IN THE JUDICIAL COMPLAINTS COMMISSION

HOLDEN AT LUSAKA

IN THE MATTER OF:	**Articles 1(3), 2, 119, 128, 129, 143 and 144 of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016**
IN THE MATTER OF:	**Sections 4(2) and 8 and 21 of the Constitutional Court Act No.8 of 2016**
IN THE MATTER OF:	**Section 25 of the Judicial Code of Conduct Act No. 13 of 1999 as amended by the Judicial Code of Conduct (Amendment) Act No. 13 of 2006**
IN THE MATTER OF:	**Order IV and XV of the Constitutional Court Rules Statutory Instrument No. 37 of 2016**
IN THE MATTER OF:	**A Complaint of alleged incompetence, gross misconduct and wilful violation of the Constitution of Zambia by judicial officers.**

BETWEEN:

MOSES KALONDE	**COMPLAINANT**
AND	
HON JUSTICE ANNIE M SITALI	**1ST RESPONDENT**
HON JUSTICE MUNGENI MULENGA	**2ND RESPONDENT**
HON JUSTICE PALAN MULONDA	**3RD RESPONDENT**

COMPLAINT

Brought pursuant to Articles 1(3) 2, 143 and 144 of the Constitution of Zambia Act Chapter 1 of the Laws of Zambia as amended Act No.2 of 2016 and Section 25 of the Judicial Code of Conduct Act No.13 of 1999 as amended by Act No.13 of 2006

THE JUDICIAL COMPLAINTS COMMISSION:

The **COMPLAINT** of Moses Kalonde whose residential and postal address is House number A42, Matero North, Lusaka, in the Lusaka District and Province of the Republic of Zambia **SAYS**:

The Parties

1.0 The Complainant

1.1 The Complainant is a 51-year old Zambian national with a keen interest in constitutional matters and is also a democracy and governance activist.

2.0 The Respondents

2.1 The 1st Respondent, Honourable Mrs. Justice Anne-Mwewa Sitali is a judge of the Constitutional Court, having been appointed on March 11, 2016. According to the Zambian Judiciary website, her educational qualifications include a Bachelor of Laws (LLB) from the University of Zambia and a Master of Laws (LLM) from the University of Sydney, and was admitted to the bar in 1987[1]. Before her current role, she served as a High Court Judge from 2010 to 2016 and held multiple key positions within the Ministry of Justice. Notably, her roles included Permanent Secretary for Legislative Drafting (2008-2010), Chief Parliamentary Counsel (2002-2008), and earlier as Deputy Chief Parliamentary Counsel. Throughout her extensive career in the Ministry of Justice, Justice Sitali chaired significant legislative drafting committees, such as the Business Licensing Reform Committee and the National Constitutional Conference Drafting Committee.[2]

2.2 The 2nd Respondent, Honourable Mrs. Justice Mungeni Siwale Mulenga serves as a Judge of the Constitutional Court of Zambia, a position she has held since the court's establishment in 2016. Prior to her esteemed role at the Constitutional Court, Justice Mulenga was a Judge of the High Court from 2010 to 2016, prior to which she served as Secretary to the NWASCO Board for nine (9) years. She currently leads the Judiciary Advisory Committee on Training and Continuing Education, underlining her commitment to the professional development of the judiciary. Additionally, she is a key member of the Advisory Committee on Court Annexed Mediation and Delay Reduction, which focuses on enhancing judicial efficiency and dispute resolution.[3]

[1] https://judiciaryzambia.com/2016/08/15/hon-lady-justice-anne-sitali/
[2] Ibid
[3] https://judiciaryzambia.com/2016/08/15/hon-lady-justice-mungeni-mulenga/

2.3 The 3rd Respondent, Honourable Mr. Justice Palan Mulonda is a Judge of the Constitutional Court, having been appointed on March 11, 2016. He holds a Bachelor of Laws (LLB) degree from the University of Zambia and a Master of International Law (LLM) from the University of Lund in Sweden, and was admitted to the bar in 1995. His career prior to his judicial appointment includes serving as the Ambassador of Zambia to the United States of America and Central America from 2012 to 2016. Additionally, Justice Mulonda was the Director of the Zambia Institute of Advanced Legal Education (ZIALE) from 2009 to 2012 and Vice Chairperson of the Human Rights Commission from 2007 to 2012. His earlier legal practice focused on civil litigation concerning international law and agreements within the Attorney General's Chambers from 1996 to 1998.[4]

Facts relied upon for the Complaint

3.0 Locus Standi of the Complainant

3.1 Article 2 of the Constitution[5] of the Laws of Zambia clothes every Zambian with locus standi to defend the constitution as follows:

> *"2. **Every person has the right and duty** to—*
>
> *(a) defend this Constitution; and*
>
> *(b) resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution."*

3.2 Furthermore, Section 25(1) of the Judicial Code of Conduct Act[6] permits any member of the public to lodge a complaint against a judicial officer in the following terms:

> 25(1) **Any member of the public** who has a complaint against any judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened this Act shall inform the committee. (**emphasis given**)

3.3 From the foregoing provisions, it is contended that by virtue of the provisions of Article 2 of the Constitution,[7] every Zambian including the Complainant herein, has a constitutional right and duty to defend the Constitution by moving the applicable tribunal for redress where an

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[4] https://judiciaryzambia.com/2016/08/15/hon-mr-justice-palan-mulonda/

[5] The Constitution of Zambia (Amendment) Act No. 2 of 2016

[6] Act No. 13 of 1999 as amended by Act No. 13 of 2006

[7] Note 5 *supra*

alleged contravention of constitutional provisions exists. Article 144(1) of the Constitution accordingly prescribes this Commission as the forum for any person seeking such redress.[8] Consequently, the Complainant has the requisite *locus standi* to lodge a Complaint before this Commission in the present circumstances and this Commission has the statutory jurisdiction to hear and determine the same.

Background to the present Complaint

4.0 Establishment of the Constitutional Court

4.1 Largely inspired by the perceived success of the Constitutional Court in neighbouring South Africa, the Constitutional Court in Zambia was finally established following an extensive amendment of the Constitution[9]. It is noteworthy that the Court has an establishment of thirteen (13) judges which include the President and the Vice President of the Court[10]. However, for the first three or so years of its establishment, including the period subject to this Complaint, the Court only had a total of six judges appointed by the Republican President.

4.2 The Constitutional Court has original and final jurisdiction over any matter relating to the interpretation of the constitution; violation or contravention of the constitution; the election of the president and vice president; appeals relating to the election of members of parliament; and any matter about the court's jurisdiction.[11] The Court, however, does not have jurisdiction to enforce the Bill of Rights under Part III of the Constitution. This is so because the Referendum held alongside the general elections in 2026 failed to meet the required threshold to amend Bill of Rights and as such, the provision on the enforcement of the Bill of Rights, Article 28, still vests jurisdiction over the enforcement of Part III of the Constitution in the High Court and the Supreme Court on appeal.

Events surrounding the case of Hakainde Hichilema and Another v Edgar Chagwa Lungu and Others 2016/CCZ/0031

5.0 Brief summary of issues relevant to this Complaint

[8] 144(1) The removal of a judge may be initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission, based on the grounds specified in Article 143.
[9] Note 5, *supra*
[10] Ibid, Article 127
[11] Ibid, Article 128

5.1 While the Court has only been in existence for less than ten (10) years, it has already handled disputes with a significant bearing on the political destiny of the country. One such test was a few months after the Court was operationalized.

5.2 Following a tightly contested presidential election held as part of the general election and referendum on 11 August, 2016, the Electoral Commission of Zambia (ECZ), on 15th August 2016, declared the then incumbent, Edgar Chagwa Lungu of the ruling Patriotic Front (PF) party, as the winner, beating his closest rival, Hakainde Hichilema, of the main opposition United Party for National Development (UPND) by a margin of only 13,022 votes.[12].

5.3 Unhappy with this development, the opposition UPND candidate, Mr. Hakainde Hichilema, disputed the results, alleging, among other things that the ECZ had colluded with the ruling PF to manipulate the results in favour of the incumbent and on the 19th of August 2016 filed a petition in the Constitutional Court challenging the election results.

5.4 After a string of interlocutory hearings, on 24th August 2016, the Constitutional Court gave Orders for Directions that the hearing of the petition would commence on 2nd September 2016 and end on 8 September 2016.[13] However, after representations from the Respondents, a full bench of the Court, comprising the three Respondents, Honourable Mrs. Justice Munalula and the President of the Court (as she was then) Honourable Mrs. Justice Hildah Chibomba, on 1st September 2016, directed the parties that the hearing of the petition would commence and end the following day, the 2nd of September 2016.

5.5 On the 2nd of September 2016, the Court informed the parties that the hearing would commence and conclude the same day at 23:45 hours. However, most of the time was consumed in hearing and determining preliminary motions, which were only concluded around 19:00hours, leaving just about four hours to hear the petition. The Court allocated each side two hours to present their case. At this time, lawyers for the petitioners walked out of the court, protesting that the manner the proceedings were had made it impossible to defend the constitution and effectively represent their clients.[14] The petitioners were, therefore, left to

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[12] <http://ecz-news.com/news/%22%80%8bguide-to-calculation-of-501-for-august-11th-2016-elections/> accessed 30 July, 2017

[13] *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016*, [9]. See also 'Presidential election petition to start on Friday and conclude on Thursday next week' <https://www.lusakatimes.com/2016/08/30/presidential-election-trial-to-start-on-friday-and-conclude-on-thursday-next-week/> accessed 30 July 2017

[14] 'Live petition updates: proceedings and discussions' <http://postzambia.com/news.php?id=19946> accessed 3 July 2017

address the Court by themselves. After hearing the petitioners, the full bench of the Court unanimously ordered trial to commence the following Monday, the 5th of September 2016 and that each party would be given two days to present its case.[15]

5.6 However, on 5 September 2016, instead of hearing the petition as it ordered on the Friday of 2nd September 2016, the Court, by a majority of 3 (all the Respondents) to 2 judges, gave a Ruling to the effect that it had lost its jurisdiction due to the passage of time and as such could not proceed to hear the matter as previously directed, effectively terminating the petition without hearing it. It is from this background that the Complainant takes issue with the conduct of the three Respondents, who penned the "majority" ruling and seeks their removal from office for incompetence and gross misconduct as will be articulated in the paragraphs that follow.

Removal of a Judge from Office

6.0 Grounds for Removal of a Judge

6.1 Article 143 of the Constitution provides only four grounds for the removal of a judge from office as follows:

> *143. A judge **shall be removed** from office on the following grounds:*
>
> *(a) a mental or physical disability that makes the judge incapable of performing judicial functions;*
>
> ***(b) incompetence;***
>
> *(**c) gross misconduct**; or*
>
> *(d) bankruptcy.* **(emphasis added)**

6.2 The Complainant contends that Article 143 is couched in mandatory terms, and as such, once it is demonstrated through this Complaint that the Respondents were incompetent in the manner they handled the petition and that their actions prior to issuing the "majority" ruling, amounted to gross misconduct, this Commission would be Constitutionally obligated to recommend the removal of the Respondents from judicial office by the President.

[15] *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016, Dissenting Judgment of Justice Chibomba*,

6.3 Incompetence

6.3.1 The Complainant submits that the Respondents, each and every one of them, exhibited levels of incompetency unbefitting of judicial officers sitting in the country's highest Court, which is also the custodian of the document that epitomises the soul and aspirations of the nation in the manner they conducted themselves in the ***Hakainde Hichilema and others***[16] case leading up to their purported Majority Ruling on the Morning of September 5th 2016.

6.3.2 It is important to note that "incompetence" is not specifically defined in the Constitution and as such this Commission is invited to look at other sources for the definition of the word in as far as it relates to judicial misconduct. A starting point is to consider the meaning of the term in its ordinary sense. To this end, the learned authors of the ***Black's Law Dictionary***[17] define incompetence as follows:

> ***Incompetence,*** *n. (17c)* ***1.*** *The quality, state, or condition of being* ***unable*** *or* ***unqualified*** *to do something. <the dispute was over her alleged incompetence as a legal assistant>* (**emphasis added**).

6.3.3 Further, the ***Cambridge English Dictionary***[18] states thus:

> ***Incompetence,*** noun. *Lack of the* ***ability, skill or knowledge*** *that is needed to do a job or perform an action correctly* ***or to a satisfactory standard****<management has demonstrated almost unbelievable incompetence in the handling of the dispute.>* (**emphasis added**)

6.3.4 From the foregoing, the Complainant contends that in dealing with the current case, the Commission should employ a two-pronged approach to the notion of incompetence as far as the Respondents are concerned. It is clear that a person can be deemed to be incompetent if it is shown that they are **not qualified** to perform a certain function or hold a particular office. A person can also be held to incompetent for the reason that they lack the **ability, skill or tact** and as such fail to perform to the required standard of their office. In this instance, the Complainant argues that the Respondents are incompetent to hold judicial office because they fail both limbs of the competence test. For avoidance of doubt, the Complainant seeks the removal of the Respondents from office because they do not have

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[16] Note 13, *supra*

[17] B. Garner (ed), Black's Law Dictionary, Eleventh Edition, Thompson Reuters (2019), p. 914

[18] https://dictionary.cambridge.org/us/dictionary/english/incompetence

the requisite training to be Constitutional Court Judges and in any event, their handling of the 2016 Presidential petition exposed their lack of ability, skill or knowledge of how to discharge their Constitutional mandate.

6.4 Lack of requisite Training/Qualification.

6.4.1 It is the Complainant's argument that, the judges who dispense justice have great power over the lives and liberty of other people, however, there are some instances where the judges are inadequately prepared, either because of lack of proper training or because they have been appointed to a position for which they are not appropriately qualified. This is injurious to litigants, and to their families, as well as to the public when a judge is inadequately trained to preside over a trial on which much is at stake for the entire nation.

6.4.2 The Constitution prescribes the requisite training and qualifications required for one to be appointed a judge of the Constitutional Court as follows:

> ***141.*** *(1) A person qualifies for appointment as a judge if that person is of proven integrity and has been a legal practitioner, in the case of the-*
>
> ***...***
>
> *(b) Constitutional Court, for at least fifteen years and has* ***specialised training or experience in human rights or constitutional law****;* (**emphasis added**)

6.4.3 A simple reading of the above provision of the Constitution leads to the inevitable but simple conclusion that for one to be qualified as a judge of the Constitutional Court, the person ought to have practised as an advocate for a minimum of fifteen (15) years and in addition, should have specialised training or experience in human rights law or constitutional law. This position was recently fortified by the Constitutional Court in the case of ***Isaac Mwanza v The Attorney General***[19] where it was stated:

> *"It is our considered view that Article 141(b) entails that for one to qualify for appointment as a Constitutional Court Judge that person must possess* ***one of either specialised training in human rights*** *or* ***constitutional law****. That is to say, if one only has specialised*

[19] 2023/CCZ/005

training in human rights or constitutional law even though they do not have experience in human rights or constitutional law and vice versa.

We thus grant the declaration prayed for by the petitioners that qualification for appointment as a Constitutional Court Judge under Article ***141(1)(b) of the Constitution requires one to have specialised training or experience in human rights or constitutional law in addition to the requisite attainment of 15 years as a legal practitioner.*** **(emphasis added)**

6.4.4 Suffice to say the Constitution does not define what the term "specialised training" means and the Court, in the ***Isaac Mwanza***[20] case did not shed any light on the subject. UNESCO, in its ***Glossary of Key terms, 2009***[21] defines "specialist training" as:

> ***"Advanced level*** *training to broaden specialized knowledge of a particular task, function or aspect of an occupation."*

The Complainant submits that for one to be termed to have "specialised training" in a particular field, one must have received advanced training in that particular field and certified as a "specialist". To this end, the ***Black's Law Dictionary***[22] states:

> *"Typically, to* ***qualify*** *as a* ***specialist****, a* ***lawyer must meet a specified level of experience, pass an examination and provide favourable recommendation from peers."*** (**emphasis added**)

6.4.5 From this standpoint, the Complainant argues that specialised training in Constitutional Law or Human Rights, in this context refers to targeted, in-depth education and instruction focused on the principles, frameworks, and practices related to human rights and constitutional law. This type of training is designed to equip individuals with advanced knowledge and skills to effectively understand, interpret, and apply human rights and constitutional principles in various contexts. In the main, it is argued, that the framers of the Constitution, in enacting Article 141(1)(b), intended that only those individuals equipped with the advanced knowledge, skills, and practical experience necessary to effectively address and advocate for issues within these fields should be appointed as judges of the Constitutional Court.

6.4.6 The qualification or suitability of the three Respondents to hold office as Constitutional Court Judges has been a matter of public discourse since

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[20] Ibid

[21] https://unevoc.unesco.org/home/TVETipedia+Glossary/show=term/term=Specialist+training#:~:text=Advanced%20level%20training%20to%20broaden,or%20aspect%20of%20an%20occupation.

[22] Supra Note 17, p215

2016 when news of their appointment by the then President surfaced.[23] Prominent Constitutional lawyer, John Peter Sangwa S.C. first raised this issue through a letter to the President in 2016, strongly opposing the appointment of 6 judges of the Court including the three Respondents herein.[24] The bone of contention being that none of the Respondents herein meet the Constitutional minimum of having specialised training or experience in Constitutional law or Human Rights Law. Information from the judiciary website[25], which profiles all adjudicators in the superior courts, reveals that none of the Respondents has any specialised training of experience in Constitutional law or Human Rights law. From that standpoint, it is submitted that none of the Respondent qualifies for appointment to the office of Constitutional Court Judge and as such, are **incompetent** to hold that office or to even exercise the functions thereof.

6.4.7 The Complainant thus contends that this Committee ought to consider the report of the Parliamentary Committee tasked with the scrutiny and interviewing of the Respondents' suitability for appointment to the Constitutional Court as well as the Respondents' Curriculum Vitae (CVs), The Commission will undoubtedly come to the conclusion that the three Respondents do not meet the minimum Constitutional threshold to sit as judges of the Constitutional Court and are therefore incompetent to preside over any matters filed in that Court. It is therefore submitted that the three Respondents' incompetence in terms of lack of requisite training and experience brings them into the crosshairs of Article 143(b) of the Constitution. The Commission is therefore beseeched to find that all three are not qualified to be Constitutional Court Judges, as per the threshold set out in the ***Isaac Mwanza*** case already cited above and hold that the Respondents are incompetent be judges of a specialised court like the Constitutional Court and as such, should be removed from office.

6.4.8 According to a number of critics, the Respondents are inadequately qualified, unaccountable for their behaviour and appointed under an arcane system damaged and flawed by pointless secrecy. The selection procedure fails on all the main tests of an acceptable appointment system: open and accountable; all vacancies advertised; proper definition of job and qualities required; and no arbitrary age limits. Compared with the system for selection of senior civil servants it is deficient in: formal procedures, accountability of the people involved, and disclosure or discussion with potential recruits. The lack of transparency in the process of selecting judges in Zambia can directly be traced to the incompetence

[23] https://www.lusakatimes.com/2020/03/15/a-look-at-zambia-constitutional-court-judges/

[24] https://www.lusakatimes.com/2020/05/23/constitutional-court-judges-are-not-qualified-but-i-respect-their-appointment/

[25] https://judiciaryzambia.com/category/adjudicators/constitutional-court-judges/

of the three Respondents by virtue of them not being suitably qualified or possessing the required training or experience for that office.

6.4.9 It is further submitted that the fact that the Respondents are not qualified for the office they hold presents an incurable legal handicap which makes their continued stay in judicial office untenable and in fact, illegal. We are fortified in this regard by the case of ***Mcfoy v United Africa Company Limited***[26], where Lord Denning stated thus:

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."*

6.4.10 It is therefore, a matter of public policy and in the interests of preserving our nation's Constitutional order, that this Commission exercises its powers to rid this Court of this anomaly which resulted in the appointment of unqualified persons as judges. The Complainant reiterates that the three Respondents are not competent to hold office of judges of the Constitutional Court and beseeches this Commission to stem this continued assault on the constitutional order and the integrity of our judicial system. The Complainant prays that the Commission finds that the three Respondents lack the requisite competence to sit or hear matters in the Constitutional Court and recommend their immediate removal from the bench on the ground of incompetence.

6.5 Lack of Ability, Skill or Knowledge and Failure to Perform to expected Standard

6.5.1 Under the second limb of incompetence, the Complainant, submits that the Respondents' incompetence in terms of being inadequately trained and thus unqualified for appointment as judges of the Constitutional Court, is reflected by the incompetent and atrocious manner in which they handled the presidential petition. To this effect, it is argued that the three Respondents displayed an alarming lack of knowledge and skill in the conduct of judicial proceedings culminating in their "Majority Ruling" on the 5th of September 2015. The net effect is that, the said Majority Ruling fell gravely short of the standard of adjudication accustomed to, and expected in our jurisdiction and internationally.

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6.5.2 The Commission is invited to consider the values and principles of judicial conduct laid out in the **Bangalore Principles of Judicial Conduct 2002[27], (**"the Bangalore Principles) which are widely authoritative in the Commonwealth legal tradition and strongly influenced the drafting of some key provisions of our own Judicial Code of Conduct Act.[28]In particular, the Commission is referred to Values 2, 4, 5 and 6 of the Bangalore Principles. For the sake of convenience, and for illustrative purposes, the Complainant will restate only the abstract principles of the said values:

> ***Value 2: Impartiality:***
>
> *Principle: Impartiality is essential to the proper discharge of the judicial office. It applies* ***not only to the decision itself but also to the process by which the decision is made****.*
>
> ***Value 4: Propriety***
>
> *Principle: Propriety****, and the appearance of propriety****, are essential to the performance of* ***all of the activities*** *of a judge.*
>
> ***Value 5: Equality***
>
> *Principle*
>
> *Ensuring equality of treatment to all before the courts is essential to*
>
> *the due performance of the judicial office.*
>
> ***Value 6: Competence and diligence***
>
> *Principle*
>
> ***Competence and diligence are prerequisites*** *to the due performance of judicial office.* **(emphasis added).**

6.5.3 In light of the foregoing, and in recalling the events that culminated in the Majority Ruling by the three Respondents, particularly that on Friday the 2nd of September 2016, the full bench of the Court comprising 5 judges, unanimously agreed to adjourn the matter for commencement of trial the following Monday, 5th September 2016 and went on to give complete Orders for direction as to how the matter was to be conducted therefrom, which was a lawful order of a lawfully constituted court passed after a public hearing. The Complainant argues that, the conduct of the three Respondents following the lawful adjournment of the full Court, was not only a blatant display of incompetence, but was also a brutal attack on the rule of law alien to our legal order and jurisprudence.

[27] https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf
[28] Note 6, *supra*

6.5.4 It is a matter in the public domain, and the Record of Proceedings will show that after the Court's order to adjourn and resume trial on Monday the 5th of September, 2016, there was no other formal sitting of the Court to consider any application or question on the Court's Jurisdiction by any of the litigants. In short, there was no application pending ruling by the time adjourned for the weekend. It is a notorious fact that this Commission is urged to take judicial notice of, that Courts in Zambia do not sit on weekends, unless in exceptional circumstances as ordered by the court and in this particular instance, there was no order directing that the Court would sit over the weekend.

6.5.5 The Commission will note from the Record of proceedings that the following Monday, the 5th of September 2016, when the Court was supposed to commence the actual hearing of the petition, two rather odd or for lack of a better term, *curious* events occurred: (i) the advocates for the Respondents therein, were absent from the proceedings without formally withdrawing their services and without permission from the Court, (ii) the three Respondents herein already had a draft "Majority" Ruling as early as 0800hrs in the morning which they shared with the Judge President and Madam Justice Munalula.

6.5.5.0 Absence of the Respondents' Advocates before Court

6.5.5.1 On the Monday scheduled for commencement of the hearing of the petition, all the lawyers for the Respondents were absent from Court and some of them were quoted in the local online press as saying that "they would not participate in an illegality"[29] what is curious from this act is how and where officers of the Court (lawyers), got the powers to decide on the illegality of judicial proceedings. The Complainant submits that in terms of Article 119(1) of the Constitution[30], judicial authority in Zambia vests in the Courts and not with litigant's lawyers and as such it is the hallowed preserve of the judiciary to determine the legality or illegality of an act.

6.5.5.2 It is therefore submitted that in that particular instance, it was not for the respondent's lawyers to "make their own ruling" on the Court's jurisdiction and decide to excuse themselves from lawfully sanctioned proceedings without making an application to assail the Court's jurisdiction to proceed with the petition. The actions of the Respondent's lawyers were not only contemptuous but were also a direct assault on the authority of the Court

[29] https://www.facebook.com/Mwebantu/posts/president-lungus-lawyers-refuse-to-participate-in-concourt-proceedingsit-has-tur/1050624385057656/?paipv=0&eav=AfZey7so2TvW1TAnLuMNaIGZ0sWJeE5OPYB8wpNUYk4Bu2nYKmAPHNxq3KWaVKf9wRM&_rdr

[30] 119 (1) Judicial authority vests in the courts and shall be exercised by the courts in accordance with this Constitution and other laws.

calculated to erode the Court's standing in the eyes of the public and ought to have met the wrath of the Court.

6.5.5.3 In a strange twist, the three Respondents herein, in an apparent endorsement of the Respondents' lawyers contemptuous behaviour, went on to craft a Ruling without a substantive application and in an open show of judicial incompetence and lack of impartiality, failed to admonish the Respondents' lawyers for demeaning the Court, but instead went on to pile on the blame on the Petitioners' lawyers even for a process which was the responsibility of the Court. This is a clear failure to uphold Value 5, application 5.5 of the Bangalore Principles and Value 6 applications 6.5 and 6.6 of the Bangalore Principles which provide as follows:

> *5.5. A judge **shall** require lawyers in proceedings before the court to **refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy**.*
>
> *…*
>
> *6.5. A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.*
>
> *6.6. A judge **shall maintain** order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge **shall require similar conduct of legal representatives**, court staff and others subject to the judge's influence, direction or control.* (**emphasis added**)

6.5.5.4 By failing to reprimand the Respondents' lawyers for absenting themselves from absenting themselves from court and for calling lawful court proceedings "illegal", the three Respondents herein lamentably failed to live up to the standard of conduct expected of them and provided under Values 5 and 6 of the Bangalore Principles. Instead, the three judges passed the buck and vehemently placed blame on the petitioners' lawyers for raising several preliminary motions that allegedly consumed the Court's time and ensured there was no time left for hearing the petition within the set period.

6.5.6.0 Respondents' "Majority Ruling" without a formal application

6.5.6.1 Notwithstanding that the full Court had made an Order, in open Court, the previous Friday, adjourning the matter to Monday September 5th, 2016, it is noteworthy that the three Respondents, on the appointed date of the commencement of hearings already had a draft ruling at 0800hrs on the appointed day. The Complainant is fortified in this regard by the words of the then Judge President of the Court, Madam Justice Chibomba in her dissenting ruling where she stated:

> *"I must also say from the outset that I have had very little time to read through the majority judgment which I was given this morning after 0800hrs together with the Judgment by Justice Munalula"*

6.5.6.2 It would appear from the two dissenting judgments that they had little time to read the Majority Ruling which was presented to them the very morning of the hearing. It brings to question on what motivated the Respondents to come up with the Ruling over a weekend when the Court did not have a formal sitting. A number of key questions arise from this development which ought to be answered by the Respondents to the satisfaction of this Commission:

a) When, at what time and where did the three Respondents convene a Judges' conference to arrive at a Majority Ruling?
b) If such a meeting took place, who called for and presided over this meeting and in what context?
c) Which legal provision empowered three judges to overrule an order made by a full bench sitting in open court?
d) Pursuant to which provision was the issue of the jurisdiction of the court re-opened after the Court adjourned?
e) When was the application challenging the jurisdiction of the Court to hear the petition made, to whom and where?
f) Was there an application for the Court to reconsider or set aside the Friday ruling made to the full bench and where and when was it heard?

6.5.6.3 The 6 questions posed above go some way in buttressing the Complainant's contention that the three Respondents exhibited extreme levels of incompetence rendering them unfit to hold judicial office in the highest court of the land. In trying to answer the above questions, this Commission, as will any other reasonable member of the public, will come to the inescapable conclusion that the three Respondents herein, either acting on their own accord or pursuant to instructions from some unknown source, convened on their own over a weekend and plotted to overturn a subsisting ruling of the full bench. They then proceeded to make the decision and also went on to write the judgment without any formal hearing or submissions from any of the parties.by purporting to

rely on the submissions of the Attorney General, made in a prior hearing that had been concluded by an order of adjournment by the full bench of the Court, the Respondents, in their ruling displayed an intellectual bankruptcy and incompetence confirming a failure to understand and apply the basic rules of litigation.

6.5.6.5 The Complainant is fortified by the judgment of the Constitutional Court in the recent case of ***Isaac Mwanza and the Attorney General***[31] which the Court clearly laid down the circumstances in which and the mode of commencement of proceedings by which the Court is clothed with jurisdiction to interpret the Constitution and further guided that mere submissions by a party on a point of law do not (nor did they) in any way confer Jurisdiction on the Court to interpret a provision of the Constitution in the manner that the Respondents purported to do when they made the Majority Ruling. From this standpoint, the Complainant submits that the three Respondents not only acted in collusion but also illegally to subvert our judicial system and undermined the Constitutional order.

6.5.6.6 The Complainant contends that it is an entrenched principle of law that does not require any further elaboration in this jurisdiction that, an order of a Court of competent jurisdiction is binding on every person and remains valid unless and until it is set aside or vacated by the same Court or overturned by an appellate court. It is not in dispute that there was no application or motion filed by any of the parties requesting the Court to vacate its orders made on Friday the 2nd of September 2016. It is thus submitted that, in the common law tradition, which Zambia subscribes to, it is not legally tenable for three judges of a Court to make a decision that overrules the full bench. In this case the three Respondents could not legally reverse the unanimous decision of the whole Court ordering trial to proceed on 5 September, 2016. The majority decision suggests judicial incompetence, arbitrariness and complete disregard of the rule of law.

6.5.6.7 The Complainant further submits that Judges are not above the law, but are accorded the privilege and considered as guardians of the rule of law. This however, does not mean that the judges can act on their own caprices not founded on any law. Therefore, when judges act contrary to established law and conduct themselves in judicial proceedings, in a manner inconsistent with established rules of law, practices and principles, severely undermine the judicial process. As Justice Michael Kirby observed:

[31] 2021/CCZ/0045

"It would be corrosive of the rule of law, if judges did not themselves conform to and uphold, clearly settled rules of law."[32]

It follows that, the decision by the three Respondents to overturn an order made by the full court is incompetent as it has no legal basis. Renowned legal scholar, Professor Muno Ndulo has argued forcefully that the majority judgment is invalid as it was a subversion of the judicial process and therefore the unanimous decision of the Court made on 2 September 2016 to hear the petition is still the valid decision of the Court.[33]

6.5.6.8 Furthermore, the Complainant submits that by, ignoring or failing to appreciate a long-standing principle of adjudication, that is, a full court cannot be reversed by three judges and also that an order of court remains valid unless vacated or set aside, the three judges were incompetent. It is therefore, beyond any rational contention that three Respondents cannot legally undo the collective decision of five judges constituting the full bench. In any case, it would follow that their decision as contained in the "majority ruling" was also rendered outside the 14 days and therefore, applying the same logic by the three, would be a nullity.[34] In a further show of incompetence which will be of interest to this Commission, an application under Article 104(3) of the Constitution, was made by the petitioners, for an interim Order that the Respondent in the Petition, Edgar Chagwa Lungu, handover power to the speaker of the National Assembly pending hearing of the petition, to date the Court has not rendered a ruling on that application, signaling a failure in adjudication.

6.5.7.0 Failure to apply the law in Majority Ruling

6.5.7.1 The Complainant is alive to the fact that decisions of the Constitutional Court are not appealable and has no intention whatsoever to turn this Commission into an appellate Court. The Complainant will highlight specific portions of the Respondents' Majority Ruling only for the purposes of proving the incompetence of the Respondents as a ground for removal from judicial office. This is in line with the obligation to show that the Respondents did not apply the requisite knowledge and skill to adjudicate the matter to the expected standard.

6.5.7.2 As already stated in earlier paragraphs, on the 2nd of September 2016, unmoved by any of the parties and without a hearing, in a move triggered by the actions of the three Respondents herein, the Constitutional Court

[32] Justice Michael Kirby, 'Lord Denning and Judicial Activism' *Denning Law journal*, 132

[33] Muna Ndulo 'The Judicial Crisis in Zambia and a Flawed Election' <http://zambianeye.com/archives/51931> accessed 8 October, 2016

[34] Kaaba

decided, by a majority of 3 to 2, to abandon the presidential petition without a hearing. The majority ruling, penned by the three Respondents in these proceedings, took the position that the time frame within which to hear the petition was rigid and allowed for no judicial discretion to extend it. This was arrived at by applying a literal interpretation of Articles 101(5) and 103(2) of the Constitution which placed a duty on the Court to hear the petition within 14 days of the filing of the petition.[35]

6.5.7.3 The three Respondents, in their Ruling, opined that the time limit was put in place to overcome the mischief where election petitions in the past took several years to be determined.[36] But since under Article 104 the president-elect could not assume office until the matter was determined, the set time limit was unchangeable and therefore the Court could not hear the petition outside that period.[37] According to the majority, once the time limit set for the petition lapsed, then the petition stood dismissed on that technicality.[38]

6.5.7.4 In arriving at that decision, the Respondents only cited one judicial precedent as authority for its construction of the time limit within which to hear the petition. This is the Judgment of the Kenyan Supreme Court, in the 2013 presidential election petition of ***Raila Odinga V The Independent Electoral and Boundaries Commission and others***.[39] This case was anchored on Article 140(1) of the Kenyan Constitution.

6.5.7.5 Interestingly, Article 140 (1) of the 2010 of the Kenyan Constitution[40] provides that:

> *"(a) A person may file a petition in the Supreme Court to challenge the election of the President elect within seven days after the date of the declaration of the results of the presidential election;*
>
> *(b) Within fourteen days after the filing of the petition, under clause (1) the Supreme Court shall* ***hear and determine*** *the petition and its decision shall be final" (****emphasis added****)*

On the other hand, Article 101(5) of the Zambian Constitution provides that:

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[35] *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016*,

[36] The case of *Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others (2005) Z.R 138, for example* took four years to conclude.

[37] Ibid, [15]

[38] Ibid, [16]

[39] *Raila Odinga V The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013*

[40] https://faolex.fao.org/docs/pdf/ken127322.pdf

*'The Constitutional Court **shall hear** an election petition filed in accordance with clause (4) within fourteen days of the filing of the petition*,

while Article 103(2) reads:

*"The Constitutional Court **shall hear** an election petition relating to the president-elect within fourteen days of the filing of the petition."*

6.5.7.6 It is clear that the Kenyan provision relied on in the ***Raila Odinga*** case and the Zambian provision are not identical, the former explicitly provides for the hearing and determination of the petition, while the latter only provides for a hearing of the petition, sufficient to say the Zambian Constitution does not state the consequences of exceeding the 14 day period. The Complainant contends that, in arriving at their decision, the Respondents adopted a simplistic approach by isolating Articles 101(5) and 103(2), which prescribe the time limit within which to hear the petition, from other related provisions within the Constitution. In a clear show of judicial incompetence, the Respondents relied on this simplistic approach to ultimately grant a remedy which is not provided for in the Constitution.

6.5.7.7 Article 103 (3) provides that

"the Constitutional Court may, **after hearing** an election petition-

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

(b) **nullify** the election of the president-elect and Vice President. (**emphasis added**)

The Complainant submits that by purporting to dismiss the petition without a hearing, the three Respondents granted a relief which not only was not prayed for by the parties but is not available at law. Under Article 103(3) the Court has a Constitutional and inescapable duty to ensure the petition is heard, any reliefs under the said Article are only available **after hearing** an election petition.

6.5.7.8 In fact, the Complainant submits, the provisions of Article 103(3) do not clothe the Constitutional Court with power to vacate or dismiss a validly filed petition without hearing it. The Constitution actually contemplates no other way of concluding an election petition apart from hearing it and determining it on its merits. It cannot even be withdrawn by a petitioner once it is filed. This is well illustrated by the decision of the Zimbabwean Constitutional Court in 2013 where opposition leader Morgan Tsvangirai sought to withdraw the petition. The Court opined:

"once such an application or petition is launched ***it can only be finalized by determination of the Constitutional Court by either declaring the election valid, in which case the president is inaugurated within forty-eight hours of such determination, or alternatively by declaring the election invalid, in which case a fresh election must be held within sixty days. Without the said determination there can be neither an inauguration of the president nor the holding of a fresh election****"*.[41](**emphasis added**)

6.5.7.9 It is submitted that the decision by the Respondents to 'dismiss' the petition without hearing it was incompetent and a blatant abdication of their Constitutional duty as provided under the same provisions they purported to rely on to abandon the petition. In arriving, at this decision, the three Respondents failed to read and apply the letter of the law as it is written, falling way below the standard of care, skill, competence and diligence expected of one holding judicial office in an apex court. A constitutional court ought not to pander to narrow constructions which leaves substantial justice prostrate. As pointed out in Justice Munalula's dissenting judgment, not to hear the petition ostensibly due to the set time limit led to the absurdity of complying with a deadline but without the purpose or intended event having taken place.[42] A judgment that purports to comply with a legal technique, dissociated from the intended substance of the law, to borrow Professor Ben Nwabueze's words, 'is like a person embarked upon a journey and yet with no clear direction as to which way to go and no idea where he is going…it is like a boat adrift in the sea.'[43]

6.5.8.0 Failure to apply Comparative Jurisprudence in reasoning

6.5.8.1 It is not in contention that the 2016 Presidential petition was a novel case in the post 2016 Constitutional landscape, and as such, the Constitutional Court jurisprudence was still at its infancy. However, the Complainant submits that the failure by the three Respondents to refer to jurisprudence from other jurisdictions which had dealt with similar cases was an ultimate show of judicial incompetence or lack of skill and knowledge in the subject matter.

[41] *Morgan Tsvangirai v Mugabe and Others Constitutional Application No. CCZ 71 of 2013*

[42] *Hakainde Hichilema and Another V Edgar Lungu and others 2016/CC/0031 Ruling No.33 of 2016,* Munalula JC] [7]

[43] Ben Nwabueze, 'Strengthening the Foundations and Institutions of Democracy in Africa,' Lecture delivered in Lagos, Nigeria, on 10 December 2009

6.5.8.2 As already stated, the Respondents, their Majority Ruling made reference to only one Kenyan case, which they also failed to cite in its full context. The Respondents neglected to state that in the ***Raila Odinga*** case they relied heavily on, the Kenyan Supreme Court warned against the court being enslaved by the prescriptions of procedure by stating that:

> "*A court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties.'*[44]

By interpreting the Constitution in a manner that had the effect of denying the Petitioners the Constitutional right to be heard, the Respondents failed to apply is a well-established principle that a Constitution should be read as a whole and no provision should be read in isolation.

6.5.8.3 The Nigerian Supreme Court has stressed this point as follows:

> *It is settled law, that the court in interpreting the provisions of a statute or constitution, must read together related provisions of the constitution in order to discover the meaning of the provisions.* ***The court ought not to interpret related provisions of a statute or constitution in isolation and destroy in the process the true meaning and effect of particular provisions.***[45] (**emphasis added**)

6.5.8.4 In a further show of limited knowledge and skill on the subject matter, the Respondents, in their Majority Ruling ignored this approach and decided to abandon the petition on the basis of isolated provisions, without regard to other related provisions which might have cast more light on those provisions in order to resolve the controversy. Article 8 of the Constitution lists national values and principles, which include democracy and constitutionalism as well as good governance and integrity. Article 9(1)(a) provides that the national values and principles shall apply to the interpretation of the Constitution. The majority ruling never referred to this provision. It is submitted that the Respondents' decision certainly does not advance the national values as required by the Constitution, rendering it incompetent. Not hearing a validly filed petition does not advance democracy, constitutionalism, good governance and integrity.

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[44] *Raila Odinga V The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013* [218]

[45] *Amaechi V Independent National Electoral Commission and others Supreme Court of Nigeria S.C.252/2007 (Judgement of 18 January 2008),* [21]

6.5.8.5 The Constitution further requires, under Article 267(1), that it shall be interpreted in accordance with the Bill of Rights and in a manner that, inter alia, promotes its purposes, values and principles, and contributes to good governance.[46] The majority judgment, for example, nowhere relates its decision to the right to be heard and to fair trial as contained in the Bill of Rights. It goes without saying that the approach taken by the Respondents does not advance these values but negates them. It should be noted that a hearing must also be fair and equitable and not just a farce or a choreography of absurdities as we saw in this case. This stems from the long-standing notion that "justice must not only be done, but must be seen to be done."

6.5.8.5 Several courts from various jurisdictions in the world have pronounced themselves on this principle. In ***R v. Sussex Justices, exp. McCarthy***[47] a leading English case on the impartiality and recusal of judges. It is famous for the precedent establishing the principle that mere appearance of bias is sufficient to overturn a judicial decision. It also underlined the commonly quoted aphorism: "Not only must justice be done; it must also manifestly be seen to have been done." Procedure and technicalities, are handmaids of law, they should never be made a tool, to deny justice or perpetuate injustice, by any oppressive or punitive use. They should not become tyrannical masters with which justice can be destroyed.

6.5.8.6 This was further elaborated by Justice Chuckwadifu Oputa in the Nigerian Supreme Court case of ***Bello v. Attorney General of Oyo State***[48] as follows:

> *"The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers.*
>
> *Nevertheless,* ***the spirit of justice does not reside in forms of formalities, or in technicalities, nor is the triumph of the administration of justice to be found in successfully picking one's way between pitfalls of technicality. Law and its technical rules ought to be but a handmaid of justice and legal inflexibility (which may be becoming of law) may, if strictly followed, only serve to render justice grotesque or even lead to***

[46] Constitution of the Republic of Zambia 2016, article 267(1)
[47] [1923] All ER Rep 233
[48] 1986(CLR)12(b)(SC)

***outright injustice**. The court will not endure that mere form or fiction of law, introduced for the scale of justice, should work a wrong, contrary to the truth and substance of the case before it."* (**emphasis added**)

6.5.8.7 Article 118(1) of the Constitution makes it very clear that the judiciary, in exercising its authority, is enjoined to ensure that 'justice be administered without undue regard to procedural technicalities.'[49] The significance of this provision is undoubtedly that no one who approaches the Curt should be prevented from stating their case and having the case determined on its merits. Justice must be dispensed without being inhibited by procedural technicalities, or as Justice Niki Tobi of Nigeria stated:

> *"the court must pursue the substance and not the shadow."*[50]

The Nigerian Supreme Court forcefully stated this point when it reversed a decision of the Court of Appeal that declined petitioners in an election from administering interrogatories on the basis of the need for speedy trial by stating:

> *Gone are the days when courts of law were only concerned with doing technical and abstract justice based on arid legalism. We are now in days when courts of law do substantial justice in light of prevailing circumstances of the case. It is my hope that the days of the courts doing technical justice will not surface again.*[51]

6.5.8.8 In the same vein, the Complainant avers that, with the amendment of the Zambian Constitution in 2016, gone are the days that Judges of superior Courts can be allowed to get away with incompetence and poor application of the law leading to failure of justice delivery. It is humbly, but firmly submitted that had the three Respondents exhibited even an iota of the competence expected of the judicial office they occupy, they would have applied their minds to the modern judicial standards exhibited by their peers across the continent and in other parts of the world. The Complainant maintains that failure to apply sound judicial principles in a case of this magnitude is the greatest form of incompetence whose perpetrators cannot be allowed to continue sitting on the hallowed bench of the Constitutional Court. In Zambia, conduct of a presidential petition is Court driven, thus the responsibility to administer justice falls on the Court and not the lawyers. The attempt by the Respondents to shift the blame to lawyers is without any Constitutional basis and only confirms their incompetence. The Respondents simply went for 'finality' without endeavoring to hear the petition efficiently, expeditiously and fairly. In the

[49] Constitution of the Republic of Zambia 2016, article 118(2)(e)

[50] *Atiku Abubakar and Others v Umaru Musa Yar'adua and Others SC 288/2007 Judgment of 25 January 2008*

[51] Ibid

end, they lamentably failed to heed the compelling advice of Lord Atkin: 'Finality is good, but justice is better.'[52]

6.5.8.9 In the grand analysis, it is submitted that the judicial incompetence of the Respondents has created some legal absurdities which are worth pointing out here. Articles 101(6) and 103(3) indicate the outcomes of a validly filed petition. Article 103(3), in almost similar terms, states:

> *The Constitutional Court may, after hearing an election petition-*
>
> *(a) Declare the election of the president-elect valid; or*
>
> *(b) Nullify the election of the president-elect and vice president-elect.*

These are the only constitutionally available outcomes of a validly filed petition contemplated under the Constitution. The Constitution has no provision entitling the Court to abandon a validly filed petition without coming to any of the above outcomes.

6.5.8.10 This view is augmented by article 105(2)(b) which regulates the assumption of office by a president-elect where there has been a presidential election petition. It states:

> *'(2)The President-elect shall be sworn into office on Tuesday following-*
>
> *…*
>
> *(b)the seventh day after the date on which the Constitutional Court* ***declares the election to be valid.****'*[53]

It is clear from this provision that a president-elect, whose election was challenged, cannot assume office without the court hearing the petition and making a finding that his/her election **was valid**. In this case, largely to the incompetent actions of the Respondents, the Constitutional Court in this case did not do that. It simply abandoned the petition without making the Constitutionally required pronunciation on the validity of the election. In the end, the president-elect was sworn in with a cloud of illegality hovering over his assumption of office. It is submitted, that as a result of the Respondents' incompetence, we had a president who was sworn into office in violation of the Constitution. The constitutional basis for inaugurating a president whose election was challenged through a petition was not met.

[52] As cited in H.W.R. Wade, *Constitutional Fundamentals* (Stevens and Sons, London: 1980) 66

[53] Emphasis the author's

6.6.0 Gross Misconduct

6.6.1 In addition to incompetence as articulated above, the second ground pursuant to which the Complainant seeks the Respondents' removal from judicial office is that of gross misconduct. The Constitution, under Article 266 defines "gross misconduct" as follows:

> *(a)* ***behaviour which brings a public office into disrepute, ridicule or contempt****;*
>
> *(b) behaviour that is prejudicial or inimical to the economy or the security of the State;*
>
> *(c) an act of corruption; or*
>
> *(d) using or lending the prestige of an office to advance the private interests of that person, members of that person's family or another person;* (**emphasis added**)

6.6.2 The learned authors of ***Black's Law Dictionary***[54] define misconduct as follows:

> ***Misconduct*** *(17c)* ***1.*** *A dereliction of duty,* ***unlawful,*** *dishonest or improper behaviour, especially by someone in a position of authority or trust…*
>
> ***Official Misconduct*** *(1830)* ***1.*** *A public officer's corrupt violation of assigned by malfeasance, misfeasance or nonfeasance- also termed misconduct in office, misbehavior in office, misdemeanor in office, corruption in office, official corruption, political corruption, abuse of office.* ***2.*** *ABUSE OF PUBLIC OFFICE*

6.6.3 The Complainant submits that the Respondents' actions which led them to convene an illegal judge's conference over a weekend and made the decision to overturn the previous ruling of the full Court is an act of gross misconduct which renders them amenable to removal from office. The Constitution is clear that gross misconduct is a ground for removal of a judge from office. The Complainant thus contends that, the three Respondents engaged in illegal conduct which demeaned and brought ridicule to the Constitutional Court.

6.6.4 Article 129(4) of the Constitution states:

[54] Note 17, *supra,* at page 1195

*(4). Constitutional Court **shall be presided over** by—*

(a) the President of the Constitutional Court;

(b) in the absence of the President of the Constitutional Court, the Deputy-President of the Constitutional Court; and

(c) in the absence of the Deputy-President of the Constitutional Court, the most senior judge of the Constitutional Court, as constituted. (**emphasis added**)

This provision is almost identically reproduced under Section 3(4) of the Constitutional Court Act[55] as follows:

(*4) The Court **shall be presided** over by—*

(a) the President;

(b) in the absence of the President, the Deputy President; and

(c) in the absence of the Deputy President, the most senior judge of the Court, as constituted.

6.6.5 The above provisions, couched in mandatory terms, entail that any business of the Constitutional Court, in order to be valid, must be presided over by the President of the Court, and in their absence, the Deputy President, and in their absence, the most senior judge of the Court. As already alluded to, the three Respondents, convened a meeting where they came up with and drafted the "Majority Ruling" after the adjournment of the full court on Friday the 2nd of September 2026. A reading of the said Majority Ruling and the two dissenting judgments, one of which was from the president of the Court, leads to the conclusion that the Respondents convened a meeting/sitting of the Court which was unlawful as it was not presided over by the President of the Court who was available at the time, in breach of Article 129(4) of the Constitution and Section 3(4) of the Constitutional Court Act.

6.6.6. For avoidance of doubt, the ***Black's Law Dictionary*[56]** defines the word preside as follows:

> ***Preside. 1.** To be **in charge of a formal event,** organization or company, specifi., to occupy the place of authority, **especially as a judge during a hearing or trial**<preside over the proceedings> **2. To exercise management or control***

From the foregoing, it is clear that any actions or proceedings of the Constitutional Court resulting in a formal judgment or ruling of the court,

[55] No. 8 of 2016

[56] Note 17, *supra,* page 1434

especially one that purports to undo an order given by the full bench of the court, ought to be presided by the President of the Court.

6.6.7 It is clear from the "Majority Ruling" crafted by the Respondents and the dissenting judgments from the Judge President and Justice Munalula that the President of the Court only became aware of the Respondent's "Majority Ruling" on the same morning it was delivered, when she was under the impression that the petition was coming up for hearing as had been ordered when the full court adjourned the previous Friday. It is thus submitted that, if the Court President was herself not even aware of the judgment of the majority until the morning of its rendering, this suggests the three Respondents separately conferred and contrived to subvert the unanimous decision of the Constitutional Court to allow the petition to be heard. Because the Constitution and the Constitutional Court Act mandate that the Judge President presides over the Court, such actions by the Respondents were illegal and as such constitute gross misconduct.

6.6.8 This is exacerbated by the fact that the Respondents' illegal actions brought ridicule and scorn to the Constitutional Court and demeaned its standing in the eyes of the Zambian public, the legal fraternity and international scholars. To exemplify this, the selected public statements ensuing from fallout following the Respondents actions and subsequent "Majority Ruling" are sampled below:

1) Renowned Constitutional Scholar and Cornell University Professor Muna Ndulo stated in an Article:

   "I would agree with Professor Hansugule's assessment that the Zambian Constitutional Court ***displays unbelievable mediocrity and is an embarrassment to Africa and the rest of the world****. In this article I argue that the September 5 decision of Justices Sitali, Mulonda and Mulenga to overturn a decision of the full bench was illegal, irregular and unprofessional and has no legal effect*"[57] (**emphasis added**)

2) In another Article carried in the SAIPAR law review Journal, Namibian Scholar, Dunia P. Zongwe had this to say:

   "It is clear that the Constitutional Court of Zambia ***failed to bring sanity to what was a chaotic process. Litigation in Zambia is***

[57] https://www.lusakatimes.com/2016/09/11/professor-muna-ndulo-launches-scathing-attack-three-constitutional-court-judges/

judge-driven, and the Court has a duty to control the courtroom and the proceedings therein. The flip-flopping of court directions worsened the situation *and apparently caught Justices Chibomba and Munalula off guard, putting them in the embarrassing position of writing a rushed judgment.*

The rushed judgment may also explain why, unlike the majority judgment, none of the dissenting opinions directly spoke to the question of whether the Court had jurisdiction to hear the petition after the expiry of the 14- day period, although this was a question expressly raised as a preliminary objection by the Attorney-General.

In the end, the court's behaviour left commentators and observers with an acute sense that something had gone terribly wrong in the Constitutional Court*. If parties have to comply with a 14-day time frame, then the Court's directions and proceedings should have been organized accordingly, as the Kenyan Supreme Court did in its conduct of the 2013 Presidential petition before it. The judges of the Zambian Constitutional Court were of one mind in condemning the behaviour of the petitioners' lawyers, who questioned the Court's impartiality.* ***Nonetheless, in view of the unsatisfactory conduct of the proceedings by the Court, the Court should have taken a more introspective, if not critical view of their own conduct."*** (**emphasis added**)

6.6.9 The foregoing quotations from renowned Constitutional Scholars are just a tip of the iceberg demonstrating the diminished confidence in the Constitutional Court resulting from the Respondents' illegal decision to connive to hold a meeting which had the effect of overturning orders for directions issued by the full court. This only served to attract ridicule towards the judiciary exemplified by words like "flip flopping", "mediocrity" and "embarrassment" in relation to the Court's decision to do a 180 degree turn from its earlier order, orchestrated by the Respondents. From this standpoint, the Complainant submits that the Respondents' actions fall within the scope of Article 143 (c) as read with Article 266 of the Constitution and as such the Respondents should be removed from judicial office on the grounds of misconduct.

7.0 Incompetence and Gross Misconduct in other cases

7.1 The Complainant submits that the incompetence and gross misconduct on the part of the three Respondents is not only restricted to the ***Hakainde Hichilema and another***[58] case, but extends to other cases presided over

[58] 2016/CC/0031

by the Respondents as a trio or in panels with other judges. A few of them are highlighted to amplify the disturbing pattern of judicially impoverished judgments and rulings which have established and almost entrenched a disturbing pattern of handling constitutional and politically sensitive cases in a manner that is at odds with the basic tenets of constitutionalism, democracy and access to justice.

7.2 In two significant judgments relating to Parliamentary election petitions, in the cases of ***Margaret Mwanakatwe v Charlotte Scott and Another***[59] (Coram: Chibomba, PJC, **Sitali JC, Mulenga JC,** Mulembe JC and Musaluke JC) and ***Nkandu Luo and Another v Doreen Mwamba and Another***[60] (Coram: **Sitali JC, Mulenga JC,** Mulembe JC, Munalula JC and Musaluke JC), the reveals significant judicial incompetence and a failure to consistently interpret the constitution and electoral laws in a manner that promotes good governance and free and fair elections.

7.3 in the ***Margaret Mwanakatwe***[61] the Constitutional Court found that the Zambia Police had acted in breach of the electoral laws by preventing the 1st Respondent from holding rallies in three different locations during the campaign period, but went on to take a narrow interpretation of Section 97(2)(b) of the Electoral Process Act in holding that an election can only be nullified if a breach of the law is perpetrated by the Electoral Commission of Zambia as the body mandated to manage elections and is inconsequential if committed by any other body like the Zambia Police Service. The Court stated at pages J44 to J47:

> *"In order for non-compliance with the law to result in the invalidation of an election under Section 97(2)(b), it must be established that the non compliance affected the result of the election* ***and must be attributable to the Electoral Commission of Zambia as the conductor of elections ...***
>
> *...*
>
> *Given the clear provisions of the law which we have cited, the learned trial judge misinterpreted the law when he held that all that is required for an election to be nullified under Section 97(2)(b) is evidence of non-compliance with the law in the conduct of elections "by the relevant player, being the Zambia Police in this case"*

[59] Selected Judgment No. 50 of 2018
[60] Selected Judgment No. 51 of 2018
[61] Supra Note 55

The role of the Zambia police in the electoral process is restricted to enforcing the law and maintaining peace and order during campaign meetings and processions and on polling day.

…

The learned trial Judge ***thus misdirected himself when he said the police breached the electoral laws,*** *as we already stated above, the* ***mandate*** *to* ***conduct elections is exclusively vested in the Electoral Commission of Zambia.***

We have examined the 1st Respondent's evidence before the lower Court on the Record of Appeal and observe that she did not adduce ***any evidence that the result of the election was affected by the refusal by the police to permit her to carry out door to door campaigns in Northmead and Rhodespark*** **(emphasis added)**

7.4 The passage above illustrates the Court's restrictive interpretation of statutory provisions and Constitutional text, ignoring the cumulative effect of breaches of the law on the electoral process, the Court chose to concentrate on **who** had committed the breach as opposed to the overall effect of breaches of the law on the integrity of the electoral process. This narrow view undermines efforts to ensure clean elections and allows candidates to benefit indirectly from malpractices committed by parties other than the Electoral Commission of Zambia. Such reasoning not only amounts to incompetence but is also gross misconduct as it goes against the principles of Constitutional interpretation provided for under Article 267(1), which places an obligation on the Court to interpret the Constitution in a manner consistent with the Bill of Rights, the principles and values enshrined in the Constitution and in a way that promotes good governance.

7.5 The Court in this case, interpreted the Constitution in a manner inconsistent with Article 8(e) and (e) which provide for integrity, democracy and good governance as national principles, By employing such an interpretation went against the spirit of the Electoral Process Act, which seeks to achieve free and fair elections in the country. The Complainant submits that good governance relies on a judiciary that upholds the rule of law impartially and consistently. In the ***Margaret Mwanakatwe***[62] case, the Court's failure to uphold the High Court's findings of a breach of the electoral code of conduct sends a dangerous message that such activities can be tolerated as long as they are not perpetrated by the ECZ. This undermines the principles of good governance, which include transparency, accountability, and the rule of law and ultimately

[62] Ibid

contributes to a decline in public confidence in the judiciary, which is an act of Misconduct under Article 143.

7.6 In the ***Nkandu Luo*** case, the Complainant submits that the Court, adopted an interpretation of the Constitution and the Electoral Process Act inconsistent with its interpretation in the ***Mwanakatwe*** case to overturn the decision of the High Court to nullify the election by finding that a breach of the Electoral Process Act, this time occasioned by the ECZ by failing to provide Form GEN 12 forms would be enough to overturn the result. This is in stark contrast to its position in the ***Mwanakatwe*** case where the Court opined that only a breach of the Act by the ECZ would occasion the application of Section 97(2)(b) of the Electoral Process Act. This decision highlights a failure to understand the broader implications of electoral malpractices on the democratic process.

7.7 The Complainant thus submits that he Constitutional Court's inconsistency in applying standards of proof and interpreting the Constitution and the Electoral Process Act demonstrates judicial incompetence. This lack of uniformity erodes public confidence in the judiciary and its role as a guardian of democratic principles. When the Court fails to apply consistent standards, it creates uncertainty and unpredictability in electoral justice. Ultimately, this warrants the removal of the Respondents and any other judges guilty of such misconduct's removal from office.

7.8 It is the Complainant's firm argument that a competent judiciary is essential for upholding democratic principles. The Respondents' and ultimately the Constitutional Court's inconsistent judgments highlighted above reflect a failure to interpret the Constitution in a manner that promotes democracy and the rule of law. The Court should aim to protect the sanctity of elections by ensuring that any form of malpractice is addressed decisively as compared to creating an enabling environment for electoral malpractices. To foster democracy, the judiciary must uniformly and effectively address electoral malpractices, ensuring that elections are conducted in a fair, transparent, and violence-free environment. The Court's approach to adjudication in these two cases highlights a lack of uniformity and incompetence in its approach to electoral malpractices. The quality of adjudication in these two cases, it is submitted, falls way below the internationally recognised standard expected to deter electoral malpractices, thereby failing to uphold the standards required for a healthy democratic process.

8.0 Conclusion

8.1 The Complaint has aptly demonstrated, in the preceding paragraphs, that the Respondents ought to be removed from judicial office as judges of the Constitutional Court based on the provisions of Article 143 of the Constitution. The Complainant has shown that the three Respondents are incompetent and also committed gross misconduct in the case of ***Hakainde Hichilema and Others v Edgar Chagwa Lungu and others,*** and as such are unfit to continue in office. Further, the Complainant has also demonstrated the Respondents' failure to apply the basic standards of competent adjudication as well as inconsistent application of interpretive approaches in the cases of ***Margaret Mwanakatwe*** and ***Nkandu Luo,*** a situation signaling failure by the Court to advance the country's democratic aspirations by protecting the electoral process. Instead, the Court delivered judgments which seem to encourage rather than deter electoral malpractice and breach of the Electoral Code of Conduct.

8.2 The Complainant is cognizant of the fact that there have been previous complaints against the Constitutional Court relating to the manner in which it conducted the proceedings in the matter subject of this Complaint and that the said complaints were disposed of by the Commission. However, the Complainant submits that the substantive questions set out in his Complaint vary significantly from the subject matter in the previous complaints and also makes reference to examples of incompetence and misconduct in later cases and consequently, the Commission has never had occasion to pronounce itself on the matters in issue herein.

8.3 Besides, the Commission did not have the benefit of the guidance recently handed down by the Constitutional Court in the **Isaac Mwanza** case cited above on the jurisdiction of the Court to interpret the Constitution and as such, the Complainant humbly submits, the Commission is entitled to take a fresh (and closer) look at that issue which was never substantively addressed in the previous proceedings.

The Complainant's prayer

In light of the foregoing, the Complainant humbly prays in summary and in terms of the provisions of the Constitution and the law cited above that proceedings for the removal of the Respondents as Judges of the Constitutional Court be undertaken by the Commission on the grounds

set out in this Complaint and on the ground that the Respondents are incompetent, that they grossly misconducted themselves as set out above and that they are consequently unfit for Judicial Office.

Dated this _____of _____2024

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SIGNED BY THE COMPLAINANT

MOSES KALONDE

At Lusaka

This……day of……2024

In the Presence of:

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COMMISSIONER FOR OATHS

IN THE JUDICIAL COMPLAINTS COMMISSION

HOLDEN AT LUSAKA

IN THE MATTER OF:	**Articles 1(3), 2, 119, 128, 129, 143 and 144 of the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016**
IN THE MATTER OF:	**Sections 4(2) and 8 and 21 of the Constitutional Court Act No.8 of 2016**
IN THE MATTER OF:	**Section 25 of the Judicial Code of Conduct Act No. 13 of 1999 as amended by the Judicial Code of Conduct (Amendment) Act No. 13 of 2006**
IN THE MATTER OF:	**Order IV and XV of the Constitutional Court Rules Statutory Instrument No. 37 of 2016**
IN THE MATTER OF:	**A Complaint of alleged incompetence, gross misconduct and wilful violation of the Constitution of Zambia by judicial officers.**

BETWEEN:

MOSES KALONDE	**COMPLAINANT**
AND	
HON JUSTICE ANNIE M SITALI	**1ST RESPONDENT**
HON JUSTICE MUNGENI MULENGA	**2ND RESPONDENT**
HON JUSTICE PALAN MULONDA	**3RD RESPONDENT**

COMPLAINT

Brought pursuant to Articles 1(3) 2, 143 and 144 of the Constitution of Zambia Act Chapter 1 of the Laws of Zambia as amended Act No.2 of 2016 and Section 25 of the Judicial Code of Conduct Act No.13 of 1999 as amended by Act No.13 of 2006

ANNEXURES

These are the Annexures referred to in the attached Complaint of **MOSES KALONDE** and marked **"Annexures 1 to 6"** before me:

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COMMISSIONER FOR OATHS

List of Annexures

1. **Majority Ruling in Hakainde Hichilema and Others 2016**
2. **Dissenting Judgment by Professor Munalula**
3. **Dissenting Judgment by Justice Chibomba**
4. **Isaac Mwanza v The Attorney General 2021/CCZ/0045**
5. **Report of Parliamentary Committee Scrutinising the appointment of Justice Anne Sitali, Mungeni Mulenga and Palan Mulonda as Judges of the Concourt.**
6. **CV for Judge Anne Sitali**
7. **CV for Judge Palani Mulonda**
8. **CV for Judge Palan Mulonda**
9. **Open Letter by SC John Sangwa on Appointment of Concourt Judges**
10. **Article by Dunia P. Zongwe.**
11. **Thr Bangalore Principles on Judicial Conduct**