands Commission, alienate land to citizens and non-citizens, as prescribed."**

Counsel submitted that the word "prescribed" referred to legislation on the use of land.

In regard to Article 149(1) empowering the President to create, divide or merge provinces, it was the learned Counsel's submission that the President did not exercise his powers in a vacuum. Counsel argued that the people are involved through the Members of Parliament. Article 149(7) requires ratification by the National Assembly on the establishment of a new province and only after that can the Electoral Commission of Zambia delineate the boundaries of the province created. There was, therefore, Ms. Mulenga argued, no unconstitutionality arising from the provisions of Article 149.

Submitting on section 18(2) of Act No. 1 of 2016, Ms. Mulenga was of the view that the Petitioner had not demonstrated how that provision offended any of the guaranteed rights in the Constitution.

And on Article 98(4) of the Constitution, Counsel submitted that the provision was specific and was subject to Article 98(9) on removal of immunity through the National Assembly. She argued that the purposes of Article 98 were very clear and they served to protect the President or person performing executive functions from criminal proceedings. However, she proceeded to advance the point that where *prima facie* evidence exists that the President had committed an offence, the Constitution gives a clear procedure on removal of immunity in accordance with Article 98(9) and (10), which would lead to subsequent prosecution.

In reply, General Miyanda reiterated his views.

We have given careful consideration to the affidavit evidence and skeleton arguments on both sides of this matter. We have also benefitted immensely from the oral submissions of both parties. This matter has enjoined this Court to pronounce itself on a myriad of issues. A number of them are stand-alone issues. However, some are related and will be addressed together. Before we proceed, it is incumbent upon us at this point to immediately isolate issues that we feel need not be addressed in this judgment.

We note that in regard to the issue of the continued stay in office of ministers and deputy ministers following the dissolution of Parliament, this Court has already, as acknowledged by both parties, rendered its decision in the case of **Stephen Katuka and Law Association of Zambia v. The Attorney General and NgosaSimbyakula and 63 Others**.[2] We, therefore, will not address that aspect of the petition in this judgment.

Before we delve into the issues raised in this matter, it is imperative that we address a point of procedure. As can be noted, virtually all the questions raised for the attention of the Court in this case are on points of law requiring the Court to provide interpretation. According to the Constitutional Court Rules, matters that are brought before this Court solely for interpretation should be commenced by way of originating summons. Order IV rule 2(2) of the Constitutional Court Rules provides that a matter relating to the interpretation of the Constitution shall be commenced by originating summons.

This matter was commenced by way of petition on 11th April 2016.

The Constitutional Court Rules came into being on 27th May, 2016.

Considering that this case was initiated before the Court's rules came into place, wherefrom the Petitioner would have sought guidance on the mode of commencement, this matter is accordingly deemed to have been appropriately commenced. It is with that background that this judgment is rendered.

We now turn to the issues raised in this case. The Petitioner has questioned the constitutionality of a number of provisions in the **Constitution of Zambia (Amendment) Act**[2], seeking the Court's declaration on the same. We wish to point out that the Petitioner raises a fundamental question - can a constitutional amendment be unconstitutional? Considering that the question is directly or indirectly posed by the Petitioner in a number of the reliefs he seeks, we find it imperative to address this point before proceeding to the other specific issues as it appears to be cross-cutting.

Essentially, though not in a direct manner, the Petitioner has enjoined this Court to review some constitutional amendments that, in his view, are unconstitutional and, therefore, null and void. Suffice it to embark from the premise that Article 128(3)(a) empowers this Court to review ordinary legislation that appears to

be inconsistent with the Constitution. Article 128(3)(a) provides that a person who alleges that an Act of parliament or statutory instrument contravenes this Constitution, may petition the Constitutional Court. In view of the Petitioner's claims, the question that immediately comes to the fore is whether this Court can extend its review powers in regard to ordinary legislation to constitutional amendments. In other words, does this Court, on a proper reading of the Constitution, have competence to rule on the constitutionality of a constitutional amendment? Indeed, if that be the case, lying in ambush is the possibility of rendering unconstitutional a constitutional amendment.

At first glance, the question whether a constitutional amendment can be unconstitutional does seem like a strange proposition. However, we hasten to note that apex courts in other jurisdictions have been confronted with similar questions over the decades. The constitutionality of constitutional amendments is thus an issue that has engaged the minds of superior courts in several jurisdictions. We consider this issue cardinal because the need to address it is premised on the presupposition that the constitution exists as a

minimally unified, coherent, functioning document. Its various parts and portions should work towards a coherent, ascertainable purpose, which is to provide a stable constitutional order in pursuit of national values and principles as stipulated in Article 8 of the Constitution. To allege, as the Petitioner has done, that a constitutional provision is unconstitutional is to impute incoherence and inconsistency within the same Constitution. The constitution represents the *grundnorm* – the basic law – laying down the normative and institutional framework for the governance of the country. Thus, it is our considered view that exploring the question of whether a constitutional amendment could itself be unconstitutional, notwithstanding that the Petitioner has questioned the introduction of some provisions in the Constitution as amended, may reward us with a better appreciation of the Constitution itself. However, for our present purposes, we do not see the need to delve into a detailed treatment of the subject beyond what we consider necessary in this matter. As noted above, we explore the issue by way of a few examples of the practice in other jurisdictions.

The question of the constitutionality of constitutional amendments challenged the mind of the High Court of Tanzania in the case of **Rev. Christopher Mtikila v Attorney General**[3]. The case concerned a constitutional amendment that banned the participation of no-party candidates in the general elections. One of the questions that arose was whether that provision was not in conflict with certain provisions in the Tanzanian Bill of Rights. The High Court remarked to the effect that 'it may of course sound odd to the ordinary mind to imagine that the provisions of a constitution may be challenged for being unconstitutional'. Borrowing heavily from Indian jurisprudence, the Tanzanian High Court stated at page 32:

> **"The Respondent contends that the amendments were constitutional because they were duly enacted by the Parliament who have powers under Article 98(1) of the Constitution. We think that is not the issue here. We accept the proposition that although the Parliament has powers to enact legislation, such powers are not limitless. As Professor Issa Shivji in his article '*Constitutional Limits of Parliamentary Powers*' published in special edition of THE TANZANIA LAWYER October, 2003 put it in on p. 39:**
>
> > ***'...the power to amend the Constitution is also limited. While it is true that parliament acting in constituent capacity...can amend any provision of the Constitution, it cannot do so in a manner that would alter the basic structure or essential features of the Constitution.'***
>
> **The issue therefore is whether the amendments to Article 21(1) and Articles 39 and 67 of the Constitution is constitutional."**

The Tanzanian High Court went on to declare the constitutional amendment to that country's Bill of Rights unconstitutional although, later, the Court of Appeal reversed the decision on the basis that there was no litmus test as to what constitutes the basic structure of the constitution. We note that the 'basic structure doctrine' emanated from the Indian Supreme Court where, in the case of **Kesavananda Bharati v. State of Kerala**[4]the court held that a constitutional amendment can be held to be unconstitutional if it violates the basic structure of the constitution. The Indian Supreme Court was of the view that amendments that violate the basic structure of the constitution are unconstitutional despite the fact that the formal conditions for amendment of the constitution had in fact been fulfilled. The **Kesavananda Bharati** case did not provide a precise list of features that constituted the constitution's basic structure.

In the case of **Executive Council of the Western Cape Legislature v. President of the Republic**[5]before the Constitutional Court of South Africa, Justice Sachs noted:

> **"There are certain fundamental features of Parliamentary democracy which are not spelt out in the Constitution but which are inherent in its very nature, design and purpose. Thus, the question has arisen in other**

countries as to whether there are certain features of the constitutional order so fundamental that even if Parliament followed the necessary amendment procedures, it could not change them. I doubt very much if Parliament could abolish itself, even if it followed all the framework principles mentioned above. Nor, to mention another extreme case, could it give itself eternal life – the constant renewal of its membership is fundamental to the whole democratic constitutional order. Similarly, it could neither declare a perpetual holiday, nor, to give a far less extreme example, could it in my view, shuffle off the basic legislative responsibilities entrusted to it by the Constitution."

Justice Sachs sums up what motivates courts to question the validity of constitutional amendments in some jurisdictions, referring to fundamental features inherent in a constitution's nature, design and purpose. That may provide some insight into the fluid concept of the basic structure doctrine.

We take cognizance of the fact that a more straight forward undertaking is where a constitution allows the courts to review the constitutionality of ordinary legislation as our own Constitution does in Article 128(3)(a). What seems more challenging is whether the court has power to review the constitutionality of a constitutional amendment, as the Petitioner in this matter is urging this Court to do.

We note that in some jurisdictions, the task is made easier where the constitution authorizes an apex court to decide the constitutionality of an amendment to the constitution. For

example, the **Constitution of the Republic of South Africa**[1] in Section 167(4)(d) provides that only the Constitutional Court may decide on the constitutionality of any amendment to the Constitution. In other jurisdictions where the courts have entertained consideration of the constitutionality of constitutional amendments, it has either been on the basis of a lack of adherence to the prescribed procedure for alteration or amendments which, in substance, notwithstanding adherence to prescribed amendment formalities, offend the "basic structure" or "fundamental principles" of the constitution in question.

In Austria, the Constitutional Court of that country, in the **State Citizenship**[6] case, determined that it was not empowered to determine the constitutionality of amendments to the constitution with respect to their substance. It, however, declared itself competent to review the constitutionality of constitutional laws with respect to procedural regularity as constitutional laws must be enacted in conformity with the procedure prescribed in the constitution. The **Turkish Constitution of 1982**[2], in Article 148(1), while empowering that country's constitutional court to,

inter alia, examine laws in respect to form and substance, limits the power of the court to examine and verify constitutional amendments only with regard to whether the requisite procedure was followed.

It would seem, therefore, from our point of view, that sister courts in other jurisdictions have allotted to themselves inherent power to review constitutional amendments either from a procedural stand point or from a substantive consideration or, as in the South African and Turkish example, the Constitution expressly authorizes the constitutional court to review the constitutionality of a constitutional amendment.

The question for our present purposes, based on the Petitioner's claims, is whether this Court can pick a leaf from the practice of courts in other jurisdictions and be able to pronounce on the constitutionality of a constitutional amendment. Indeed, is it even possible under our current constitutional framework?

Our departure point is that Article 1(3) of the Constitution states that the Constitution "shall bind all persons in Zambia, State Organs and State institutions." "State organ" is defined in Article

266 of the Constitution as meaning "the Executive, Legislature or Judiciary." The Judiciary, therefore, is bound to uphold the provisions of the Constitution, including what the Constitution stipulates on alteration or amendment. In this respect, Article 79 of the Constitution provides in part that:

> **"(1) Subject to the provisions of this Article, Parliament may alter this Constitution or the Constitution of Zambia Act.**
>
> **(2) Subject to clause (3) a bill for the alteration of this Constitution or the Constitution of Zambia Act shall not be passed unless –**
>
> > **(a) not less than thirty days before the first reading of the bill in the National Assembly the text of the bill is published in the Gazette; and**
> >
> > **(b) the bill is supported on second and third readings by the votes of not less than two thirds of all members of the Assembly.**
>
> **(3) A bill for the alteration of Part III of this Constitution or of this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to National referendum with or without amendment by not less than fifty per cent of persons entitled to be registered as voters for the purposes of Presidential and parliamentary elections."**

It is clear that under our Constitution, there are no substantive limits for constitutional amendments under Article 79. In other words, all provisions of the Constitution are amenable to amendment although the Constitution distinguishes between what one may venture to term 'ordinary provisions' on the one hand and 'entrenched provisions' on the other. Article 79 is unequivocal. First, Parliament has the mandate to alter the Constitution.

Second, for 'ordinary provisions', the procedure is clearly stipulated in Article 79(2). Third, the entrenched provisions, that is Part III and Article 79 itself, are amenable to amendment in accordance with Article 79(3), requiring the approval of the people through an affirmative referendum vote. Thus, faced with the question as to whether a constitutional amendment is constitutional, we are of the firm view that the Constitution itself provides a guide in Article 79 to which alterations or amendments to the Constitution of the Republic of Zambia must conform. As long as the prescribed procedure is followed, the constitutionality of a constitutional amendment cannot be called into question. We echo the words of the South African Constitutional Court in the case of **Premier of Kwazulu-Natal v President of the Republic of South Africa:**[7]

> **"There is a procedure which is prescribed for the amendment to the Constitution and this procedure has to be followed. If that is properly done, the amendment is constitutionally unassailable. It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and reorganizing the fundamental premises of the Constitution, might not qualify as an 'amendment' at all."**

For the avoidance of doubt, this Court would be on firm ground to look into the constitutionality of an amendment to the Constitution if, *prima facie*, there were questions about compliance with Article

a modern democracy is to protect the Constitution and to prevent bodies that were created by the Constitution from abrogating its provisions. In this instance, the Court's role would be to verify whether the conditions for alteration provided for in the Constitution have been fulfilled. An alteration to the Constitution is valid only if it was enacted in conformity with the conditions of form and procedure provided for in the Constitution. Thus, as was stated in the **Premier of Kwazulu-Natal** case aforesaid, if procedure is followed, then the amendment to the Constitution is unassailable.

Our reading of the Constitution also reveals that, while we recognize the possibility of this Court to question the constitutionality of a constitutional amendment from the procedural stand point, under the present constitutional framework, this Court cannot determine the constitutionality of an amendment based on substantive considerations. An amendment becomes part of the Constitution itself upon its passing. Any perceived contradictions between content within the Constitution are matters for interpretation. One could call into question the procedural validity of an amendment

and, thus, attempt to sever the amendment from the Constitution, as the Petitioner wishes this Court to do, but this has nothing to do with the constitutionality of the amendment itself, but the process through which it is proposed, voted upon and enacted.

We find no basis upon which to hold that the amendments introduced by the **Constitution of Zambia (Amendment) Act**[2] violated Article 79 of the Constitution. We note that procedure was followed and the Petitioner has not questioned that fact. Instead, his claims, though not stated in express terms, seem to call into question the validity of the substantive content of the amendments he isolates, that is, alteration of the preamble; that Article 50 of the Constitution as amended is inconsistent with the **Constitution of Zambia**[3]; that Articles 105(8), 233(2) and 254(2) are unconstitutional; and, that Article 98(4) contravenes Article 11 of the **Constitution of Zambia**[3]. We do not find merit in the Petitioner's claims and hold that the Constitution was amended according to the procedural requirements of Article 79(1) and (2).

We now turn to individual reliefs sought by the Petitioner. The first and second reliefs sought by the Petitioner are somewhat related as

they address issues to do with the preamble and, hence, we deal with them together.

In his first prayer, the Petitioner seeks a declaration from this Court that there was no referendum to adopt the Constitution as alleged in the preamble to the **Constitution of Zambia (Amendment) Act**[2] and that the said adoption by the people of Zambia did not occur. His prayer is that that part of the preamble should be struck out as the people had not endorsed it through a referendum. Secondly, the Petitioner seeks a declaration that the purported amendment to the preamble has added words that have changed the character of the nation and State as it has been without the sanction of the people through a referendum and is thus illegal, null and void.

In regard to the question of adoption of the Constitution, the Petitioner claims that the use of the word "adopt" in the last part of the preamble to the Constitution as amended is misleading as it suggests that there was a referendum at which the people endorsed the amendments to the Constitution, when in fact not. The Respondent, on the other hand, argues that the adoption happened through the people's representatives and is, therefore, valid.

The impugned phrase reads as follows:

> **"We, the people of Zambia...do hereby solemnly adopt and give to ourselves this Constitution:"**

The key word, which the Petitioner has asked the Court to interpret is "adopt". The Constitution as amended does not provide a definition. However, the **Concise Oxford English Dictionary**[3] defines the word "adopt", *inter alia*, as meaning to "formally approve or accept". The Petitioner's contention is that the referendum is the mode in which the people express their will and since no such referendum was held, there was no time when the Zambian people, as indicated in the preamble, had adopted or approved the amendments. The Respondent countered this view by submitting that the approval was done through the people's duly elected representatives acting in Parliament.

To resolve the question, it becomes imperative for us to revisit what the Constitution says on amendment or alteration of the Constitution. Article 79 provides for alteration of the Constitution. The relevant portion for our current purpose is Article 79(1) and (2), cited earlier.

The preamble is a constituent part of the Constitution, albeit not part of the operative provisions. According to **Black's Law Dictionary**[4], a preamble is defined as an introductory statement in a constitution, statute, or other document explaining the document's basis and objective. Thus, a preamble to a constitution is important because it sheds light on the aspirations of the people and it provides the foundation stone upon which the Constitution is built. It, therefore, goes without saying, that its alteration has to conform to the requirements of the relevant portions of Article 79. As we noted earlier, Article 79(1) is clear. Under that clause, Parliament has the mandate to alter the Constitution. Article 79(2) provides guidance on the stages a bill for the alteration of the Constitution has to undergo. We hasten to state here that looking at Article 79 as a whole, the only aspect of alteration of the Constitution that has to be referred to a referendum is a bill to alter Article 79 itself or Part III of the Constitution. For the rest of the Constitution, the procedure is as stipulated in Article 79(2).

The Constitution of Zambia (Amendment) Bill No. 17 of 2015 was introduced, debated and passed in the National Assembly and,

together with the Constitution of Zambia Bill No. 16 of 2015, was assented to by the President of the Republic on 5th January, 2016. As stated above, we find that the process of alteration or amendment of the Constitution was duly complied with in accordance with the dictates of Article 79(2). For that reason, we agree with the Respondent's position that the people, through their duly elected representatives, the Members of Parliament, properly altered the Constitution, save for Part III and Article 79 itself which still subsist. Accordingly, we find that the Petitioner's claim that the word "adopt" is misleading as no referendum was held for the people of Zambia to adopt the Constitution is without merit and is dismissed.

In his second prayer, the Petitioner claimed that the inclusion of the phrases *"multi-ethnic, multi-racial, multi-religious and multi-cultural"* had changed the character of the State and nation of Zambia and was unconstitutional, illegal, null and void as no referendum was held to sanction the changes. The Respondent disagrees and submits, as earlier stated, that the amendments were done through the people's representatives and were progressive as Zambia was a

multi-ethnic, multi-racial, multi-religious and multi-cultural country.

From the outset, we wish to state that for reasons already given above, we find that, contrary to the Petitioner's claim, the phrases were inserted in accordance with procedure required in Article 79 of the Constitution. We also note that Article 4(3) of the Constitution reaffirms what is stated in the preamble by providing that:

> **"The Republic is a unitary, indivisible, multi-ethnic, multi-racial, multi-religious, multi-cultural and multi-party democratic State."**

That notwithstanding, we find the Petitioner's claim curious because it is common knowledge that the demographic composition of the Republic of Zambia today is confirmed in the words "multi-ethnic, multi-racial, multi-religious and multi-cultural". Although it is true that the majority of Zambians are of black African ancestry, there are people of other ethnic backgrounds that are Zambian citizens by birth, decent or registration. Under the Constitution, they have equal rights just like any other citizen. We are firmly of the view that a major objective of a good and lasting Constitution is to accord recognition to all types of people within the jurisdiction, to assure their equal worth and value as stipulated in Articles 11 and

23 of the Constitution. We agree with the Respondent that recognizing Zambia as a "multi-ethnic, multi-racial, multi-religious and multi-cultural" country is progressive and simply reaffirms the true nature and character of this country. Accordingly, we find no merit in the Petitioners' claim that it changes the nation's nature and character. It is dismissed.

The Petitioner's third, fourth and fifth prayers were on the subject of the 11th August, 2016 Referendum. Inevitably, to some degree, the reliefs sought are related and intertwined. As is common knowledge, the Referendum was held on 11th August, 2016, and this matter was filed on 11th April, 2016. As we have indicated earlier, the Constitutional Court Rules became operational on 27th May, 2016 and this petition was deemed to have been filed on that date. At the hearing of this matter on 18th August, 2016, the Petitioner sought the Court's guidance as to whether he should proceed to submit on the issue. The Court guided that he could.

In his third prayer, the Petitioner seeks a declaration that the decision by the President to hold a referendum simultaneously with the 11th August, 2016 elections was based on improper

considerations, contrary to public policy, irrational and not justifiable in a democratic State. In his submissions, the Petitioner asserted, among other things, that the issues in question were too complex and there was not adequate sensitization on the referendum. The Respondent's counterview was that conducting the two events at the same time was prudent and afforded citizens an opportunity to participate in the referendum.

A referendum is a device of direct democracy by which the people are asked to vote directly on an issue. It differs from an election, which is a vote to elect persons who will make decisions on behalf of the people. **Black's Law Dictionary**[4] defines a referendum as:

> **"The process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote."**

Ideally, considering the magnitude of the changes to be made to Part III and Article 79, and given the nature of the referendum question, the referendum should have been held separately from the general election. However, there is nothing in the **Referendum Act**[4]that prohibited the holding of the referendum alongside the general elections. We, therefore, find no merit in the Petitioner's claim and dismiss it accordingly.

In his fourth prayer, the Petitioner seeks a declaration that the decision by the President to direct the Electoral Commission of Zambia or another body to determine the Referendum Question is inconsistent with the intent and purpose of the Referendum Act.The Petitioner argued, albeit without much clarification, that the Referendum Question was convoluted and that, in his view, it was meant to confuse the voters.

To the extent that a question put to the electorate should be clear, we agree that beyond considerations of process and participation, the credibility of a constitutional referendum from the perspective of democracy hangs on the content of the question put to the voters. The intricacies of constitutional change are not always easily understood, particularly by citizens who in general pay little heed to such matters. Clarity is important because a meaningful exchange of reasons is only possible if people understand the issues at stake. If citizen reflection is to be meaningful, a prerequisite is that the issues presented to the people are commonly understood. The question in **Statutory Instrument No. 35 of 2016**[6] read as follows:

> **"Do you agree to the amendments to the Constitution to enhance the Bill of Rights contained in Part III of the Constitution of Zambia and to repeal and replace Article 79 of the Constitution of Zambia."**

Just to isolate Part III of the Constitution, the referendum in that case involved a range of different issues packaged together as one. A bill of rights is an extremely complex constitutional matter – it needs some time for reflection and possibly for the building of consensus on how to distil it in a way that is both amenable to a referendum question "yes-no" format and yet still capable of speaking to people's real concerns.

The wording of a referendum question is indeed critical and that a lack of certainty as to the meaning of a question can cause people not to make an intelligent, informed decision and thus participate meaningfully in processes of constitutional authorship. Whereas we do not agree that the question was convoluted, we are of the considered view that it ought to have been broken down into two questions; the first being related to whether or not Part III ought to be amended to enhance the Bill of Rights and, secondly, whether or not Article 79 of the Constitution ought to be repealed or replaced. We say so because it was possible for one to agree to the amendment of Part III of the Constitution and, yet, disagree with the repeal and replacement of Article 79 and vice versa. The

question as framed did not give the option to the voters in the referendum or the opportunity to address their minds appropriately to the two separate questions.

Further on the referendum, the Petitioner contended that the Referendum Question ought to have been personally framed by the President in accordance with the Referendum Act and not by the Electoral Commission of Zambia. A scrutiny of the provisions of the Referendum Act reveals that it does not place a mandatory obligation on the President to personally frame the referendum question, nor does it stipulate who should frame the question. Section 2 of the **Referendum Act**[4] merely provides that if the President considers that a referendum ought to be held on any question or questions specified in the order, he may direct that a referendum be held. Therefore, the issue regarding who should frame the question is administrative.

In the circumstances, the Petitioner's contention that the President should have framed the question has no statutory basis and is therefore dismissed.

The next point the Petitioner raises is whether the President had acted properly in respect of the provisions of Section 2(1) of the **Referendum Act**[4]. Section 2(1) reads:

> **"The President may, if in his opinion it is necessary or desirable so to do, by statutory order, direct that a referendum be held on any question or questions specified in the order."**

The Petitioner's contention is that the President should have issued the statutory order in March 2015 when the announcement was made that a referendum would be held. The **Statutory Instrument No. 35 of 2016**[6] was issued on 20th May, 2016 and the Petitioner argues that its issuance was an after-thought.

Our considered view on this point is brief. We do not agree that the issuance of the said statutory instrument was an after-thought. The material time for the activation of section 2(1) of the Referendum Act, from our point of view is 20th May, 2016, on the basis of which the 11th August Referendum was conducted. From a legal point of view, that is the time the process leading to the holding of the Referendum was triggered. We hold that the process, as required by the Constitution and the Referendum Act was properly adhered to and the Petitioner's claim lacks merit and is dismissed.

Still on this aspect of the referendum, the Petitioner strongly argued that a census was a condition precedent to holding a referendum. That this is pertinent to determining the correct threshold. The Petitioner has a point when he asserts that a recent count of the population would provide current statistics in regard to the portion of the population that qualifies to vote in a referendum as per Article 79(3) of the Constitution of Zambia. We make recourse to the provisions of the **Referendum Act**[4]and our view is that, on a plain reading of the said Act, there is no indication in any of its provisions that a census should be held as a mandatory requirement. Therefore, the claim fails and is dismissed.

In his fifth prayer, the Petitioner seeks a declaration that the purported amendments to the **Referendum Act**[4] by the **Referendum (Amendment) Act**[5] are inconsistent with the intent and purpose of the principal Act and would deny many Zambians their constitutional right to participate and vote in the once in a lifetime Referendum; that the said amendments be struck down as being illegal, null and void.

The Petitioner argued that amendments introduced by the **Referendum (Amendment) Act**[5]were inconsistent with the **Referendum Act**[4]. He makes this claim without making it clear - whether in his petition or skeleton arguments - in what manner the Referendum (Amendment) Act is inconsistent with the principal Act. The **Referendum (Amendment) Act**[5] introduced a number of amendments but a significant amendment was to bring the Referendum Act in compliance with Article 79(3) of the Constitution. We agree with the Respondent that the Referendum (Amendment) Act enables both registered voters and persons entitled to be registered as voters to participate in a referendum. We find nothing in the Referendum (Amendment) Act that runs counter with the intent and purposes of the Referendum Act. The Petitioner's claim on this aspect is unmeritorious and fails and is dismissed.

For his sixth, seventh and eighth prayers, the Petitioner asked this Court to make declarations on three related issues that, in his view, offend Article 79(3) of the Constitution. He claimed that the new definitions in Article 266 of "Bill of Rights", "discrimination" and

"rights and freedoms" are *ultra vires* Article 79(3) and thus illegal, null and void. The Respondent opposed these claims, arguing that the amendments were not illegal. We address the impugned definitions one at a time.

What is commonly referred to as the "Bill of Rights" in the Constitution of Zambia is in Part III -*"Protection of the Fundamental Rights and Freedoms of the Individual"*. The **Constitution of Zambia**[3] did not provide any definition to connote that part of the Constitution. The term "Bill of Rights" is defined in Article 266 of the Constitution as amended to mean:

> **"...the human rights and fundamental freedoms set out in Part III, and includes their status, application, interpretation, limitations, derogations, non-derogations and enforcement".**

Ordinarily, the term "bill of rights" is a generic term. The learned author Charles O. H. Parkinson, in his book **Bills of Rights and Decolonization: The Emergence of Domestic Human Rights Instruments in Britain's Overseas Territories**[5], says the following at page 3:

> **"The term 'bill of rights' also requires explanation. As with many terms in political science, the phrase bill of rights has been used at various times in different contexts by different people. Even today there is no standard definition. It is often used to denote a statement of rights, either domestic or international. A domestic bill of rights may even declare**

adherence to an international statement of rights, such as the United Nations Universal Declaration of Human Rights."

The question that falls for our consideration is, does the provision of the definition of the phrase "Bill of Rights" amount to an amendment of any portion of Part III? A close examination of the meaning of "Bill of Rights" in Article 266 aforesaid seems to refer to the entire package or content of the part of the Constitution dealing with human rights and fundamental freedoms as the caption to Part III clearly suggests.

We see nothing in the definition cited above that suggests that it has caused an alteration to Part III of the Constitution and in the process offended Article 79(3). We find the Petitioner's claim unmeritorious and dismiss it accordingly.

Turning to the definition of the word "discrimination" as given in Article 266, again it is imperative to look at the Constitution. The relevant portion is in Part III. Article 23 of the Constitution deals with protection from discrimination and clause (3) reads:

"(3) In this Article the expression 'discriminatory' means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges

or advantages which are not accorded to persons of another such description."

The impugned definition in Article 266 of the Constitution as amended provides:

" 'discrimination' means directly or indirectly treating a person differently on the basis of that person's birth, race, sex, origin, colour, age, disability, religion, conscience, belief, culture, language, tribe, pregnancy, health, or marital, ethnic, social or economic status;"

It is obvious that, though the two provisions substantively refer to the same principle of prohibition of discrimination, they are worded very differently. We further note that, in addition, the new definition in Article 266 expands the prohibited grounds for discrimination and adds grounds that are not mentioned in Article 23(3), these being birth, age, disability, religion, conscience, belief, culture, language, pregnancy, health, or ethnic, social or economic status. We also note that, unlike Article 23(3), Article 266 does not mention "political opinions" and "creed" as prohibited grounds of discrimination.

Clearly the two provisions are different. We find merit in the Petitioner's contention and hold that maintaining the definition of "discrimination" as given in Article 266 has the effect of amending Article 23(3) which, being part of Part III of the Constitution, cannot be altered minus referral to a referendum as required in Article

79(3). In view of the conflict that the definition causes with the definition given in Article 23(3), we urge the Legislature to redress the conflict by removing the definition from Article 266.

The third aspect the Petitioner raised on alleged amendments to Part III is the definition of the phrase "rights and freedoms" to mean "*the human rights and fundamental freedoms provided for in the Bill of Rights;*". Again, we note that the Constitution before amendment did not provide a definition of the phrase "rights and freedoms". The phrase is a generic term to refer to recognized entitlements for human beings in the field of human rights law. We hasten to state that to the extent that the definition merely and generally refers to the rights and freedoms recognized in Part III of the Constitution, there is no alteration to any portion of that part. We accordingly find no merit in the Petitioner's claim and dismiss it.

For his ninth prayer, the Petitioner seeks a declaration that the decision and announcement by the President in early 2016 that he had decided to dissolve Parliament in May 2016 was unconstitutional and contrary to Article 81(5), (6) and (7) of the Constitution.

The gist of the Petitioner's argument is that it is not within the discretion of the President to dissolve Parliament as the Constitution already determines when dissolution is to happen. To that extent, the Petitioner is correct as evidenced by Article 81(3) of the Constitution. However, as noted in the relief he seeks, the Petitioner cited Article 81(5), (6) and (7) of the Constitution and proceeded to base his argument on the same. For clarity, the said provisions provide as follows:

> **"(5) Where the President intends to dissolve Parliament in accordance with clause (4) the President shall inform the public and refer the matter within seven days, to the Constitutional Court.**
>
> **(6) The Constitutional Court shall hear the matter, referred to it in accordance with clause (5), within seven days of receipt of the matter.**
>
> **(7) The Constitutional Court shall, where it decides that the situation in clause (4) exists, inform the President and the President shall dissolve Parliament."**

As Counsel for the Respondent rightly observed, the events in the foregoing clauses are directly related to Article 81(4). Article 81(4) reads:

> **"Subject to clauses (5), (6) and (7), the President may dissolve Parliament if the Executive cannot effectively govern the Republic due to the failure of the National Assembly to objectively and reasonably carry out its legislative function."**

There is a clear disconnect between the Petitioner's claim and the provisions of the law that he relies on. We, accordingly, find that the Petitioner premised his claim on the wrong provisions of the law

and this proves fatal to his argument on this aspect of the petition. The claim fails for lack of merit and is dismissed.

In his tenth prayer, the Petitioner seeks a declaration that the refusal by the President to assent to a bill not yet submitted to him is irrational and inconsistent with Article 66 of the Constitution. The Petitioner called into question what he termed "angry" sentiments on the part of the President regarding calls to amend the Constitution in respect of the Grade 12 clause. We hasten to state that, clearly, this claim is misconceived. It would have been helpful to the Court had the Petitioner raised issue with either the interpretation or application of Article 66. In our considered view, this was not done. We find that there is no specific issue for the Court to determine on this particular aspect of the petition and dismiss it accordingly.

In his eleventh prayer, the Petitioner seeks a declaration that Article 50 of the Constitution as amended is inconsistent with the **Constitution of Zambia**[3], a fetter to the right of access to media and contravenes Article 20 in Part III. On the other hand, the

Respondent argued that Article 50 is in fact in furtherance of the objectives of Article 20 on freedom of expression. Article 50 states:

> **"A political party and a candidate contesting an election shall have access to the media, especially during election campaigns."**

Article 20 of the Constitution guarantees freedom of expression and the attendant freedoms to receive ideas and information, as well as freedom to impart and communicate ideas and information, whether the communication be to the public or to any person or class of persons. At issue is the Petitioner's contention that Article 50 contravenes Article 20. We have difficulties accepting that assertion. We are inclined, instead, to agree with the Respondent's position that, in fact, Article 50 supports the aims of Article 20. Freedom of expression, as espoused in Article 20, is essential in a democracy. It is a basic right that, in its exercise, enables democratic government to claim legitimacy. It is indispensable to the projection and receipt of ideas and opinions that fuel democratic discourse. The media is one of the platforms that can be used to ensure that political actors send out their messages for the consumption of the polity. In our view, Article 50 is meant to contribute to the easy dissemination of political messages. It is set

in the broader context of the electoral system and process and its objective is to help political players to use the media as a vehicle on which the load of their messages is carried. The Petitioner's claim that Article 50 fetters access to the media is unfounded and without merit. This portion of the petition fails and is dismissed.

In his twelfth prayer, the Petitioner seeks a declaration that Article 105(8)(a) is inconsistent with the principle of separation of powers and that it is unconstitutional. His argument is that no arm of government should prevail over the others as the three bodies – the executive, the legislature and the judiciary – have specific functions.

In opposition, the Respondent argued that Article 105(8)(a) facilitates the transition of executive power in the event that both the President and Vice-President are unable to execute those functions.

The principle of separation of powers gives effect to the strategy of checks and balances, a strategy to preserve liberty and protection against tyranny. In functional terms, it means that there is a diffusion of power by dispersing it amongst the three centres of decision-making, that is, legislature, executive and judiciary. Each

one of these is quite independent of the others in one's own area demarcated by the Constitution. Essentially, it means that the legislature is generally limited to the enactment of the law and not to implementation or interpretation of the same; the executive is generally limited to the implementation of the law and not to the enactment or interpretation of the same; and the judiciary is generally limited to the interpretation and application of the laws in specific cases and not to the making or implementation of the same. The doctrine seeks to prevent monopoly or concentration of power to one person or group of persons. Articles 61, 90 and 118 of the Constitution declare that legislative, executive and judicial authority derive from the people of Zambia and, thus, is testimony to the fact that sovereignty resides in the people and it should remain that way. Put another way, all branches of government act under delegated authority from the people. Government officials, in their various capacities, are representatives of the people and must exercise the powers of their office in the interest of the public.

We note that at the centre of the Petitioner's argument is the point that it should not be allowed that one arm of government

encroaches on another. We agree on that point. However, we hasten to state that from our stand point, it is important to understand that separation does not mean exclusivity. Our view is based on the point that while each arm of government exercises its respective power, it does so in collaboration with the other branches because, in the end, they all belong to one unified government with a common purpose. That unified functioning of government is at the core of the working of the Constitution. And, therefore, through the corollary doctrine of checks and balances, there is no absolute separation of the three branches of government. However, to maintain their co-equality, each arm checks the power of the others. We are of the view that generally the three branches of government cannot, and should not, encroach on each other's space, but constitutional mechanisms allow each one of them to perform acts that would check the power of the others to prevent monopoly, concentration and abuse of power.

The question then is, does Article 105(8)(a) provide a necessary constitutional mechanism or does it allow for a breach in the sacred doctrine of separation of powers?

The Petitioner argues that allowing the Speaker to assume executive powers is an encroachment on the territory of the executive. It is trite that the Speaker is the head of, and presides over, a specific branch of government, the legislature. The follow up question then is, is there anything in Article 105(8)(a) that promotes a breach in the cherished principles of separation of powers and checks and balances in democratic governance? Article 105(8)(a) reads as follows:

> **"Where the Vice-President elect who is supposed to assume the office of President as specified in clause (3) or (6) dies, resigns or is for another reason unable to assume the office of President –**
>
> **(a) the Speaker shall perform the executive functions; ..."**

It is clear from the content of Article 105(8)(a) that the Speaker only steps in when the Vice-President-elect is unable to assume office. The Petitioner submitted that a caretaker, as he termed it, should not, in his view, exercise the powers of the Commander-in Chief. We are inclined to disagree. The Petitioner's argument is flawed because what he is arguing against is precisely what the framers of the Constitution intended; that the person acting as president has full executive powers as provided in Article 92 with the exceptions stated in Article 105(9) of the Constitution. There must be someone

to hold the country together and to perform the functions of the Chief Executive Officer of the State, albeit on a temporary basis and that includes making critical decisions in matters of governance and security of the nation. There would be nothing illegal about the acting president doing what his or her mandate allows within the confines of the Constitution – the full powers of the Chief Executive of the country and Commander-in-Chief, save for powers to dissolve Parliament and to make appointments. Indeed, it would be absurd if that were not the case. Also, it is clear that the Constitution does not intend for this situation to perpetuate, as Article 105(8)(b) shows, when it requires that an election be held within sixty days. There is a limit and it is to ensure that leadership and administration of the country is intact and continuing as opposed to leaving the country in a suspended state of things, which situation would be clearly against the public interest and security.

The Petitioner argues that Article 105(8)(a) was not thought through by the framers of the Constitution. On the contrary, we find that it was. In fact, it would have been remiss for Parliament not to have provided a clear mechanism of transfer of executive power even if

for a temporary period should the situation in Article 105(8) arise. As it is, Article 105(8)(a) gives assurance that someone, in this case the Speaker, is in charge and will make critical decisions as necessary in the interim within the confines of the law. It is our firm view that the acting president, in pursuit of Article 105(8)(a), must be able to exercise full executive powers save for the exceptions prescribed in the Constitution. If the framers of the Constitution had intended for the person acting in the office of president of the Republic not to exercise the full powers and duties of the presidency, it would have been made explicitly and unequivocally clear as this is not a matter that a properly framed constitution can leave in abeyance or to the frailties of conjecture.

We are not satisfied with the Petitioner's contention that the provision in Article 105(8)(a) results in an encroachment by the legislature on the functions of the executive. We hold that it is a necessary constitutional mechanism that ensures stable governance of the country in the event that the Vice-President-elect is unable to assume the office of President. We, therefore, agree with the Respondent that the provision does not in any way offend

the principle of separation of powers and find no merit in the Petitioner's contention. The claim fails and is dismissed.

In his thirteenth prayer, the Petition seeks a declaration that Articles 233(2) and 254(2) are inconsistent with the principle of separation of powers between the President and the traditional authorities and that they do not protect land for indigenous people and, hence, are unconstitutional.The Petitioner's argument is that the impugned provisions have deprived the chiefs of control over traditional land and, thus, left the natives unprotected as far as land is concerned; that the President can alienate land to anybody and this is not restricted to State land.

Articles 233(2) and 254(2) of the Constitution provide as follows:

> **233(2). "The Lands Commission shall administer, manage and alienate land, on behalf of the President, as prescribed."**
>
> **254(2). "The President may, through the Lands Commission, alienate land to citizens and non-citizens, as prescribed."**

Under the new constitutional framework, Article 233 of the Constitution establishes the Lands Commission to undertake the mandate indicated in clause (2) of Article 233. In regard to alienation of land, and as read together with clause (2) of Article

254, the Lands Commission acts as the conduit through which the President alienates land to citizens and non-citizens.

What is notable is that the impugned provisions incorporate the phrase "as prescribed." In terms of Article 266 of the Constitution, "prescribed" means provided for in an Act of Parliament. Therefore, anyone reading the affected provisions must quickly realise that Articles 233(2) and 254(2) aforesaid are not to be taken in isolation. The details regarding alienation of land, in particular customary land which is the Petitioner's prime concern, are to be discovered in an Act of Parliament.

The **Lands Act**[7] is the relevant piece of legislation in this respect. To get to the point, among the purposes of that Act is to provide for the statutory recognition and continuation of customary tenure. In terms of Section 3(1) of the Lands Act, all land in Zambia vests absolutely in the President. It reads:

> **"Notwithstanding anything to the contrary contained in any other law, instrument or document, but subject to this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia."**

And in terms of Section 3(5) of the Lands Act, all land in Zambia is administered and controlled by the President for the use or common benefit, direct or indirect, of the people of Zambia.

The Constitution in Article 254(1) addresses the classification of land by stating that:

> **"Land shall be delimited and classified as State land, customary land and such other classification, as prescribed."**

The position of the law is, therefore, that all land, of whatever classification, vests in the President and he can alienate the same through the Lands Commission as provided in Articles 233(2) and 254(2) of the Constitution. The Constitution does not define the term "land". However, in Section 2 of the Lands Act, "land" means:

> **"...any interest in land whether the land is virgin, bare or has improvements, but does not include any mining right as defined in the Mines and Minerals Act in respect of any land."**

The central issue the Petitioner raises is whether these powers the President has in relation to land, albeit exercised through the Lands Commission, presents an insecure situation in regard to customary tenure or interest. As he argued, the Petitioner fears that through Articles 233(2) and 254(2), rich land seekers from the urban areas will rush to the villages and lap up all the land, leaving nothing for

the poor locals. At this point, we find it imperative to examine what the law says regarding alienation of customary land.

We have already noted above that all land, of whatever classification, vests in the President and he can, according to Article 254(2) of the Constitution, alienate it, through the agency of the Lands Commission, to citizens and non-citizens alike. We remind ourselves that such alienation is "as prescribed", meaning as provided in an Act of Parliament. The **Lands Act**[7] in Section 3(2) and (3) confirms the constitutional provision in Article 254(2) that the President may alienate land to citizens and non-citizens. That point is not in contention. What is troubling to the Petitioner is whether the local people in the villages or rural areas are secure as far as land is concerned.

According to the **Lands Act**[7], alienation of land in a customary area is subject to Section 3(4), which states:

> **"Notwithstanding subsection (3), the President shall not alienate land situated in a district or an area where land is held under customary tenure –**
>
> **(a) without taking into consideration the local customary law on land tenure which is not in conflict with this Act;**
>
> **(b) without consulting the Chief and the local authority in the area in which the land to be alienated is situated, and in the case of a game management area, and the Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated;**

(c) without consulting any other person or body whose interest might be affected by the grant; and

(d) if an applicant for a leasehold title has not obtained the prior approval of the chief and the local authority within whose area the land is situated."

Section 3(4) provides limitations as far as alienation of traditional land held under customary tenure is concerned. Our courts have had the occasion to pronounce on the legal consequences of not complying with the restrictions in Section 3(4) aforesaid. The case of **Siwale and Others v. Siwale**[9]shows that the failure to consult any person or body whose interest might be affected before alienating land situate in customary area can be fatal to any subsequent title granted. In **Still Water Farms Limited v. Mpongwe District Council and Others**[10] the Supreme Court stated that Section 3(4) is couched in such a way that it is mandatory to consult persons with interest in the land and that failure to do so results in the purported allocation to be null and void. The Supreme Court also held similarly in **Village Headman Mupwanya and Another v. Mbaimbi**[11]that failure to consult any person whose interest may be affected by the grant as required in Section 3(4) (c) was fatal.

Further, Section 7 of the **Lands Act**[7]reinforces the interests of customary land tenure, when it provides that the rights and privileges of persons holding land under customary tenure shall be recognized.

We agree with Counsel for the Respondent that there is nothing in Articles 233(2) and 254(2) of the Constitution that implies a displacement of traditional authorities in the alienation of customary or traditional land. Article 254(1) of the Constitution preserves the delimitation and classification of land, as customary land, among other classifications. In any case, we wish to point out that the provisions regarding land being vested in the President and procedures for alienation have, up until now, been provided for in an Act of Parliament with appropriate safeguards which have worked well. The provisions of the Constitution, read together with the relevant legislation, protect customary land tenure interests. We accordingly find the Petitioner's claim on this aspect as lacking merit and dismiss it.

In his fourteenth prayer, the Petitioner seeks a declaration that Article 149(1) of the Constitution is unconstitutional and uncertain

and that it purports to give the President and Parliament unlimited powers to change the boundaries of Zambia at will without the deliberate and direct participation of the citizenry. He stated that the provision sought to alienate the acquired land rights of the native Zambians without their consent. We note that the Petitioner did not offer detailed submissions on this aspect.

In opposing the Petitioner's contention, Counsel for the Respondent argued that the powers in Article 149(1) were not to be exercised in a vacuum. Counsel proceeded to point out that Article 149 provides checks and balances as it provides for approval of the National Assembly.

Article 149(1) reads:

> **"The President may, subject to the approval of the national Assembly, create or divide a province or merge two or more provinces, as prescribed."**

Article 149, in its entirety, is clear. The Respondent is correct in stating that the powers in Article 149(1) are not exercised in a vacuum. The provision expressly provides that the President creates, divides or merges provinces "subject to the approval of the National Assembly". The National Assembly is made up of the people's representatives and, acting through them, the people may

approve or disapprove of the action of the President. This portion of the petition fails for lack of merit and is dismissed.

In his fifteenth and sixteenth prayers, the Petitioner raised the issue of the Grade 12 clause as provided in Articles 70(1)(d), 100(1)(e) and 153(4)(c). He submitted that the provisions are prospective and not retrospective; that they are discriminatory and based on improper considerations.

If we understand the Petitioner's argument on the Grade 12 clause, he suggests that it is prospective in application so that it did not apply to the nominations of candidates relating to the 11th August 2016 elections. He did not explain why he argued that way. When the Constitution as amended was assented to by the President and came into effect on 5th January 2016, all the provisions in the said Constitution came into effect. There was nothing in the Act to suggest that any part of the Constitution would come into effect on a different date. That being the case, it was correct for the Electoral Commission of Zambia to have required candidates for nomination for election of President, Member of Parliament and Councillor to submit their Grade 12 certificate or its equivalent in support of the

application to stand for election. The argument that the provisions are prospective is untenable in view of the clear provisions of the law.

With regard to the Petitioner's argument that to require a candidate for election as President, Member of Parliament or Councillor to have the Grade 12 qualification is to deny them an opportunity to serve and further that politics is not a professional career, cannot stand. Clearly, the framers of the Constitution and Parliament recognized that for one to effectively represent the electorate he needed a minimum educational qualification of Grade 12 or its equivalent in order to articulate the various issues that arise in Parliament. We note that even prior to the current constitutional provisions, Article 64(c) of the **Constitution of Zambia**[3]before amendment provided that a person qualified to be elected as a Member of Parliament if, *inter alia*, he was literate and conversant with the official language of Zambia. The Petitioner's claim, therefore, lacks merit, fails and is dismissed.

For his eighteenth prayer, the Petitioner seeks a declaration that the dissolution of political parties on the grounds given in section

18(2) is irrational, unconstitutional, illegal, null and void and that it is a contravention of Article 21 of Part III of the **Constitution of Zambia**.[3]We note that in both his oral and written submissions, the Petitioner was referring to "Article 18(2)". Looking at the substance of his submission, however, it is clear to us that the Petitioner meant to refer to section 18(2) of the **Constitution of Zambia Act**[1]. For the avoidance of doubt, Article 18, located in Part III of the Constitution, is on a totally unrelated subject to what the Petitioner is advancing here. In this regard, we refer to "Section 18(2)" and not to "Article 18(2)".

The Petitioner's contention was that dissolving a political party in what he termed "unclear circumstances" is taking away their rights to associate and assemble guaranteed in Articles 11(b) and 21 of the Constitution. He argued that Section 18(2) of the **Constitution of Zambia Act**[1]purported to amend Articles 11(b) and 21 contrary to Article 79(3) of the Constitution and that it was not reasonably justifiable in a democratic society. Counsel for the Respondent disagreed and stated that there was no inconsistency and no subtraction from the guaranteed fundamental rights.

Section 18 of the **Constitution of Zambia Act**[1] provides as follows:

> **"(1) A political party in existence immediately before the effective date shall, within twelve months of the effective date, comply with the Constitution as amended and any legislation enacted by Parliament in accordance with the Constitution as amended.**
> **(2) If on the expiry of the period of twelve months, a political party has not complied with the Constitution as amended and any legislation enacted under subsection (1), the political party shall forthwith cease to exist as a political party."**

The directly relevant portion of the Constitution for political parties is Article 60 which, among other things, enjoins political parties to promote the values and principles specified in the Constitution; to promote intra-party democracy; to have a national character; and, to desist from acts of violence, corruption and discrimination. Political parties are the vehicle through which, in a properly functioning democracy, people express their political beliefs, convictions and ideologies. As the Petitioner rightly points out, political parties enable people to exercise their fundamental freedoms to association and assembly, especially in furtherance of political interests.

The key question is, does section 18 of the **Constitution of Zambia Act**[1] in any way offend the rights to freedom of association and assembly as guaranteed in Article 21?

Section 18 is a transitional provision which directs political parties to comply with the provisions of Article 60 of the Constitution, which has introduced parameters within which political parties should operate. In view of the new constitutional requirements, section 18 makes it imperative for political parties to comply with the new constitutional order and any legislation enacted by Parliament in accordance with the Constitution as amended if they are to continue in existence.

The transitional provision is necessary and does not in any way affect the rights to freedom of assembly and association as guaranteed in Article 21 of the Constitution. Further, Article 1(3) of the Constitution clearly states that the Constitution binds all persons in Zambia as well as State organs and State institutions. Political parties are not exempted from complying with the Constitution. The claim fails and is dismissed.

Turning to the Petitioner's nineteenth prayer, the gist of his claim is that Article 98(4) runs counter to Article 11 in Part III of the Constitution. He argues that it is not reasonably justifiable in a democratic State that the Constitution bars the immediate criminal

prosecution of a President who may have committed a heinous crime during his tenure. On the other hand, the Respondent submitted that Article 98 did not bar criminal prosecution of a former President as shown in Article 98 read as a whole. Article 98(4) states in part that:

> **"Subject to clause (9), the President or a person performing executive functions, ..., is immune from criminal proceedings which immunity continues after that person ceases to hold or perform the functions of office."**

It is unequivocal that Article 98(4) shields the Head of State or a person acting in that stead from criminal prosecution. We agree with Counsel for the Respondent that the purpose is to protect the President or person performing executive functions from criminal proceedings as relates to those functions performed in office. It would not augur well for the proper governance of the country if the person performing the duties of president were, at every turn, fearful of any perceived criminal consequences of his actions or decisions in office. Inexplicably, the Petitioner seems not have examined the rest of the content in Article 98. Closer scrutiny reveals that, as shown in Article 98(5), immunity is not absolute, contrary to the Petitioner's assertion. As the Respondent rightly observes, Article 98(5) of the Constitution gives a clear procedure of

the process of removal of immunity and subsequent prosecution. It reads:

> **"Where there is prima facie evidence that a person who held the office of President or who performed executive functions committed an offence whilst in office or during the period that person performed executive functions, the President shall submit a report, outlining the grounds relating to the offence allegedly committed, to the National Assembly, requesting the National Assembly to remove the immunity from criminal proceedings of that person."**

The Constitution does not, therefore, protect persons who have held the office of president from wanton criminality committed during their tenure. Modern constitutions use the mechanism of head of state immunity to avoid unnecessary disruption in the execution of executive functions; to ensure that the Head of State is not inhibited in performing his or her executive functions. This immunity applies to the proper and honest execution of the functions of president and not to deliberate acts or omissions that, by definition, amount to felonious activity. In appropriate circumstances, the provisions of Article 98(5), cited above, can be unlocked. Article 11 is the declaratory provision affording a bird's eye view of the contents and nature of Part III of the Constitution and it is not at odds with Article 98. We find the Petitioner's claim

that Article 98(4) is in conflict with Article 11 untenable and unmeritorious. It is dismissed.

This petition wholly fails on all reliefs sought by the Petitioner save for the claim that the definition of the word "discrimination" given in Article 266 of the Constitution as amended is in conflict with Article 23(3) in Part III of the Constitution.

The case raised important constitutional arguments. Clearly, many, if not all the issues raised are of great interest to the public. Accordingly, and in view of the public interest nature of the issues, we order that each party bear their own costs.

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A. M. SITALI

Constitutional Court Judge

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M. S. MULENGA

Constitutional Court Judge

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E. MULEMBE

Constitutional Court Judge