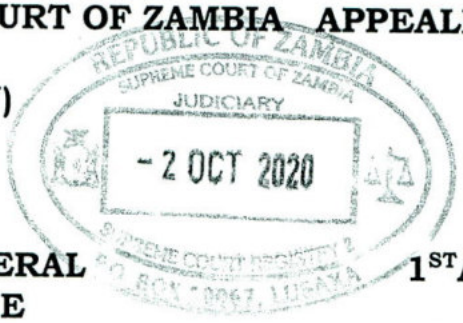
IN THE SUPREME COURT OF ZAMBIA APPEALNO.10/2017
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)



BETWEEN:

THE ATTORNEY GENERAL	**1ST APPELLANT**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**2ND APPELLANT**
ELECTORAL COMMISSION OF ZAMBIA	**3RD APPELLANT**
AND	
GEOFFREY BWALYA MWAMBA	**RESPONDENT**

CORAM: MAMBILIMA CJ; WOOD AND MUTUNA JJS;
On the 15th of July, 2020 and 2nd October, 2020

For the 1st and 2nd Appellants:	**Mr. F. K. Mwale, Principal State Advocate of the Attorney General's Chambers**
For the 3rd Appellant	**Mr. B. Musenga, Commission Secretary, Electoral Commission of Zambia**
For the Respondent:	**Ms. M. Mushipe, of Mushipe and Associates**

JUDGMENT

MAMBILIMA, CJ delivered the Judgment of the Court.

CASES REFERRED TO:

1. **BENNY TETAMASHIMBA V THE SPEAKER OF THE NATIONAL ASSEMBLY, CHAIRMAN OF THE ELECTORAL COMMISSION OF**

ZAMBIA AND THE ATTORNEY GENERAL 2001/HP/0675 (UNREPORTED)

2. THE PEOPLE V THE SPEAKER OF THE NATIONAL ASSEMBLY AND THE HON. R. M. NABULYATO EX PARTE HARRY MWAANGA NKUMBULA (1970) ZR 97
3. THE ATTORNEY GENERAL AND THE MOVEMENT FOR MULTIPARTY DEMOCRACY V AKASHAMBATWA MBIKUSITA LEWANIKA, FABIAN KASONDE, JOHN MUBANGA MULWILA, CHILUFYA CHILESHE KAPWEPWE AND KATONGO MULENGA MAINE SCZ JUDGMENT NO. 2 OF 1994
4. DERRICK CHITALA (SECRETARY OF THE ZAMBIA DEMOCRATIC CONGRESS) V THE ATTORNEY GENERAL SCZ JUDGMENT NO. 14 OF 1995
5. COUNCIL OF THE CIVIL SERVICE UNIONS V MINISTER FOR CIVIL SERVICE [1985] 3 ALL ER 935
6. CHISHIMBA KAMBWILI V ATTORNEY GENERAL 2019/CCZ/009
7. THE ATTORNEY GENERAL AND THE SPEAKER OF THE NATIONAL ASSEMBLY V DR. LUDWIG SONDASHI MP (2003) ZR 42
8. BROMLEY LONDON BOROUGH COUNCIL V GREATER LONDON COUNCIL AND ANOTHER[1982] 1 ALL ER 129
9. ROY CLARKE V ATTORNEY GENERAL 2004/HP/003
10. AMARINDER SINGH V SPECIAL COMMITTEE PUNJAB VIDHAN SABHA AND OTHERS CIVIL APPEALS NO. 6053 OF 2008

LEGISLATION REFERRED TO:

i. THE CONSTITUTION, CHAPTER 1 OF THE LAWS OF ZAMBIA AS AMENDED BY ACT NO. 18 OF 1996, ARTICLES 11, 23, 71(1)(c), 72(1)(a), 86 AND 94(1)
ii. THE SOCIETIES ACT, CHAPTER 119 OF THE LAWS OF ZAMBIA SECTION 2
iii. THE NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) ACT, CHAPTER 12 OF THE LAWS OF ZAMBIA SECTION 34
iv. THE CONSTITUTION, CHAPTER 1 OF THE LAWS OF ZAMBIA AS AMENDED BY ACT NO. 2 OF 1966 SECTION 65 (3) (4) AND (5) (REPEALED)
v. THE CONSTITUTION, CHAPTER 1 OF THE LAWS OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 ARTICLE 119 (1) AND (2)(a)

WORKS REFERRED TO:

a. BLACK'S LAW DICTIONARY
b. OXFORD DICTIONARY OF LAW, ELIZABETH A. MARTIN FIFTH EDITION 2003 OXFORD UNIVERSITY PRESS

1.0 INTRODUCTION

This appeal emanates from a Judgment of the High Court, dated 23rd March, 2016 granting a writ of certiorari to quash the decision by the 2nd Appellant to declare the Respondent's parliamentary seat vacant. The Court also awarded the Respondent damages for loss of emoluments and costs.

2.0 BACKGROUND

2.1 The facts of this case are substantially not in dispute. The Respondent was a duly elected Member of Parliament for Kasama Central Constituency on the governing Patriotic Front (PF) ticket in 2011. On 22nd July, 2015, the Respondent accepted an appointment as Vice President in charge of administration in the opposition United Party for National Development (UPND), without relinquishing his membership in the PF. The Respondent's acceptance was done at a UPND press conference, where he stated as follows -

> **"Country men and women, firstly let me thank the UPND through, of course, the President and the National Management Committee for appointing me to the position of the party Vice-President of Administration. Sir, it is such an honour to serve you in this manner. Mr President, I am extremely humbled that you have chosen to place your faith and trust in me. I accept this offer wholeheartedly. This is a responsibility that I do not take lightly and I will endeavour to do the utmost to advance the cause of this great party which, I have no doubt, will form the next government in**

the next few months. Mr. President, once again, thank you very much for this appointment."

2.2 This event triggered a point of order in Parliament. The then Minister of Home Affairs, Hon. Davis Mwila inquired whether the Respondent was in order to continue to sit in the House when earlier that day he had resigned from PF and joined UPND. He stated that under the Constitution, a member of parliament who resigned from the party on whose ticket he/she was elected and joined another political party, immediately lost his/her seat. This was in an apparent reference to Article 71(2)(c) of the **CONSTITUTION**[i] as amended by Act No. 18 of 1996, which provided that -

> **"71 (2) A member of the National Assembly shall vacate his seat in the Assembly –**
> **(a) ...**
> **(b) ...**
> **(c) in the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or having been a member of a political party, he becomes an independent;**

2.3 The Speaker of the National Assembly, who is the 2nd Appellant in this appeal, reserved his ruling on the point of order, along with other points of order which raised similar issues. The 2nd Appellant indicated that he needed time to

carefully study the matters in order to render a measured ruling.

2.4 On 24th July, 2015, two days after the point of order was raised, the Respondent filed a petition in the High Court under Cause No. 2015/HP/1182. In that petition, the Respondent sought *inter alia* an interpretation of Articles 11, 23 and 71(2) of the **CONSTITUTION**[i]. The petition read in part:-

> **"This is a petition for an interpretation of the Constitution of Zambia, Chapter 1 of the Laws of Zambia primarily concerning Articles 11, 23 and 71(2) with respect to the uncertainties regarding the application to the question of an opposition party associating or appointing Members of Parliament from the ruling party to party positions within the opposition party without the aforesaid Members of Parliament neither expressly revoking their membership in the ruling party nor expressly or entirely becoming members of the opposition party that they freely choose to politically associate with."**

2.5 In addition to the petition under Cause No. 2015/HP/1182, the Respondent was in possession of an injunction, granted to him by the High Court in another matter under Cause No. 2014/HP/239, prohibiting the PF, its agents or servants from expelling him from the party.

2.6 The 2nd Appellant eventually delivered a consolidated ruling on 28th July, 2015. With respect to the Respondent, the 2nd Appellant ruled that he had crossed the floor and

consequently was out of order to sit in the House. His decision was largely informed by Section 2 of the **SOCIETIES ACT**[ii], which interpreted **"member"** in relation to a society to include an **"office bearer"**. The word **"office bearer"** was defined in the following terms -

> **"...in relation to any committee or governing or executive body of a society, means any person who is a president, vice president, chairman, deputy chairman, secretary or treasurer of such society, committee or body, or holds therein any office or position analogous to any of those mentioned above."**

2.7 The 2nd Appellant ruled that by accepting a senior position of vice president, the Respondent became an office bearer and subsequently a member of the UPND as defined in the **SOCIETIES ACT**[ii], bringing him squarely within the realm of Article 71(2)(c)of the **CONSTITUTION**[i], which outlawed dual membership.

2.8 The 2nd Appellant declared that in keeping with the precedent of the House set by his predecessor, and affirmed by the High Court in the case of **BENNY TETAMASHIMBA V THE SPEAKER OF THE NATIONAL ASSEMBLY, CHAIRMAN OF THE ELECTORALCOMMISSION OF ZAMBIA AND THE ATTORNEY-GENERAL**[1], the Respondent had lost his seat. He then went on to declare the Kasama

Central parliamentary seat vacant. The relevant part of his ruling read as follows-

> **"I now declare that in joining the UPND by becoming its vice president responsible for administration on Wednesday, 22 July, 2015, a political party on whose ticket he was not elected to this House, Mr. G. B. Mwamba MP crossed the floor as envisioned by Article 71(2)(c) of the Constitution and lost his seat as Member of Parliament for Kasama Central Parliamentary Constituency. Mr. G. B. Mwamba MP was, therefore, out of order to sit in the House. Accordingly, I now declare that the Kasama Central Parliamentary Constituency seat is vacant forthwith."**

3.0 THE RESPONDENT'S ORIGINATING NOTICE OF MOTION FOR JUDICIAL REVIEW

3.1 Disenchanted with the 2nd Appellant's ruling, the Respondent instituted legal proceedings in the High Court by way of judicial review. The Respondent deposed in his affidavit in support of the originating notice of motion that he had accepted the appointment of UPND Vice President, without expressly revoking his membership in the PF. He contended that he did so just as other elected opposition Members of Parliament, who had been appointed in the PF government and were freely and openly associating with and campaigning for the ruling party in by-elections, had done.

3.2 He further deposed that he had received reliable information through media reports, raising questions about a vacancy in his parliamentary seat. That considering the nature of the

questions being raised, he instructed his lawyers to commence proceedings under Cause No. 2015/HP/1182. That his advocates duly notified the 2nd Appellant about his matters in Cause No. 2015/HP/1182 and Cause No. 2014/HP/239 but the 2nd Appellant disregarded the notice and went ahead to rule on the point of order, declaring his parliamentary seat vacant. The Respondent sought a wide range of reliefs, which were formulated as follows –

1. **An order of certiorari to move into the High Court for purposes of quashing the2ndRespondent's decision delivered on 28th July, 2015, declaring the Applicant's parliamentary seat vacant and to quash the said decision.**

2. **An order and declaration that the purported interpretation of the provisions of the Constitution, in particular Article 71(2)(c) and the subsequent ruling regarding the membership of the Applicant by the 2nd Respondent concerning the Applicant's parliamentary seat is unconstitutional and to that effect wholly null and void.**

3. **An order and declaration that the exercise of power by the Speaker declaring the Applicant's parliamentary seat vacant in contravention of Articles 71(2) (c) and 72(1)(a) was not within the confines of the provisions of the Constitution and as such is not protected by Section 34 of the NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) ACT, Chapter 12 of the Laws of Zambia but is instead constitutionally amenable to judicial intervention by the courts of law.**

4. **An order and declaration that the 2nd Respondent owed and still owes a constitutional, administrative and statutory duty to the Applicant not to dwell into questions concerning the determination of membership of the National Assembly with regard to a seat being declared vacant pursuant to Article 72(1)(a) of the CONSTITUTION, Chapter 1 of the Laws of Zambia.**

5. **An order of prohibition proscribing the 2nd Respondent from acting in excess or outside of its jurisdiction by interpreting**

Article 71(2)(c) or enforcing Article 72(1)(a) of the CONSTITUTION OF ZAMBIA, Chapter 1 of the Laws of Zambia, respectively.

6. **An order of prohibition proscribing the 3rd Respondent from invoking sections 26,28,32,33,35,108and 129(1) of the ELECTORAL ACT No. 12 of 2006 on the basis of the purported declaration made by the 2nd Respondent until full determination of this matter.**

7. **Damages for loss of emoluments and privileges.**

8. **Costs.**

3.3 The grounds upon which the Respondent sought the afore-mentioned reliefs were illegality, excess of jurisdiction, unreasonableness, irrationality, procedural impropriety, unfairness and breach of legitimate expectation.

3.4 On illegality, the Respondent contended that the 2nd Appellant purported to exercise a power he did not possess by interpreting Article 71(2)(c) of the **CONSTITUTION**[i] and proceeding to declare his parliamentary seat vacant. That in doing so the 2nd Appellant acted *ultra vires* the provisions of Article 72(1)(a), which conferred exclusive jurisdiction on the High Court to determine any vacancy in the National Assembly. The said Article 72(1)(a) provided that-

> **"72 (1) The High Court shall have power to hear and determine any question whether -**
> **(a) any person has been validly elected or nominated as a member of the National Assembly or the seat of any member has become vacant;"**

3.5 As regards procedural impropriety and unfairness, the Respondent asserted that by not forwarding the question of the vacancy in his parliamentary seat to the High Court, the 2nd Appellant failed to observe the correct procedure. According to the Respondent, the procedure was that the 2nd Appellant would have first received notification regarding his seat from the leader of the PF, in this case, the vice president. That upon receipt of the said notice, the 2nd Appellant would have forwarded the issue to the Chief Justice, who by himself or by nominating a High Court Judge, would have determined the truth of the allegation or otherwise. He relied on the case of **THE PEOPLE V THE SPEAKER OF THE NATIONAL ASSEMBLY AND THE HON. R. M. NABULYATO EX PARTE HARRY MWAANGA NKUMBULA**[2] where it was held that -

> **"When the requirements of Section 65(4) of the Constitution have been satisfied, it is mandatory for the Speaker to inform the National Assembly of the allegations made by the leader of a political party that a member of his party in the Assembly has ceased to be a member of his party. It is then a matter for the Chief Justice, either by himself or through a Judge of the High Court nominated by him, to determine the truth or otherwise of the allegations."**

3.6 On excess of jurisdiction, the Respondent argued that the 2nd Appellant, by entertaining the point of order, erred as

determination of any question relating to the vacancy, in a Member's seat was the preserve of the High Court.

3.7 Coming to unreasonableness and irrationality, the Respondent contended that by improperly exercising power to interpret the Constitution, the 2nd Appellant acted so unreasonably and irrationally in the Wednesbury sense that no reasonable Speaker could ever have made such a decision.

3.8 Lastly on legitimate expectation, the Respondent asserted that the 2nd Appellant acted contrary to his legitimate expectation, both procedurally and substantively. That he had a legitimate expectation that the 2nd Appellant would reserve his ruling considering that he (the Respondent) had pending court proceedings and the Speaker had a practice of reserving his rulings in matters which were before the courts of law.

4.0 THE APPELLANTS' AFFIDAVIT IN OPPOSITION TO THE ORIGINATING NOTICE OF MOTION FOR JUDICIAL REVIEW

4.1 The Appellants opposed the Respondent's originating notice of motion for judicial review, arguing that the Respondent ceased to be a member of the PF, the party which sponsored

his election to the National Assembly for the Kasama Central parliamentary constituency, the moment he accepted the position of vice president in the UPND.

4.2 In their affidavit in opposition to the notice of motion, the Appellants argued that the 2nd Appellant was not precluded from delivering his ruling on 28thJuly, 2015 even though the Respondent had matters pending before the courts of law.

The Appellants also asserted that the 2nd Appellant was merely enforcing provisions of the law when he delivered the ruling. Further that the 2nd Appellant acted within his jurisdiction in accordance with the doctrine of separation of powers as enshrined in Article 86 of the **CONSTITUTION**[i], which provided that -

> **"Subject to the provisions of the Constitution, the National Assembly may determine its own procedure."**

4.3 The Appellants further asserted that in the exercise of his powers the 2nd Appellant was protected by the principle of exclusive cognisance under Section 34 of the **NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) ACT**[iii], which states that -

> **"Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the**

Assembly, the Speaker or such officer by or under the Constitution, the Standing Order and this Act."

4.4 For the most part, the Appellants discounted all assertions that the 2nd Appellant's decision was irrational, unreasonable, illegal, procedurally improper and in excess of jurisdiction.

5.0 DECISION OF THE HIGH COURT

5.1 Lengalenga J (as she then was) examined Articles 71(2) and 72(1)(a) of the **CONSTITUTION**[i], as they existed at the time. In terms of Article 72(1)(a),she held the view that ordinarily, the jurisdiction to hear and determine whether the seat of any member had become vacant was vested in the High Court.

5.2 As regards Article 71(2), the learned Judge observed that the provisions clearly stated instances when a Member of Parliament was required to vacate his/her seat. That because of the mandatory nature of the provisions of Article 71(2), these instances did not require the High Court to determine the circumstances by which a member vacated his or her seat. She, nonetheless, found that when the two provisions were read together with Section 34 of the **NATIONAL ASSEMBLY (POWERS AND PRIVILEGES)**

ACT[iii], the 2nd Appellant acted illegally and *ultra vires* the provisions of Article 72(1)(a) of the **CONSTITUTION**[i].

5.3 On excess of jurisdiction, the learned Judge found that the mere filing of a petition seeking the interpretation of Article 71 did not oust the 2nd Appellant's jurisdiction to deliver his reserved ruling and nor was it a basis upon which to stay the ruling. That in any event, the Respondent only filed his matter after the 2nd Appellant had reserved his ruling. This notwithstanding, she held that the 2nd Appellant exceeded his jurisdiction when he proceeded to declare the Respondent's parliamentary seat vacant.

5.4 With regard to irrationality and unreasonableness, the learned Judge found that the act of ruling on the point of order was not in itself irrational or unreasonable. That what was unreasonable and irrational was not referring the question of the vacancy of the seat to the High Court.

5.5 Coming to procedural impropriety and unfairness, the learned Judge concluded that there was impropriety and unfairness when the 2nd Appellant declared the Respondent's seat vacant instead of referring the matter to the High Court. In her own words, she stated-

"On the authority of the NABULYATO case and the constitutional provisions, I am fortified in finding that there was procedural impropriety and unfairness on the part of the 2nd Respondent when he proceeded to declare the Applicant's parliamentary seat vacant instead of referring the matter to the High Court for determination."

5.6 Dealing with legitimate expectation, the learned Judge found that by declaring the parliamentary seat vacant, the 2nd Appellant breached the Respondent's legitimate expectation to have the status of his parliamentary seat determined by the High Court.

All in all, the learned Judge granted the Respondent an order of certiorari to quash the decision of the 2nd Appellant and a host of other reliefs except for a declaration that the interpretation of Article 71(2)(c) and the ruling thereof, were unconstitutional, and therefore null and void. She ordered that the Respondent should be paid damages for loss of emoluments but not for loss of privileges because he did not furnish the Court with evidence to support his claim. Costs were to follow the event or be taxed in default of agreement.

6.0 THE APPEAL AND APPELLANTS' HEADS OF ARGUMENT

6.1 The Appellants were disappointed with the determination by the High Court and escalated the matter to this Court,

advancing three grounds of appeal, which were expressedin the following terms -

1. **The Judge in the Court below erred in law and fact by deciding that" *On the authority of the NABULYATO case and the Constitutional provisions, I am fortified in finding that there was procedural impropriety and unfairness on the part of the 2nd Respondent when he proceeded to declare the Applicant's Parliamentary Seat vacant instead of referring the matter to the High Court for determination".***

2. **The Judge in the Court below erred in law and fact in deciding that the Speaker of the National Assembly acted illegally or *ultra vires* the provisions of Article 72(1)(a) of the Constitution.**

3. **The Judge in the Court below erred in law and fact when she found that the Applicant's legitimate expectation to have the status of his parliamentary seat determined by the High Court was breached by the declaration of seat vacant and by her order to pay the Respondent his emoluments.** (sic)

6.2 At the hearing of the appeal, we were informed by Mr. Musenga that the 3rd Appellant had not appealed although it was appearing on the notice and record of appeal. As a result, there were no heads of argument filed on behalf of the 3rd Appellant.

6.3 Mr. Mwale on behalf of the 1st and 2nd Appellants relied on the written heads of argument filed on 16th February, 2017. He augmented them with brief oral submissions.

6.4 On the first ground of appeal, the Appellants' argument, in the main, was that the 2nd Appellant, when delivering the disputed ruling on 28th July, 2015 was exercising powers

derived from Article 71(2)(c) of the **CONSTITUTION**[i]. They argued that there was nothing in the provisions of Article 71(2)(c) to suggest there was a requirement to call upon the High Court to interpret whether a member of the National Assembly had lost his seat after crossing the floor.

6.5 The Appellants contended that the Respondent's seat fell vacant by operation of law, and that the 2nd Appellant was merely enforcing the provisions of Article 71(2), which spelt out instances when Members of the National Assembly lost their seat. They asserted that the impugned ruling was not a decision capable of being reviewed but an implementation of the constitutional provisions. They argued that referring the matter to the High Court would have been unnecessary because there was no dispute over the Respondent's action.

6.6 The Appellants submitted that this Court has had occasion to deal with the interpretation of Article 71(2) and the holding has been that the Speaker was on firm ground to declare a parliamentary seat vacant when a member of parliament crossed the floor. In support of this submission, they cited the case of **ATTORNEY GENERAL AND THE MOVEMENT FOR MULTIPARTY DEMOCRACY V**

AKASHAMBATWA MBIKUSITA LEWANIKA, FABIAN KASONDE, JOHN MUBANGA MULWILA, CHILUFYA CHILESHE KAPWEPWE AND KATONGO MULENGA MAINE[3] in which Bweupe, Acting CJ (as he then was) stated:-

> **"It is perfectly clear on the face of it, the Article is intended to prohibit floor crossing generally...The effect of our interpretation of Article 71(2)(c) is that the Respondent in the main appeal, who were petitioners in the Court below, had vacated their seats in the National Assembly on 12th August, 1993, the date on which they announced their resignation from the MMD, the party on whose tickets they were elected to the National Assembly."**

6.7 The Appellants also called in aid, the High Court case of **BENNY TETAMASHIMBA V THE SPEAKER OF THE NATIONAL ASSEMBLY, THE CHAIRMAN OF THE ELECTORAL COMMISSION OF ZAMBIA AND THE ATTORNEY GENERAL**[1] where Mutale J held as follows -

> **"He (the applicant) became a UPND Member...it unfortunately made him a dual member contrary to the provisions of Article 71 and draws him into the jurisdiction of the Speaker...the Speaker found that the applicant did have dual membership...there was, therefore, no illegality, impropriety, malice or unreasonableness when the Speaker made that decision."**

The Appellants submitted that unlike the **TETAMASHIMBA**[1] case, where the Speaker had to draw an inference from a letterhead of the office of the UPND Secretary General as an indication that Mr. Tetamashimba

had crossed the floor, the Respondent in the case in *casu* publicly announced his appointment during a press conference.

6.8 The Appellants further submitted that the **TETAMASHIMBA**[1] case needed to be carefully distinguished from the **NABULYATO**[2] case on which the learned Judge relied for her finding of procedural impropriety and unfairness. The two cases, the Appellants submitted, were heard and decided under two different constitutional regimes with different procedural requirements. According to them, the **NABULYATO**[2] case was decided when the constitutional provisions mandated the Speaker to refer the question as to whether a member of parliament had lost his/her seat to the High Court after crossing the floor; while the case of **TETAMASHIMBA**[1], on the other hand, was determined when the constitutional provisions did not require the Speaker to do so.

6.9 The Appellants submitted that the provisions of Section 65(4) of the **CONSTITUTION**[iv], as amended by Act No. 2 of 1966, which were in force at the time that the case of **NABULYATO**[2] was decided, were distinct from the

provisions of Article 71 of the **CONSTITUTION**[i] as amended by Act No. 18 of 1996, and the subject of the appeal in the **TETAMASHIMBA**[1] case. Section 65 (4) of the 1966 Constitution provided as follows –

> **"If notice in writing is given to the Speaker of the National Assembly, signed by a member of the National Assembly who is recognised by the Speaker as being the leader in the Assembly of a particular political party, alleging that an elected member of the Assembly –**
> **a) conducted his campaign for election to the Assembly as a member of such political party; and**
> **b) has, since his election to the Assembly ceased to be a member of such political party,**
> **the Speaker shall inform the Assembly of such allegations and shall furnish the Chief Justice with a copy of the notice given to him."**

6.10 Counsel submitted that the learned Judge in the Court below appreciated the distinction between the two provisions in her ruling granting the Appellants stay of execution of her judgment pending determination of this appeal. She (the Judge) stated at page 419 of the record of appeal, that -

> **"After carefully considering the 1st and 2nd Respondents' arguments in which they distinguished the TETAMASHIMBA case giving reasons that at the time the NABULYATO case was heard there was a provision that mandated the Speaker to refer the matter to the High Court whereas the TETAMASHIMBA case was based on the constitutional provisions that formed the basis of this court's decision. According to the learned Solicitor General's arguments the said provisions do not mandate the Speaker to refer the question of determination of a parliamentary seat's vacancy to the High Court. I consider the foregoing arguments to form the basis for good and convincing grounds that the proposed appeal has prospect of success".**

6.11 Coming to the second ground of appeal, the Appellants echoed their arguments in support of the first ground of appeal that the 2nd Appellant acted within the confines of the law. They argue that the Speaker was merely enforcing the provisions of Article 71 when he rendered his ruling and that the ruling in issue was simply an implementation of those constitutional provisions.

With regard to the learned Judge's finding that the 2nd Appellant acted illegally and *ultra vires* Article 72(1)(a), the Appellants argued that the provisions of Article 72 only provided a forum by which a party could challenge decisions of the Speaker. They submitted that the Speaker had authority under Article 71 of the **CONSTITUTION**[i] and Section 34 of the **NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) ACT**[iii] to make a ruling on the standing order and that it was up to a party aggrieved by the decision to take the dispute to the High Court under Article 72(1)(a).

6.12 With regards to the third ground of appeal, the Appellants submitted that the Respondent's ground of legitimate expectation was premised on a misdirection of the law in that the Constitutional regime which was in place when the

case of Nabulyato was decided had changed. At that time, the Speaker was required to refer the Standing Order to the High Court. The position changed when the Constitution was amended in 1996. The Speaker now had the power under Article 86 of the Constitution and Section 34 of the National Assembly (Powers and Privileges) Act to hear and determine the Standing Order and Article 71(1)(a) of the Constitution mentioned the court to which a party aggrieved by the Speaker's decision would take the matter for determination. The Appellants relied on the cases of **TETAMASHIMBA**[1] and **AKASHAMBATWA**[3] which were decided under the latter constitutional regime. They contend that the ground of legitimate expectation should have been focused on these two cases and not the case of Nabulyato. The Appellants ended their submissions by urging us to overturn the decision of the High Court with costs and to declare that the Respondent had crossed the floor thereby bringing him within the purview of the 2nd Appellant's jurisdiction.

6.13 In his oral submissions, Mr. Mwale submitted that the learned Judge in the Court below seemed to have agreed

with the Appellants that the Respondent had crossed the floor and that it was within the Speaker's power, using the constitutional order which was in force at the time, to declare the Respondent's seat vacant.

7.0 THE REPONDENT'S HEADS OF ARGUMENT

7.1 In response to this appeal, Counsel for the Respondent Ms. Mushipe filed written heads of argument on 21st April, 2020. She relied on the said arguments and augmented them with oral submissions.

Reacting to the Appellants' arguments on the first ground of appeal, Ms. Mushipe submitted that the learned Judge was on firm ground when she held that there was procedural impropriety and unfairness when the 2nd Appellant proceeded to declare the Respondent's seat vacant instead of referring the matter to the High Court for determination.

7.2 Learned Counsel, while acknowledging that the remedy of judicial review is available to challenge the manner in which a decision was made, and not the merits of the decision, conceded that the 2nd Appellant acted within his parliamentary powers when he responded to the point of order. She, however, contended that by interpreting Article

71, the 2nd Appellant seriously exceeded his authority and improperly exercised a power which did not reside in his precincts.

7.3 Ms. Mushipe argued, as she did in the Court below, that the power to interpret the Constitution or any law, for that matter, was vested in the Judiciary. That this was provided for under Article 72(1)(a) as well as Article 94(1) of the **CONSTITUTION**[i], which conferred the High Court with unlimited and original jurisdiction to hear and determine criminal and civil proceedings.

7.4 It was learned Counsel's further submission that the 2nd Appellant exceeded his constitutional power by delivering a ruling when there were matters pending before the High Court. That by straying or encroaching into the adjudicative functions of the Court, the 2nd Appellant's decision was amenable to judicial review for procedural impropriety and unfairness. To support this proposition, Ms. Mushipe referred to a number of authorities. One of them was the case of **DERRICK CHITALA (SECRETARY OF THE ZAMBIA DEMOCRATIC CONGRESS) V ATTORNEY GENERAL**[4] in which Ngulube CJ (as he then was) cited with

approval, the opinion of Lord Diplock in **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**[5] in which he stated:-

> **"I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

7.5 Ms. Mushipe also invited us to look at the decision of the Constitutional Court in the case of **CHISHIMBA KAMBWILI V ATTORNEY GENERAL**[6]. In particular, she drew our attention to a portion of the judgment at J30 where the Court held that-

> **"It is also clear from Article 119 of the Constitution as amended that the mandate to interpret the law and the Constitution has been given to the courts of the land...**

We were also referred to J38 where the Court held as follows:-

> **"As regards the contention that the Speaker breached the Constitution on (the) ground that he went on to decide on a matter that was before the courts of the land and, therefore, sub judice...we of course agree that, this issue was raised from the floor of the House but nevertheless, since the same issue was already pending determination in the courts of law, the Speaker by proceeding as he did, fell foul of the sub judice rule"**

7.6 Commenting on the Appellants' argument that the 2nd Appellant was clothed with authority to declare a parliamentary seat vacant based on the courts pronouncements in the **AKASHAMBATWA**[3] and **TETAMASHIMBA**[1] cases, Ms. Mushipe submitted that the two cases were distinguishable and inapplicable. The difference, she submitted, was that the 2nd Appellant in the case in *casu* improperly went ahead to render his ruling, declaring the Respondent's seat vacant despite being duly notified about the active cases, and that he failed or neglected to refer the matter to the High Court for determination. She submitted that in contrast, the Applicants in the **AKASHAMBATWA**[3]and **TETAMASHIMBA**[1] cases were mainly seeking an order or declaration that the Speakers' decision to declare their seats vacant, was null and void.

7.7 Ms. Mushipe submitted further that there was clearly no contention over the 2nd Appellant's power to declare a seat vacant. That what the Respondent had a quarrel with was the 2nd Appellant's decision to declare his seat vacant when there were active matters, namely Cause No.

2015/HP/1182 and Cause No. 2014/HP/239, which were pending determination of constitutional issues regarding his parliamentary seat. That by so deciding, the 2nd Appellant improperly breached the Respondent's legitimate expectation to have the status of his parliamentary seat determined by the High Court.

7.8 Ms. Mushipe contended that while there may have been constitutional amendments enacted after the **NABULYATO**[2] case was decided, these amendments never stripped the courts of their mandate to interpret the Constitution and the law. Also, that even though the Constitution gives power to the National Assembly to regulate its own procedure and make standing orders for the conduct of business, and for the Speaker to declare a seat vacant in accordance with the constitutional provisions, this power is not absolute. According to Counsel, the Courts still have the constitutional mandate to scrutinise the actions of the National Assembly or the Speaker whenever allegations of contravention in constitutional procedures arose. To support this proposition, she cited the case of **THE ATTORNEY GENERAL AND THE SPEAKER OF THE**

NATIONAL ASSEMBLY V DR. LUDWIG SONDASHI MP[7] where, according to Counsel, we stated that Courts through judicial review, can scrutinise the actions of the National Assembly or the Speaker where there is an allegation that there was contravention of the Constitution.

Ms. Mushipe also cited the learned authors of Black's Law Dictionary who defined the term **"usurpation"** as **"the unlawful seizure and assumption of another's position, office or authority"** and the learned authors of the Oxford Dictionary of Law for the definition of the**"sub judice rule".** They define it as:-

> **"1.A rule limiting comment and disclosure relating to judicial proceedings in order not to prejudge the issue or influence the jury.**
> **2.A parliamentary practice in which the Speaker prevents any reference in questions or debates to matters pending decision in court proceedings (civil or criminal) ..."**

7.9 Coming to the second ground of appeal, Ms. Mushipe repeated her earlier arguments that by declaring the Kasama Central parliamentary constituency seat vacant when there were active matters before the High Court, the 2nd Appellant breached the Respondent's expectation to have the status of his seat determined by the Court and rendered the said matters, nugatory.

7.10 She submitted that not only did the 2nd Appellant usurp the powers of the Court, but he also violated the rules of natural justice, thereby denying the Respondent the right to be heard by the High Court. That as such, the 2nd Appellant's actions were outrageous, illegal, unreasonable and *ultra vires* the provisions of Article 72(1)(a). Learned Counsel cited, for persuasive value, the cases of **BROMLEY LONDON BOROUGH COUNCIL V GREATER LONDON COUNCIL AND ANOTHER**[8] and **COUNCIL OF THE CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**[5] to demonstrate that unreasonableness of a decision extended to an authority proceeding upon a misconception of the duties imposed by statute.

Ms. Mushipe also relied on the 2004 High Court decision in the case of **ROY CLARKE V ATTORNEY GENERAL**[9] where Musonda J (as he then was)held as follows –

> **"Illegality or *ultra vires* entails that all public bodies and officials must act within the law. Ministers exercise powers as a consequence of statute and common law and cannot act beyond those powers as that would be illegal or *ultra vires*. When considering whether a public body has been acting *ultra vires*, the Court will look at the relevant statutory provisions and the purpose of the statute."**

7.11 Reacting to the Appellants' argument on the third ground of appeal, that the Respondent's ground of legitimate

expectation was premised on a misdirection of the law, Ms. Mushipe maintained that the Constitution still mandates the Court to interpret the Constitution itself and the law. She submitted that **CONSTITUTION[i],** as amended by Act No. 18 of 1996, never changed the position in the **NABULYATO[2]** case nor did it oust the courts' constitutional mandate regarding determination of a vacancy in a parliamentary seat.

7.12 Learned Counsel echoed her argument that Article 72(1)(a) vested power in the High Court to hear and determine any question relating to a vacancy of a seat in the National Assembly. That in addition, Article 119(1) and(2)(a) of the **CONSTITUTION[v]** as amended by Act No. 2 of 2016 vests judicial authority and judicial function in the court to hear civil and criminal matters as well as matters relating to and in respect of the Constitution.

7.13 Ms. Mushipe, in summing up, submitted that the judicial review proceedings in this case were premised on Article 72 of the Constitution and on the fact that the 2nd Appellant declared the Respondent's seat vacant despite there being active matters in court. That for this reason the 2nd

Appellant's decision was illegal and *ultra vires* the provisions of Article 72(1)(a) and a breach of the Respondent's legitimate expectation. That on that premise, it was proper for the learned Judge to order payment of the Respondent's emoluments.

7.14 In her oral submissions, Ms. Mushipe rehashed the written heads of argument. She asserted that the judgment of the Court below was very clear that the 2nd Appellant had usurped the power of the courts of law by delivering a ruling when there were active matters before the High Court. When reminded that the Respondent only filed his petition in the High Court on 24th July, 2015, two days after the point of order was raised as if to circumvent the Speaker's ruling, Ms. Mushipe responded that the Respondent was compelled to petition the High Court because constitutional issues were being raised over the vacancy in his parliamentary seat. Learned Counsel argued that the 2nd Appellant, upon being served with the court process, should have stayed his ruling until the High Court had determined the matters and that his failure to do so, was sub judice. That in fact Article 72(1)(a) proscribed the 2nd Appellant from delivering his

ruling until the High Court had determined the constitutional issues before it. For this proposition, Ms. Mushipe relied on the **CHISHIMBA KAMBWILI[6]** case which she said was on all fours with the case in *casu*. She urged us to dismiss the entire appeal with costs for lack of merit.

7.15 In reply to the Respondent's submission, Mr. Mwale submitted that the constitutional order in the **CHISHIMBA KAMBWILI[6]** case was different from that in the case in *casu*, adding that it was clear that the Respondent's petition under Cause No. 2015/HP/1182 was intended to block the 2nd Appellant from delivering his ruling on the point of order. He urged us to uphold the appeal.

8.0 DECISION OF THIS COURT

8.1 We have considered the evidence on record and the judgment appealed against. We have also considered the arguments and authorities from Counsel. In our view, the main issue falling for determination in this case, at the end of the day, is whether the 2nd Appellant properly exercised his authority when he declared the Respondent's parliamentary seat vacant. The answer will become evident

as we interrogate the three grounds of appeal in the order in which they were argued.

8.2 The first ground of appeal assailed the lower Court's finding of procedural impropriety and unfairness on the part of the 2nd Appellant for declaring the parliamentary seat held by the Respondent vacant instead of referring the matter to the High Court for determination. The Appellants' arguments on this ground of appeal can be segmented into two parts.

8.3 The first part was that the 2nd Appellant was merely enforcing the provisions of Article 71(2) of the **CONSTITUTION**[1] when he rendered his ruling and that there was nothing in the said provisions to suggest that there was a requirement for the High Court to interpret whether a Member had lost his seat after crossing the floor. Further that the vacancy in the Respondent's seat occurred by operation of law.

8.4 Reacting to this submission, Ms. Mushipe acknowledged that the remedy of judicial review was available to challenge the manner in which a decision was made, and not the decision itself. She also conceded that there was no contention over the 2nd Appellant's power to respond to the

point of order and to declare a seat vacant. Her argument was that the 2nd Appellant exceeded his authority and constitutional powers when he proceeded to interpret Article 71(2)(c)when declaring the seat vacant. Furthermore, that the 2nd Appellant strayed or encroached into the adjudicative functions of the Court when he ruled on matters which were pending determination before the High Court.

8.5 It is trite that in order to ascertain the framework within which any power is exercisable, and if indeed an authority acted in accordance with its provisions, it is necessary for the court to examine the whole provision of the statute. For this principle we adopt the opinion of Lord Wilberforce in the case of **BROMLEY LONDON BOROUGH COUNCIL V GREATER LONDON COUNCIL AND ANOTHER**[8] when he stated that -

> **"It is necessary to examine the rest of the Act in order to ascertain the framework in which this power is exercisable. It remains to ask whether GLC and LTE acted in accordance with the statutory provisions."**

8.6 We, therefore, took time to examine the entire Article 71 of the **CONSTITUTION**[1] (Amendment), Act No. 18 of 1996, as

it was couched at the time. The said Article 71 provided as follows -

> **"71. (1) Every member of the National Assembly, with the exception of the Speaker, shall vacate his seat in the Assembly upon dissolution of the National Assembly.**
> **(2) A member of the National Assembly shall vacate his seat in the Assembly -**
> **(a) if he ceases to be a citizen of Zambia;**
> **(b) if he acts contrary to the code of conduct prescribed by an Act of Parliament;**
> **(c) in the case of an elected member, if he becomes a member of a political party other than the party of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or having been a member of a political party, he becomes an independent;**
> **(d) if assumes the office of President;**
> **(e) if he is sentenced by a court in Zambia to death or to imprisonment, by whatever name called, for a term exceeding six months;**
> **(f) if any circumstances arise that, if he were not a member of the Assembly, would cause him to be disqualified for election as such under Article 65;**
> **(g) if, under the authority of any such law as is referred to in Article 22 or 25-**
> **(i) his freedom of movement has been restricted or he has been detained for a continuous period exceeding six months;**
> **(ii) his freedom of movement has been restricted and he has immediately thereafter been detained and the total period of restriction and detention together exceeds six months; or**
> **(iii) he has been detained and immediately thereafter his freedom of movement has been restricted and the total period of detention and restriction together exceeds six months."**

8.7 On the face of it, we find that Article 71 was couched in plain language but in mandatory terms. We have stated in a plethora of cases that when the words of a statute sought to be interpreted are plain and unambiguous, no more can be necessary than to expound on them in their ordinary and

literal meaning. In the **AKASHAMBATWA**[3] case we affirmed a passage from the learned authors of **Craies on Statute Law** which stated that –

> **"The cardinal rule for the construction of Acts of parliament is that they should be construed according to the intention expressed in the acts themselves. If the words of a statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense."**

8.8 Consequently, by applying the natural and ordinary cannon of interpretation, we have come to the inescapable conclusion that the intention of Article 71 was that the seat of a Member of the National Assembly would become vacant upon the happening of any one of the circumstances cited therein. The usage of the mandatory form **"shall"**, endorses the fact that such a seat fell vacant automatically and by operation of law.

8.9 With regard to Article 71(2)(c), a member lost or had to vacate his/her seat automatically after resigning or leaving the party that sponsored their election. In terms of the rationale of the provising, we echo what we said in the case of **AKASHAMBATWA**[3]**,** that Article 71(2)(c) was intended to discourage floor crossing. We stated then that-

> **"It is quite clear that the Article 71(2) provided two types of situations (a) a member who resigns from a party on whose**

ticket he was elected to join another political party and (b) an independent that joins a political party. These are members who have to automatically vacate their seats... It is perfectly clear on the face of it, the Article is intended to prohibit floor crossing generally...The effect of our interpretation of Article 71(2)(c) is that the Respondent in the main appeal, who were petitioners in the Court below, had vacated their seats in the National Assembly on 12th August, 1993, the date on which they announced their resignation from the MMD, the party on whose tickets they were elected to the National Assembly."

8.10 It follows, therefore, that when a seat fell vacant in any one of the circumstances highlighted in Article 71, there was no need to refer the matter to the High Court for determination of the vacancy unless there was a dispute. In this regard, we find that the learned Judge was right to observe at J38(at page 49 of the record of appeal) that -

"However, I am not oblivious to the contents of Article 71(2), which clearly state the instances when a member of the National Assembly is required to vacate his or her seat in the Assembly. Suffice to state that because of the mandatory nature of the provision, the instances cited therein do not require the High Court's determination of the circumstances which call for the member to vacate his or her seat."

8.11 She, however, misdirected herself when, in another breath, she held that there was procedural impropriety and unfairness on the part of the 2nd Appellant when he proceeded to declare the Respondent's parliamentary seat vacant instead of referring the matter to the High Court for determination. The provisions of Article 71(2) are clear.

There was no requirement to refer to the High Court the determination of the question as to whether, the seat of a Member of Parliament was vacant.

8.12 In the case in *casu,* there was no contention over the Respondent's action. The Respondent accepted a very senior position in the UPND, thereby becoming a member of that party. As a matter of fact, he announced his appointment to all and sundry during a press conference. In our view, the Respondent vacated his seat on 22nd July, 2015 the moment he accepted the position of Vice President of UPND. This means that by the time that the 2nd Appellant was declaring the seat vacant in his ruling on 28th July, 2015, the Respondent had already vacated his seat by operation of law.

8.13 The second part of the Appellants' arguments on the first ground of appeal is that the learned Judge erred by relying on the **NABULYATO[2]** case to justify a finding of procedural impropriety and unfairness. It was submitted by the Appellants that the constitutional regime at the time that the **NABULYATO[2]** case was decided mandated the Speaker to refer the question of a vacancy in a Members' seat to the

Chief Justice. That Article 71(2)(c), which was in force when the **TETAMASHIMBA**[1] and the **AKASHAMBATWA**[3] cases were heard and determined, had no such requirement.

8.14 Ms. Mushipe, although conceding that the constitutional regime may have changed in 1996, maintained that the amendments that were introduced did not oust the High Court's constitutional mandate to determine the vacancy in the seat of a member of the National Assembly under Article 72(1)(a). She argued that the **TETAMASHIMBA**[1] and **AKASHAMBATWA**[3] cases were inapplicable because the Respondent's contention in the case in *casu* was that the Speaker declared his seat vacant when there were pending matters in the High Court, and was thus sub judice. She relied on the case of **CHISHIMBA KAMBWILI**[6] among others.

8.15 We have already stated that under Article 71(2)(c), a member lost or vacated a seat by operation of law and did not require the High Court to determine any vacancy arising out of any of the instances highlighted therein, unless there was a dispute. The procedure under Section 65 of the

CONSTITUTION[iv] as amended by Act No. 47 of 1966 was somewhat different.It provided in the relevant portion that –

> **"An elected Member of the National Assembly shall vacate his seat in the Assembly –**
> **(3) ...**
> **(4) If notice in writing is given to the Speaker of the National Assembly, signed by a member of the Assembly who is recognised by the Speaker as being the leader in the Assembly of a particular political party, alleging that an elected member of the Assembly—**
> **(a) conducted his campaign for election to the Assembly as a member of such political party; and**
> **(b) has, since his election to the Assembly, ceased to be a member of such political party;**
> **the Speaker shall inform the Assembly of such allegations and shall furnish the Chief Justice with a copy of the notice given to him.**
> **(5) Whenever the Chief Justice is furnished with a copy of a notice given to the Speaker under subsection (4) of this section—**
> **(a) the Chief Justice or a judge of the High Court nominated by him (hereinafter referred to as the tribunal) shall investigate the allegations contained in the notice and shall report to the Speaker whether the tribunal finds the allegations to have been substantiated;**
> **(b) the elected member of the National Assembly to whom the allegations relate shall have the right to appear and be represented before the tribunal during its investigation of the allegations against him.**
> **(c) The Speaker shall inform the National Assembly of the report made to him by the tribunal and shall, if the tribunal has reported that it finds the allegations to have been substantiated, require the elected member of the Assembly to whom the allegations relate to vacate his seat in the Assembly."** (underlining ours)

8.16 It is clear that under these provisions, the Speaker was mandated to refer the question as to whether a Member of Parliament had ceased to be a member of a political party under which he was elected to the Chief Justice. In this respect, Magnus and Hughes JJ (as they were then) rightly

spelt out the mandate of the Speaker in the **NABULYATO**[2] case. They stated:-

> **"When the requirements of Section 65(4) of the Constitution have been satisfied, it is mandatory for the Speaker to inform the National Assembly of the allegations made by the leader of a political party that a member of his party in the Assembly has ceased to be a member of his party. It is then a matter for the Chief Justice, either by himself or through a Judge of the High Court nominated by him, to determine the truth or otherwise of the allegations."**

8.17 It is evident that the law changed after the 1996 constitutional amendments, which ushered in Article 71(2).It was no longer a mandatory requirement, post-1996, for the Speaker to refer the question of a vacancy of a seat in the House to the Chief Justice. It was, therefore, a misdirection for the learned Judge to have relied on the **NABULYATO**[2] case because the law under which it was decided had been repealed. What applied in the Respondent's case was Article 71(2), which as held, in the **TETAMASHIMBA**[1] and **AKASHAMBATWA**[3] cases, entailed an automatic vacation of a seat by operation of law.

8.18 Having so found, it also follows that Article 72(1)(a) had no application where there was no contention. This provision states that -

> **"72 (1) The High Court shall have power to hear and determine**

any question whether -

(a) any person has been validly elected or nominated as a member of the National Assembly or the seat of any member has become vacant;"

8.19 In our view, Article 72(1)(a) was intended to be an avenue for redress only where there was a challenge either to an election or nomination of a member; or to the vacancy of a seat in the National Assembly. The Respondent's argument that the 2nd Appellant usurped the High Court's constitutional mandate to determine the vacancy of his seat, falls away because he lost his parliamentary seat by operation of law.

8.20 Ms. Mushipe forcefully submitted that the 2ndAppellant acted improperly by delivering his ruling even when he was aware of the active matters pending determination of constitutional questions pertaining to the Respondent's parliamentary seat and that consequently, the action by the 2nd Appellant was sub judice. Mr. Mwale's reaction was that the action before court was aimed at blocking the 2nd Appellant from delivering his ruling.

The learned authors of the Oxford Dictionary of Law defined the sub judice rule as follows:-

"1. A rule limiting comment and disclosure relating to judicial proceedings in order not to prejudge the issue or influence the jury.
2. A parliamentary practice in which the Speaker prevents any reference in questions or debates to matters pending decision in court proceedings (civil or criminal)."

8.21 Further, in the case of **AMARINDER SINGH V SPECIAL COMMITTEE PUNJAB VIDHAN SABHA AND OTHERS**[10], the Supreme Court of India explained the rationale of the sub judice rule as follows-

> **"It is a settled principle that ordinarily the content of legislative proceedings should not touch on sub judice matters. As indicated in the extract quoted above, the rationale for this norm is that legislative debate or scrutiny over matters pending adjudication could unduly prejudice the rights of the litigants"**

In that case, the Punjab VidhanSabha (Legislative Assembly) passed a resolution to expel a member of the Assembly and instituted investigations against him over allegations of improper land exemption when at the same time there were proceedings before the High Court Punjab and Haryana, over the same subject matter. Chief Justice of India Balakrishnan held that –

> **"When it was well-known that the allegedly improper exemption of land from the Amritsar Improvement Scheme was the subject matter of the proceedings instituted before the High Court of Punjab and Haryana, the Punjab VidhanSabha should have refrained from dealing with the subject matter."**

It is apparent from the cited authorities that for a matter to be subjudice, it should not just be one that is before a court, but must also be substantially on the same subject matter.

8.22 In light of the above, we visited and examined the petition in the subtitled **GEOFFREY BWALYA MWAMBA V ATTORNEY GENERAL AND DAVIES CHAMA** under Cause No. 2015/HP/1182. We observed that the petition which sought, among others, an interpretation of Article 11, 23 and 71(2) of the **CONSTITUTION**[1] in relation to the Respondent's association with the UPND and the possible vacancy in his parliamentary seat. It was filed on 24th July, 2015. The point of order was raised on 22nd July, 2015 two days before the suit was filed. It is clear to us that at the time when the Respondent was filing his petition, the 2nd Appellant was already seized with jurisdiction regarding the point of order. It cannot therefore, be seriously argued that the matter was sub judice.

8.23 With regards to Cause No. 2014/HP/239, the petition itself did not form part of the record of appeal but from the facts gleaned from the record, the Respondent obtained an

injunction to prevent the PF from expelling him from the party. This subject matter is substantially different from the issues raised in the point of order, namely, crossing of the floor. This too, in our considered view, did not amount to being sub judice.

8.24 Counsel for the Respondent sought to persuade us that the case of **CHISHIMBA KAMBWILI**[6] was on all fours with the Respondent's case. We are of the view that this case is not helpful to Respondent in many respects. To begin with in that case there was a pending appeal filed by the Petitioner on 25th October, 2018 and counter petition by the Respondent when the Speaker declared the Roan Constituency seat vacant on 27th February, 2019. Furthermore, under Article 121 of the **CONSTITUTION**[v] (Amendment) Act No. 2 of 2016, the Supreme Court and the Constitutional Court rank equivalently and the decisions of the Constitutional Court are not binding on this Court and vice versa. Furthermore, the 1996 constitutional regime has been overtaken by the constitutional amendments of 2016. Even if we were to stretch our imagination these cannot be applied retrospectively.

There was, therefore, no procedural impropriety or unfairness on the part of the 2nd Appellant.

For the reasons given above, the first ground of appeal is allowed.

8.25 We now turn to the second ground of appeal. This ground attacks the learned Judge's finding that the 2nd Appellant acted illegally and *ultra vires* Article 72(1)(a) when he declared the Respondent's seat vacant and did not refer the matter to the High Court. The Appellants argued that Article 72(1)(a)was basically a forum by which a party could challenge decisions of the Speaker. That the Speaker had authority under Article 71 to render a ruling and it was up to an aggrieved party to take the dispute to the High Court under Article 72(1)(a).

8.26 Ms. Mushipe re-stated that the 2nd Appellant breached the Respondent's legitimate expectation of having the status of his seat determined by the High Court, thus rendering the matters before court nugatory. She argued further, that the 2nd Appellant violated the rules of natural justice, thereby denying the Respondent the right to be heard by the High Court. That his actions were outrageous, illegal,

unreasonable and *ultra vires* the provisions of Article 72(1)(a).

In discussing what constitutes illegality or *ultra vires* in the **DERRICK CHITALA**[4], Ngulube CJ followed the opinion of Lord Diplock when he said that -

> **"By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it."**

8.27 The powers of the National Assembly and the Speaker are governed by Article 86 of the **CONSTITUTION**[i] which states that:-

> **"Subject to the provisions of the Constitution, the National Assembly may determine its own procedure."**

8.28 The Speaker and the legislature as a whole, in the exercise of their powers, are protected by the doctrine of exclusive cognisance under Section 34 of the **NATIONAL ASSEMBLY (POWERS AND PRIVILEGES) ACT** which provides that -

> **"Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Assembly, the Speaker, or such officer by or under the Constitution, the Standing Orders and this Act."**

8.29 On the aspect of exclusive cognisance, Ms. Mushipe properly conceded that the 2nd Appellant was within his power to render the ruling and as such we shall not go into

detail, except to point out that the doctrine is by no means a blank cheque for the National Assembly to do as it wills. The National Assembly, as a public body, must exercise its powers within the confines of the Constitution and the law as prescribed, failing which it will be susceptible to judicial scrutiny. As we said in the **DERRICK CHITALA**[4]case, there is no blanket immunity from judicial review.

8.30 In the case in *casu*, the 2nd Appellant declared that the Respondent had crossed the floor as envisioned by Article 71(2)(c) of the Constitution and therefore he had lost his seat. The 2nd Appellant went further to declare the Respondent's seat vacant.

8.31 As we have stated above, the Respondent lost his seat by operation of law. By the time that the Speaker was declaring the Kasama Central parliamentary constituency seat vacant, the Respondent had already lost his seat by virtue of Article 71(2)(c). As such, even the argument of the Respondent being denied the right to be heard is untenable. It was open to the Respondent to invoke the provisions of the then Article 71(2)(c) if he was aggrieved by the loss of his seat in the National Assembly. We do not find any illegality

in the manner that the 2nd Respondent acted. He properly gave effect to the relevant provisions of the law. The second ground of appeal also has merit.

8.32 Coming to the third ground of appeal, the Appellants' main argument was that the Respondent's ground of legitimate expectation was premised on a misdirection of the law. They argued that the constitutional regime in the **NABULYATO**[2] case, which mandated the Speaker to refer the question of the vacancy of a seat in the National Assembly to the Chief Justice was no longer in force. The Appellants urged us to reverse the decision of the Court below with costs.

Ms. Mushipe maintained that the Respondent's legitimate expectation was breached. She argued that despite the constitutional amendments in 1996, the Constitution still vested the authority in the Court to make a determination on the status or vacancy of a parliamentary seat under Article 72(1)(a). She, additionally, referred to Article 119(1) and (2)(a) of the **CONSTITUTION (AMENDMENT) ACT**[v] No. 2 of 2016, which vests judicial authority and judicial function in the courts. On this premise, she argued that

the Respondent was entitled to damages for loss of emoluments.

We have already found that Section 65(4) of the Constitution as amended by Act No. 47 of 1966 which mandated the Speaker to refer the question of a vacancy to the Chief Justice was repealed. Consequently, we found that it was erroneous for the learned Judge to have relied on the case which was decided under the 1966 Constitutional Order. In addition, we have also held that the 2nd Appellant's ruling was not sub judice with regard to matters which were before the courts.

In the case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE**[5], it was stated that –

> **"Legitimate expectation must affect (the) other person...by depriving him of some benefit, or an advantage which either:**
> **(1) He had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it."**

In the case in *casu*, it cannot be said that the Respondent was deprived of any benefit or advantage which he had in the past been permitted to enjoy. The law which was in force at the time of the events which inferred his litigation did not grant him the

benefit of any procedure, other than losing his seat by operation of law. The third ground of appeal succeeds.

8.33 All the three grounds having succeeded, this appeal is allowed. For the avoidance of doubt, we reverse all the orders granted by the Court below. We also declare that since the Respondent crossed the floor, he was not entitled to any payment of emoluments. We also order that the costs in this Court and in the Court below are for the Appellants to be taxed in default of agreement.

I.C. Mambilima
CHIEF JUSTICE

A.M. Wood
SUPREME COURT JUDGE

N.K. Mutuna
SUPREME COURT JUDGE