JUDICIAL COMPLAINTS COMMISSION 2016/JCC/84

IN THE MATTER OF A COMPLAINT BY MR. PETER SINKAMBA ON BEHALF OF THE GREEN PARTY OF ZAMBIA AGAINST MADAM JUSTICE HILDAH CHIBOMBA, MADAM JUSTICE MUGENI MULENGA, MADAM JUSTICE ANNE SITALI, MADAM JUSTICE MARGARET MUNALULA AND MR. JUSTICE PALAN MULONDA

AND

IN THE MATTER OF ARTICLES 143(b) AND (c), 144 (1) AND (2) AND 236 (2) OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA AS AMENDED BY ACT NO. 2 OF 2016

AND

IN THE MATTER OF SECTIONS 3, 5 (1), 9(5), 10 (1), 24 AND 25 (1) AND (3) OF THE JUDICIAL (CODE OF CONDUCT) ACT NO. 13 OF 1999 AS AMENDED BY ACT NO. 13 OF 2006

AND

IN THE MATTER OF HAKAINDE HICHILEMA AND GEOFFREY BWALYA MWAMBA VS EDGAR CHAGWA LUNGU, INONGE MUTUKWA WINA, ELECTORAL COMMISSION OF ZAMBIA AND ATTORNEY-GENERAL – 2016/CC/0031

BETWEEN:

PETER SINKAMBA ON BEHALF OF THE GREEN PARTY OF ZAMBIA	**COMPLAINANT**
AND	
MADAM JUSTICE HILDAH CHIBOMBA	**1ST RESPONDENT**
MADAM JUSTICE MUGENI MULENGA	**2ND RESPONDENT**
MADAM JUSTICE ANNE SITALI	**3RD RESPONDENT**
MADAM JUSTICE MARGARET MUNALULA	**4TH RESPONDENT**
MR. JUSTICE PALAN MULONDA	**5TH RESPONDENT**
ATTORNEY-GENERAL	**INTERESTED PARTY**

CORAM:	**Mr. Justice C.S. Mushabati, Chairperson, Mr. G. W. Simukoko and Mr. N.M. Banda – Members**
In Attendance	**Mr. Justice F.M. Chomba,SC by invitation**
For the Complainant:	**In Person**

For the 1st Respondent:	**Mr. V.B. Malambo,SC, Malambo & Co and Mrs. I.M. Kunda, George Kunda & Co.**
For the 2nd, 3rd and 5th Respondents:	**Mr. S.L. Chisulo,SC, Samson Chisulo & Co**
For the 4th Respondent :	**Mrs. E. Chiyenge, C.C. Mwansa & Associates**
For the Interested Party:	**Mr. Likando Kalaluka, Attorney-General, Mr. Francis Mwale, Acting Principal State Advocate**
Secretary	**Naisa Makeleta**

RULING

Legislation referred to:

Constitution of Zambia (as amended by Act No. 2 of 2016) – Articles 18 (9), 98 (1), 101(5), 104(3), 129(2), 143, 144, 236 (1) and (2), 266 and 269.

Judicial (Code of Conduct) Act No. 13 of 1999 (as amended by Act No. 13 of 2006)- Sections 24 (1) a and b(1), 25 (1) and 28 (1).

Interpretation and General Provisions Act Cap 2 – Sections 25 and 35

Constitutional Court Act No. 8 of 2016 – Section 5

Constitutional Court Rules, 2016 - S.I. No. 37 of 2016, Order Xiv rr 3(1) and (5) and Order Xv rr 6 and 7.

INTRODUCTION

When we heard this complaint, among others, the late Nixon M. Banda was one of the Members of the panel but he died before this ruling was prepared. May his soul rest in eternal peace. The decision herein shall be taken as a majority decision.

COMPLAINT

This complaint was filed on behalf of the Green Party of Zambia by Peter Sinkamba, its President (the Complainant). The complaint is against five Constitutional Court Judges namely the Judge President of the Court Madam Justice Hildah Chibomba, Constitutional Court Judges Madam Justice Anne Sitali, Madam Justice Mugeni Mulenga, Madam Justice Margaret Munalula and Mr. Justice Palan Mulonda (the Respondents).

The complaint arose out of the Presidential Election Petition emanating from the Presidential Elections in which Messrs Hakainde Hichilema and Geoffrey Bwalya Mwamba (the petitioners) challenged the election of Mr. Edgar Chagwa Lungu and Mrs. Inonge Mutukwa Wina (the respondents). The respondents were elected

President and Vice President respectively following the general elections held on 11th August, 2016.

The Complainant was dissatisfied with the manner in which the said petition was handled by the Constitutional Court presided over by the five Respondents.

The Complainant's grounds in support of his complaint are as contained in his letter dated 6th September, 2016. This letter reads:

RE: COMPLAINT FOR REMOVAL CONSTITUTIONAL COURT JUDGES ON GROUNDS OF INCOMPETENCE AND GROSS MISCONDUCT PURSUANT TO ARTICLES 143 AND 144 OF THE CONSTITUTION

My full names are Peter Chazya Sinkamba. I am the President of the Green Party. I reside at House No. 18 Chishimba Crescent, Parklands in Kitwe. I am 52 years old. I contested in the poll held on 11th August, 2016 as a Presidential Candidate. I write this letter pursuant to Article 144(1) of the Constitution of Zambia and Section 25(1) of the Judicial (Code of Conduct) Act, where it is provided that any member of the public who has a complaint against a judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened the Constitution and the Act should inform the Authority.

My complaint is against the entire bench of the Constitutional Court on how the bench handled the Petition of United Party for National Development Presidential Candidate Mr Hakainde Hichilema and his Running-Mate Mr. Geoffrey B. Mwamba.

I believe the behaviour of the entire bench in the manner in which they handled the petition from the start to finish brought the Constitutional Court into disrepute, ridicule or contempt contrary to Article 143(a) of the Constitution. Further, the behaviour of the said bench was prejudicial or inimical to the economy of the country, and threatened the security of the State contrary to Article 143(b) of the Constitution.

The said bench issued contradictory orders which bordered on breaching Rules of Constitutional Court and the Constitution of Zambia. For example, on Thursday, 1st September,2016, the said bench made a ruling to the effect that the petition before it can only be heard within fourteen days according to the provisions of Article 101 (5) of the Constitution which time frame was coming to close at 23:59 hours on 2nd September, 2016. The following day, the bench changed it decision by extending the hearing of the petition by another 4 days, up to Thursday 8th September, 2016. When the matter came for commencement of trial on 5th September, 2016, the same bench delivered a judgment dismissing the petition admitting the bench had no jurisdiction to extend the 14 days constitutional time.

The contradictory statements are clear manifestation of incompetence. This behaviour was also prejudicial or inimical to the economy of the country. Here on the Copperbelt, soldiers had to be deployed across the province as the behaviour threatened the security of the State. It was feared that the President was going to invoke Emergency Provisions to declare the State of Emergency. The conduct of the petition since it was lodged depressed the economy especially on the Copperbelt where I live.

Probably for the first time in the history of Zambia, we saw the entire team of very senior lawyers representing a petitioner or petitioners walk out in protest due to the behaviour of the said bench. For the first time too in the history of the country, we saw an entire team of lawyers representing a respondent or respondents boycotting appearing before the bench. The walk-out and boycott by "officers of the Court" was a sign that the manner in which the bench was conducting the matter before it was fundamentally wrong. By directing proceedings to be held beyond the 14 days, the bench would have breached Order XV Rule 7 of the Constitutional Court Rules Act 2016. Whilst the Constitutional Court may break its own rules i.e. Order XV Rule 7 of the Constitutional Court Rules Act 2016, it appears to me that the decision by the Constitutional Court to extend the sittings to 8th September, 2016 was clearly unconstitutional. It appears to me that such a decision by the bench would have suspended or illegally abrogated Articles 1, 101 and 269 of the Constitution and set an utterly wrong precedence.

There is no doubt in my mind that the behaviour of the bench brought the Constitutional Court into disrepute, ridicule or contempt. This is evident from commentaries featured in public and private print and electronic media, which evidence I will bring before the Authority if requested to do so. This is also evident, not only from the boycott and walk-out by legal teams, as earlier alluded, but also at the camping of protesting party cadres at the Court premises. Furthermore, it is evident from the apparent protest of President Mr. Edgar Lungu, who it is reported was prompted to summon his lawyers.

Whilst the general rule is that the decision by the Supreme or Constitutional Court is final, however, a departure from this principle can be justified only when circumstances of a substantial and compelling character makes it necessary to do so in order for the Court to make sure that there is no miscarriage of justice in a particular case. The court is bound to provide justice to the extent it is within the human procedure of the administration of justice; the wrong must be checked and corrected. In the interest of justice, if it means changing the rules of procedure, save provisions of the Constitution, the Court is duty-bound to strike out any written law, customary law and customary practice inconsistent with provisions of the spirit of Constitution to the extent of the inconsistency.

Whilst justice is said to "be above all", it is not however, above the Constitution. Per Article 1(4) of the Constitution, the validity or legality of

any provision of the Constitution is not subject to any challenge by or before a State organ or other forum however unjust the provision is. Article 1(3) binds all persons in Zambia, including State organs and State institutions, (Constitutional Court inclusive), to comply with all provisions of the Constitution. Furthermore, it is for this reason that by Article 1(2), any act or omission by any person that contravenes the Constitution is illegal.

Whilst I applaud the fact that the bench vacated this illegal position on 5th September, 2016, however, the integrity and credibility of the Court was already brought in question. Furthermore, prior to commencement of the trial, it was imperative that the Constitutional Court pronounced itself on the question of whether or not the President-Elect should hand over power to the Speaker in view of Article 104(3) and Article 98 (1). This issue was highly contentious throughout the proceedings. It required a prompt pronouncement by the bench as it bordered on a power vacuum and thereby threatened the security of the State. Unfortunately, the bench decided to ignore this critical issue all together throughout the proceedings. Put simply, the whole management of the petition was in the long run rendered a circus.

It is now my considered view that the Constitutional Court, being the highest forum and the apex court for constitutional matters, must always be really careful about its decisions all the time to save its integrity and

credibility, as elaborated above, I submit the entire bench be removed and replaced for incompetence and gross misconduct as provided under Articles 143 and 144 of the Constitution of Zambia.

THE LAW

The complaint was purportedly filed pursuant to Article 143(a) and (b) and Article 144 (1) of the Constitution of Zambia as amended by Act No. 2 of 2016 (the Constitution) as read with Section 25(1) of the Judicial (Code of Conduct) Act No. 13 of 1999 as amended by Act No. 13 of 2006 (the JCC Act).

We wish from the outset to state that the correct sub-Articles of Article 143 of the Constitution are (b) and (c) and not (a) and (b). We shall comment on this in detail later in the ruling.

For ease of reference the Articles of the Constitution under which this complaint is premised are 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.

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.

(2) The Judicial Complaints Commission shall, where it decides that a prima facie case has been established against a judge, submit a report to the President.

Section 25(1) of the JCC Act which has been referred to reads as follows:

Any member of the public who has a complaint against a judicial officer or who alleges or has reasonable grounds to believe that a judicial officer has contravened this Act shall inform the Commission.

The above provisions of the Article must be read in conjunction with Article 236 (1) and (2) of the Constitution and Section 24 (1) (a) and (b) (i) of the JCC Act.

We hereby, for ease of reference, reproduce the above pieces of legislation.

Article 236 (1) There is established the Judicial Complaints Commission.

(2) The Judicial Complaints Commission shall –

(a) enforce the Code of Conduct for judges and judicial officers;

(b) ensure that judges and judicial officers are accountable to the people for the performance of their functions;

(c) receive complaints lodged against a judge or judicial officer, as prescribed;

(d) hear a complaint against a judge or judicial officer, as prescribed;

(e) make recommendations to the appropriate institution or authority for action; and

(f) perform such other functions as prescribed.

Section 24 (1) The functions of the Commission shall be to –

(a) receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer;

(b) submit its findings and recommendations to-

(i) the appropriate authority for disciplinary action or other administrative action; .....

The Judicial Complaints Authority has been reconstituted as the Judicial Complaints Commission by sub-Article 236 (1) of the Constitution cited above.

Further, the application of the JCC Act has to be in tandem with the Constitution of Zambia as amended by Act No. 2 of 2016. Some of the effects the said amendment has had on the JCC Act are definitions of a judicial officer as obtaining under Section 2 and also that of the "appropriate authority" under Section 24(2)(a) of the JCC Act.

The new definition of a judicial officer under Article 266 excludes judges. This Article reads (quoting the relevant provision):

"Judicial officer" includes a magistrate, local court magistrate, registrar and such officers as prescribed.

The appropriate authority as regards the judges under Section 24 (2) is the Chief Justice. However, under Article 144 (2) (3) and (5) of the Constitution, "appropriate authority" is the President.

INVESTIGATION

The Complainant's letter of complaint dated 6th September, 2016 was received by the Judicial Complaints Commission (the Commission) on 8th September, 2016.

The Commission considered the complaint and a decision was made to draw it to the attention of the Respondents for their respective individual responses, which they did. Their responses were composite ones in that they addressed all the complaints made against them by various Complainants.

After receipt of the Respondents' responses we looked at both the complaint and the responses thereto. The Commission was of the view that it required to hear oral evidence from the Complainant.

The legislation under which this complaint was made is silent on how the Commission should proceed in considering whether or not a *"prima facie"* case has been established.

The Commission therefore sought refuge in the provisions of Section 28(1) of the JCC Act and decided to formulate its own procedure which we are going to outline shortly.

Section 28 (1) of the JCC Act reads as follows:

> *Subject to the other provisions of this Act, the Commission may regulate its own procedure.*

The Commission opted to hear oral evidence from the Complainant and his witnesses. We were fortified to take this course of action by the provisions of Article 236 (2) (d) of the Constitution and Section 24 (1) (a) of the JCC Act. Though already cited above these two pieces of legislation read as follows:

Article 236 (2) The Judicial Complaints Commission shall –

(d) hear a complaint against a judge or judicial officer, as prescribed;

Section 24 (1): The functions of the Commission shall be to -

(a) *receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer;*

(here a judicial officer is inclusive of a Judge as the JCC Act is yet to be amended in line with the Constitution).

We have said above that the Commission, after considering the complaint and the Respondents' written responses, was not able to determine whether a *prima facie* case had been made out in terms of Article 144 (2). The Commission therefore, summoned the Complainant to give oral evidence.

On behalf of the Complainant Peter Chazya Sinkamba said six issues were raised in his written witness statement and those issues bordered on incompetence as well as gross misconduct by the Respondents in that they brought the "Judiciary" Constitutional Court and the office of the Constitutional Court Judge into disrepute, ridicule and contempt contrary to Article 143 (c) of the Constitution. He testified that the Respondents demonstrated incompetence in the manner they managed the petition by Hakainde Hichilema and Geoffrey Bwalya Mwamba and that that contravened Article 143(b) of the Constitution. He felt that the six issues raised in the written witness statement supported the allegations for the removal of the Respondents. One of the six issues was that there was a protest by petitioners and respondents' lawyers arising from the Court's failure to interpret Article 101(5) of the Constitution within a reasonable time. Such an omission, according to the Complainant, brought the Court and the office of Constitutional Court Judge into disrepute, ridicule and contempt. According to him the fact that:

1. The Attorney-General applied to put himself on record;

2. The adjournment by the Court of the hearing of the petition to Monday 5th September,2016 at 08:00 hours to afford Hakainde Hichilema and Geoffrey Bwalya Mwamba to be heard;

3. The parties were each given two days to present their cases, thereby extending the close of hearing to 8th September, 2016; and

4. the Attorney-General's protest, made in open Court.

According to him these instances supported the alleged incompetence and gross misconduct by the Respondents. He went on to say that it was unprecedented for the serving Attorney-General, who is the head of the bar in the country to do what he did before a Court. The Court should have cited the Attorney-General for Contempt of Court for his refusal to be put on record on Monday 5th September, 2016, which according to Mr. Sinkamba brought the Court into disrepute, ridicule and contempt. He further gave instances where the Court did not act, such as what he termed as a boycott by senior lawyers who walked out on the Court and the Court's failure to make a pronouncement on the handing over of power by the President-elect to the Speaker. In the same statement, he high-lighted, what he called the "flip flop" decisions made by the Court. He alluded to the decision made on 30th August, 2016 in which the Court ruled that the hearing would continue until 8th September, 2016, but that that decision was reversed on 1st September, 2016. The Court then ruled that the hearing would end on 2nd September. This decision was flip also reversed at mid-night of that same day. The parties were then told that the trial would commence on 5th September and end on 8th September. This decision was also reversed because the time line had lapsed and to prove this he promised to call witnesses to testify to this fact. He urged the Commission to recommend to the President for the removal of the Respondents.

This was Mr. Sinkamba's evidence in chief. He was then cross examined by the Attorney-General. After being referred to Rule 7 of Order XV he agreed that the Court had powers to vary the time it had set for itself. He did not agree that the Court had a mandate to "flip-flop" on the time lines. He insisted that the Constitution limited the time to 14 days. The changing of decisions ended up in denying the petitioners an opportunity to be heard. The "flip-flopping" amounted to incompetence and gross misconduct under Article 143. He went on to say that if a Judge implements Order XV rule 7 in such a manner that his/her conduct amounts to gross misconduct then that would be a reasonable ground for removal of that Judge but conceded when further cross-examined that the word "manner" is not mentioned under Rule 7 of Order XV. When cross-examined on the alleged protest by the Attorney-General he referred to the portion of the record where the Attorney-General had applied to be heard before the Court went into chambers at the request of State Counsel Malambo.

On the interpretation of the 14 days Mr. Mwale from the Attorney-General's office asked Mr. Sinkamba as to who had moved the Court for such interpretation. In reply he said he remembered that the interpretation of Article 101(5) was first made on 1st September and that to his recollection the application was made by Counsel Mutale and Counsel Eric Silwamba. He alluded to a paragraph on page 142 where Mr. Mutale addressed the Court on the said 14 day period after the Court had directed that the trial would conclude on 8th September. As to whether a single Judge had powers to interpret the Constitution Mr. Sinkamba said the single Judge had powers only to set down a matter for trial but the powers to interpret the

Constitution was a preserve of the full Court though at some point he said the single Judge (Judge Sitali) whilst acting in consultation with other Judges failed to interpret Article 101 (5). He however, conceded that there was no motion requesting for the interpretation of Article 101 (5). He further admitted that at a scheduling conference a single Judge consults the parties before an order is made.

In his cross-examination, State Counsel Malambo asked Mr. Sinkamba to state when the full Court was requested to interpret Article 101(5). He said that it was on 1st September while appearing before the single Judge, but when pressed he said the application was informally made. He could not state when the formal application was made. He however, said the Court could either be moved or it could have done so on its own motion to interpret Article 101(5) of the Constitution. He further said though there was no application for the interpretation of Article 101 (5) the Court was bound by the provisions of Article 18 (9) of the Constitution to make the interpretation. (Article 18 (9) provides for the right to be heard). On the question of the Attorney-General being put on record as at 5th September Mr. Sinkamba conceded that it was only Counsel Malambo who was not yet on record hence the request by the Court to the advocates present to put themselves on record. He was then asked about the alleged protest by the Attorney-General. He said that it was by implication.

The next Counsel to cross-examine the Complainant was State Counsel Chisulo who first referred him to paragraph 15 of his written witness statement in which he said the Court ought to have *"pronounced itself on the question of whether or not the*

President-Elect should hand-over power to the Speaker in view of Article 104 (3) and 98 (1)." He was asked if there was any matter that was pending before the Court regarding the interpretation of Article 104 (3). He said there was an application which was made before the Court, and that the application was a formal one and that this was going to be part of his submission. He however, later admitted that that matter was an independent formal application pending before the Court relating to Article 104 (3) which had not yet been determined. He said in fact, according to Judge Mulonda's written response, the matter was to be heard in October (2016). He felt the failure by the Court to make a pronouncement on that application was a serious omission on the part of the Court. When he was referred to paragraph 6 of his written witness statement in which he was alleging "flip-flopping" decisions by the Judges he said his saying so was based on what he called *"premature collapse of the petition and denial of the right of the petitioners to be heard was clear manifestation of amateurishness, clumsiness, inefficiency, inability or lack of skill and proficiency to dispense justice in a manner that protects and promotes values and principles of the Constitution."* He went on to say that it was necessary to deal with Article 104 (3) because Article 98 (1) of the Constitution provides *that "no person should institute or continue civil proceedings against the President while performing executive functions",* but that the Judges allowed civil proceedings to be instituted against the President whilst he was performing executive functions. They ignored making a ruling on the application relating to Article 103.

When he was asked whether the provisions of Article 98(1) of the Constitution affected the filing of a petition against a sitting President when he wins an election, Mr. Sinkamba maintained his stand that the President ought to have handed over power to the Speaker for the petition to proceed. According to him a President-Elect must hand-over power the moment a petition is filed against him. Mr. Sinkamba's attention was drawn to the fact that by the time he filed his complaint on 6th September the Court had already made a decision on the petition and so he was asked why he included in his complaint the Court's failure to interpret the issue of handing over power. In reply he said the issue ought *"to have been one of the those first application (sic) to be heard, capacity to sue this person who is holder of power".* He went on to say there was an application before the Court to determine the issue of handing over of power and even assuming that there was none, the Court ought to have known who the person they were dealing with was and they ought to have taken cognisance of Article 98. Finally, Counsel Chisulo drew the Complainant's attention to the existence of a petition relating to Article 103 which he (Mr. Sinkamba) said they would bring to the attention of the Commission.

There was no cross-examination from Mrs. Chiyenge.

The next witness was Mr. Sketchley Sacika a retired Civil Servant. State Counsel Malambo raised some objections relating to some parts of the written statement of this witness and he applied that they be expunged from the statement. Mr. Sinkamba objected to the application. The objections were sustained by the Commission. The witness then proceeded to give evidence on what remained of his

statement. He commented on President Lungu's continued stay in office after the petition was filed against him challenging his election. According to him the Court failed to make a ruling on whether President Lungu should have continued as President despite the petition against him. Mr. Sacika alluded to a dangerous political situation which he said prevailed then because there was no Head of State. Most of his evidence was ruled out as irrelevant.

The last witness was Mr. Edson Mweemba Hamakowa a retired Managing Director. His written statement, like that of the previous witness, was a subject of objections relating to some parts therein. The application was made by Counsel Malambo and supported by Counsel Chisulo, Counsel Chiyenge and Counsel Mwale. The application was opposed by Mr. Sinkamba but the Commission ruled in favour of the applicant. The witness was allowed to testify on what was not expunged from his statement. He was allowed to specifically talk to the second bullet in paragraph three of his statement. That bullet reads:

> *The events of the week-end from mid-night, Friday September 2 to Monday morning September 5, 2016.*

Mr. Hamakowa testified that there was an announcement by either Muvi or other media that lawyers had walked out (of court) because they were not pleased with the manner the case (petition) was to proceed or not to proceed at or about mid-night. After mid-night the Court made a decision that the matter would proceed on the following Monday. As he was listening to the radio he heard that the decision of

the full bench had been reversed by three Judges. The Court's "flip-flopping" on key decisions that affected the nation, showed clear incompetence and/or misconduct by one of the highest court in the country. According to him some people had been beaten up, killed and one man sustained a broken leg. This was the brief evidence of Mr. Hamakowa.

He was not cross-examined by Counsel Malambo. Counsel Chisulo asked him a few questions the effect of which was that the witness confessed that he was outside court on 2nd September, 2016 but that he had listened to the radio as to what was transpiring. The only time he attended court was during the first two days when the case was on each occasion adjourned. When the hearing was adjourned into chambers he did not attend.

Both Mrs. Chiyenge and Mr. Mwale had no cross-examination.

Under re-examination he said he had contact with both Mr. Hichilema and his Counsel Mr. Mwiimbu who briefed him of the happenings in the court-room. He was further informed that it was agreed that the case would proceed on Monday.

Mr. Sinkamba then applied to have some witnesses subpoenaed by the Commission but the application was opposed. The Commission rejected the application because it found no good ground for doing so.

We then proceeded to submissions.

We must mention here that the submissions by the parties were highly spirited and lengthy and so instead of summarising them here we intend to be referring to them as and when the need arises.

His first ground of complaint is that the Respondents brought the Constitutional Court into disrepute, ridicule or contempt, contrary to Article 143 (a) of the Constitution.

In the same paragraph the Complainant alleges that the behaviour of the Respondents was prejudicial or inimical to the economy of the country and threatened the security of the State contrary to Article 143 (b) of the Constitution.

In support of this ground Mr. Sinkamba submitted that the Respondents' conduct brought the Constitutional Court into disrepute, ridicule and contempt under Article 143 (c). He based his argument on what he called commentaries featured in public and private print and electronic media. He went on to say that the above evidence was a confirmation that the Judiciary was brought into disrepute as it was published on a worldwide web. He urged the Commission to recommend to the President for the suspension and removal of all the Respondents.

In reply State Counsel Malambo said he wondered whether misconduct as defined under Article 266 is the same as referred to under Article 143. He further said that this ground had no basis as there was no evidence of misconduct or incompetence against the Respondents.

Counsel Chiyenge submitted that reference to media reports was erroneous on the part of Mr. Sinkamba because he was relying on an expunged statement as earlier referred to.

We have looked at the provisions of Article 143 *vis-à-vis* the allegations Mr. Sinkamba was relying upon for removal of the Respondents.

The quoted sub-articles of Article 143 read as follows:

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.

It is clear to us that the allegations made against the Respondents are at variance with the quoted provisions of the law. Sub-Articles (a) and (c) of 143 do not refer to bringing "*Constitutional Court into disrepute, ridicule or contempt.*" Neither does sub-article (b) of 143 talk about a judge's "*behaviour which is prejudicial or inimical to the economy of the country*" and "*threatened the security of the State.*"

These allegations are completely misplaced as they are not supported by the quoted provisions of the law. The sub-articles which were quoted do not refer to any of the

above allegations claimed by the Complainant. They have no relevance to Article 143 (a) and (b) of the Constitution. So this ground is dismissed for being outside the ambit of the law.

The second ground of the complaint is contained in the fourth paragraph of the complaint. His contention is that the Court issued contradictory orders which bordered on breaching Rules of the Constitutional Court and the Constitution of Zambia. He stated that on Thursday 1st September, 2016 the Court made a ruling to the effect that the petition before it could only be heard within 14 days in accordance with Article 101 (5) of the Constitution. The time frame was to come to an end at 23:59 hours on 2nd September, 2016, but when the matter came up on the following day the hearing time was extended by 4 days from 5th to 8th September, 2016 and then the petition was dismissed on 5th September, 2016, when the Court admitted that it had no jurisdiction to extend the 14 day time line.

The Respondents admitted in their responses that the matter was adjourned to 5th September, 2016 but this decision was overturned by the majority ruling. The main reason advanced in the majority ruling was that the petition had lapsed by passage of time.

The learned advocates for the Respondents submitted that the Court acted within its rules when it reversed its decisions. Reference was made to Order XIV r3 (5) of the Constitutional Court Rules. This Rule reads as follows:

(5) A Judge of the Court may, after a scheduling conference, summon the parties to a compliance or status conference to review the status of the petition and make any order, including an order as to costs, against any party.

It was further submitted by Counsel Mwale that where a law confers powers on a person to do an act there is also an implied power to change that act. He referred to Section 25 of the Interpretation and General Provisions Act Cap 2 and Order XV rule 7 of the Constitutional Court Rules. Section 25 of the Interpretation and General Provisions Act Cap 2 reads as follows:

Where any written law confers a power on any person to do or enforce the doing of an act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

In like manner Rule 7 of Order XV of the Constitutional Court Rules reads:

The Court may extend time limited by these rules, or by a decision of the Court, except where time is specifically limited by the Constitution.

Mr. Sinkamba submitted that the "flip-flopping" by the Judges on their rulings caused the walk out on the Court by some advocates.

We must state from the outset that we are not an appellate court but an administrative body constituted to investigate the conduct of judges and judicial officers in the performance of their judicial functions. These powers are enshrined in Article 236 of the Constitution.

The decision to adjourn the petition to Monday 5th September, 2016 was made after some concerns were raised by the lawyers that represented the respondents in the Presidential Election Petition. Both State Counsel Bonaventure Mutale and the Attorney-General raised similar concerns in relation to the decision by the Court to adjourn the petition. Despite these objections the Court still adjourned the matter to Monday, 5th September,2016.

We wish, at this stage to give the chronology or sequence of the orders made by the Court on the hearing of the petition.

(a) On 30th August, 2016 the single judge said at folio 93 thus: *Trial in the matter commences this Friday, 2nd September, 2016 at 08:00 hours and we wish to direct that we shall allow two and a half working days for the petitioner. Meaning that you will have Friday as well as Monday and Tuesday morning for the petitioner and on Tuesday afternoon at 14:00 hours, we begin to hear the respondents through to Thursday afternoon. That is how we shall proceed.*

(b) On 31st August, 2016 the single judge said among other things, as follows:

Court: Clearly you are raising issue with the fact that as far as the 14 days are concerned from the time the petition was filed that runs up to Friday the 2nd of September. I don't know what it is about what I said that made you think that the Court had misdirected itself in giving a hearing or rather we commence the hearing on the 2nd of September and we go on into next week, obviously the Court will pronounce itself vis-à-vis what the Courts understanding is with respect to the issue of hearing the petition within 14 days of the filing of the petition..... Now, when you have 5 days from the filing of the petition to file your answer as respondents, two days within which the petitioners must reply following which the rest of the rules must be followed unless you are suggesting that come 2nd September this Court drops everything and says well the 14 days are up? The Court will make a pronouncement at the right time concerning our understanding because as you know the Court must interpret what is meant by hearing the petition..... Those are issues the Court must pronounce itself on but in any case the counting of the days as far as the Court is concerned we are very alive to the fact that because the petition was filed on the 19th and because we are talking about the period 14 days, we have looked at what the constitution says as far as computation of time is concerned and from the date of filing the petition it was on the 19th of August, 2016, 2nd of September is the 14th day so I hope that helps to show that notwithstanding that 2nd September, 2016, is very much around the corner this Court has a job to do

which job is not coming to an abrupt end on the 2nd of September, 2016, hence, my giving directions as I did.

(c) On 1st September, 2016 another ruling was made by the single judge on the same topic. This is what was said: *Court: ..... On Tuesday 30th August, 2016, I had scheduled the hearing of the main matter for trial on Friday, 2nd September 2016 starting at 08:00 hours. Now in terms of the provisions of the Constitution regarding the time in which the Court must hear the petition from the date on which it was filed, indication of time is in accordance with the provisions of the Constitution shows that 14 days allotted to the Court to hear the petition expires midnight tomorrow, 2nd September 2016. I have, therefore, called you to discuss how we shall proceed with the trial which must and conclude tomorrow. This matter on the Courts perspective is not negotiable vis-à-vis the time to hear and conclude the trial. As the Court is in a straight jacket on account of the law as stated in the Constitution and the jacket is not replaceable. ..... So if we start at 08:00 hours and go on say 23:30 tomorrow we have, according to what we have computed, a couple of hours to rest in between to allow us to refresh, we have 14 hours or so which we must share be (sic) equitably among the parties. .....*

(d) On 2nd September, 2016 at 10:20:47 the full bench sat and said at page 209: *The further point that I wish to make is with regard to the time keeping, we only have up to midnight today to conclude this petition, that is the hearing of*

the witnesses so it means the petitioners will have 6 and a half hours and the respondents also will have 6 and a half hours. We proposed that we should try to finish by 23:45 hours so it means that in terms of each witness that you have you may need to take about 15 minutes for cross-examination, re-examination and also just to tender in witness statements so there will be no examination In chief.

(e) The first order that was made by the single judge on 30th August, 2016 was confirmed by the full bench at or about 00:01:18. This is what transpired; *Court: Can the petitioner(s) take their place? The application by the petitioners is to be given time and opportunity to engage counsel. This Court recognizes that the lawyers have left them mid-stream for the reasons given whether they are correct or not whether (sic). Given the nature of the case that is before the Court, this Court has a job to do. And it is now almost midnight but then the matter has not been heard and there is still the petition before us, as the Court, and this petition must be heard and determined. So this means that we will go beyond the necessary prescribed period.*

This Court was prepared to hear the matter within the time stipulated by the Constitutional provisions but the unfolding event on this day has led to a situation where we have not been able to hear the matter today.

In view of this, we shall allow the petitioners to engage lawyers to represent them; meaning that this matter stands adjourned up to Monday 08:00 hours.

And we wish to further order that each party namely the Petitioners have two days to present their case and the Respondent also have two days, and so we order. The Court stands adjourned.

(f) On 5th September, 2016 the Court rendered two split decisions and by a majority ruling the petition was dismissed for what they called "want of prosecution."

We must state here that the question of interpreting Article 101 (5) of the Constitution kept on coming. At some point in time the single judge at page 147 did say in the ruling of 31st August, 2016: "*obviously the Court will pronounce itself vis-à-vis what the Courts understanding is with respect to the issue of hearing the petition within 14 days of the filing of the petition".*

The single judge went on to say in the same ruling that: *The Court will make a pronouncement at the right time concerning our understanding because as you know the Court must interpret what is meant by hearing the petition.*

The single judge continued to explain that though the filing of the petition was on 19th August, 2016 and the 14th day after that was 2nd September, 2016 which date was "*very much around the corner this Court has a job to do which job is not coming to an abrupt end on the 2nd September, 2016, hence, my giving directions as I did."*

However, on 1st September, 2016 in yet another ruling the single judge said the interpretation of any provisions of the Constitution could not be made by the full Court without a formal application. She went on to say *"the petition was to be heard and concluded on 2nd September, 2016 unless there was going to be a formal application for the interpretation of the relevant provision of the Constitution regarding the computation of time in which the Court could hear an election petition and the Court was to direct otherwise."*

It appears to us that the failure by the Court to pronounce itself on the provisions of Article 101(5) of the Constitution is the main reason for all the perceived concerns raised herein.

The contention by the Respondents' advocates that there was need for a formal application under Article 128 (1) (a) of the Constitution was a misconception.

This Article reads:

> *(1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear -*
>
> *(a) a matter relating to the interpretation of this Constitution;*

The petition was filed under Articles 101 and 103 among other Articles of the Constitution. Articles 101(5) and 103(2) provide for the time frame within which a Presidential Election Petition should be heard after filing. The stipulated time frame

is 14 days. The question that arose here was whether or not the Court ought to have been moved for the interpretation of Article 101(5).

In considering this petition the Court was duty bound to look at all the provisions of these Articles. Sub-Article 101(5) of the Constitution was not outside the Articles under which the petition was brought, that is, it was not a stand alone Article from which the Presidential Election Petition was based. So why should the question of filing a formal application to have sub-article 101(5) interpreted arise? We feel the Court should have just invited the parties to address it on this issue and so it is our view that there was no need. In fact the single judge on two occasions or so stated that the Court would pronounce itself on this matter.

Computation of time is enshrined under Article 269 of the Constitution. This Article reads as follows: *For the purposes of this Constitution, in computing time, unless a contrary intention is expressed –*

(a) a period of days from the happening of an event or the doing of an act shall be considered to be exclusive of the day on which the event happens or the act is done;

(b) if the last day of the period is a Saturday, Sunday or a public holiday ("excluded day"), the period shall include the next day;

(c) where an act or a proceeding is directed or allowed to be done or taken on a specified day and that day is an excluded day, the act or proceeding

shall be considered as done or taken in due time if it is done or taken the next day; and

(d) where an act or a proceeding is directed or allowed to be done or taken within a time not exceeding six days, an excluded day shall not be counted in the computation of time.

The above provisions are repeated word for word under Order XV r. 6 of the Constitutional Court Rules and for this reason we do not intend to reproduce the above rule. Order II r. 3 of the Constitutional Court Rules states as follows: *An act required to be done by a person on a date which falls on a Saturday, Sunday or public holiday shall be valid and effective if done on the next following day not being a Saturday, Sunday or public holiday.* Further Section 35 of the Interpretation and General Provisions Act, Cap 2 is also framed more or less in similar words except that Saturday is not included in the definition of "*excluded day*" unlike in other pieces of legislation where it is one of the excluded days.

Sub-Article (a) of Article 269 of the Constitution is clear. The petition having been filed on the 19th August, 2016 this date is excluded from the computation of time both under the Constitution and the subordinate Acts referred to.

The main issue that attracted a number of complaints is on whether the week-ends were to be included or excluded.

Sub-Article (d) of Article 269 states that "*where an act or a proceeding is directed or allowed to be done or taken within a time not exceeding six days, an excluded day shall not be counted in the computation of time.*"

The petition having been filed on 19th August, 2016 and the time frame within which it was to be heard was 14 days, which was more than six days, the excluded days ought to have been included in the stipulated time frame as per sub-article (d) above. If the Court took the provisions of this Sub-Article into account in computing the 14 days then the week-ends that fell within the 14 day period ought to have been counted as part of the 14 day time line. The first day should have been 20th August 2016, a Saturday followed by a Sunday, both excluded days and so the last day would have been 2nd September, 2016 thus giving the parties 14 days to present their cases. This period was however, inclusive of the days for pleadings. The Court never sat on any of the week-ends that fell within that period. These were 20th, 21st, 27th and 28th of August, 2016 thus the 14 days period was reduced by 4 days.

Sub-Article (c) of Article 269 seems to be contradicting Sub-Article (d) in that it says, *where an act or a proceeding is directed or allowed to be done or taken on a specified day and that day is an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken the next day.* The 20th and 21st August, 2016 being excluded days it would have meant that the time line ought to have started from 22nd August, 2016. In this case the last day of hearing

would have been 4th September, 2016, if the remaining "excluded days" were included. These were 27th and 28th August, 2016.

However, the Court seems not to have followed this computation. It was also interesting to note that if the provisions of sub-article 269(b) were to be taken into account in the foregoing interpretation the petition could have been concluded on 5th September,2016 because 4th September, 2016 the last day was an excluded day.

In fact in considering the issue of the computation of time we have come up with the following scenarios.

The first one is where all week-ends were to be included (sub-articles 269 (a) and (d)).

In this case the Court should have sat from 20th August, 2016 through to 2nd September, 2016.

The second possible one is where the day of filing (Friday) was followed by the excluded days as per Sub-Article 269 (c).

In this case the sitting days should have been from 22nd August,2016 through to 4th September, 2016 thus including the subsequent 'excluded days" namely 27th and 28th August, 2016, 3rd and 4th September,2016 as already observed above.

The third scenario is where all week-end days were to be excluded from the 14 day period (Sub-Articles 269 (a), (b) and (c).

In this case there would have been eight days in August, 2016 namely 22, 23, 24, 25, 26, 29, 30 and 31 then six days in September, 2016 namely 1,2,5,6,7, and 8 The hearing or trial should have ended on 8th September, 2016, a Thursday.

Applying the above scenarios to what happened in the petition under review, the Court must have settled for the first scenario where all excluded days were counted. The Court did not however, sit on weekends – Saturdays and Sundays thus denying the parties 4 days from the time stipulated for the petition, as already observed above.

On 30th August, 2016 the Court under the single judge said "*Trial in the matter commences this Friday, 2nd September, 2016 at 08:00 hours and we wish to direct that we shall allow two and –a- half working days for the petitioner. Meaning that you will have Friday as well as Monday and Tuesday morning for the petitioner and on Tuesday afternoon at 14:00 hours, we begin to hear the respondents through to Thursday afternoon. That is how we shall proceed.*"

On 31st August, 2016 the Court had again this to say: *When you talk about hearing are you also talking about determination? Those are issues the Court must pronounce itself on but in any case the counting of the days as far as the Court is concerned we are very alive to the fact that because the petition was filed on the 19th and because we are talking about the period 14 days, we have looked at what the constitution says as far as computation of time is concerned and from the date of filing the petition it was on the 19th of August, 2016, 2nd of September is the 14th day so I hope that helps to show that notwithstanding that 2nd September, 2016, is*

very much around the corner ***this Court has a job to do which job is not coming to an abrupt end on the 2nd of September, 2016, hence, my giving directions as I did.*** *(emphasis is ours)*

On 1st September, the Court addressed the parties as follows: *On Tuesday 30th August, 2016, I had scheduled the hearing of the main matter for trial on Friday, 2nd September 2016 starting at 08:00 hours. Now in terms of the provisions of the Constitution regarding the time in which the Court must hear the petition from the date on which it was filed, indication of time in accordance with the provisions of the Constitution shows that 14 days allotted to the Court to hear the petition expires midnight tomorrow, 2nd September 2016. I have, therefore, called you to discuss how we shall proceed with the trial which must (start) and conclude tomorrow. This matter on the Courts perspective is not negotiable vis-à-vis the time to hear and conclude the trial. As the Court is in a straight jacket on account of the law as stated in the Constitution and the jacket is not replaceable. So if we maintain the hearing dates, the trial dates that is tomorrow we as a Court are ready to hear you from as early as 08:00 hours or depending on what you say we maintain 8 o'clock or we can bring it forward to 07:00 hours but that is again up to the parties. But if we start you are all to present your evidence tomorrow.*

On 2nd September, 2016 the full bench had this to say through the Court President: *The further point that I wish to make is with regard to the time keeping, we only have up to midnight today to conclude this petition, that is the hearing of the witnesses so it means the petitioners will have 6 and a half hours and the respondents also will have 6 and a half hours. We proposed that we should try to*

finish by 23:45 hours so it means that in terms of each witness that you have you may need to take about 15 minutes for cross-examination, re-examination and also just to tender in witness statements so there will be no examination In chief.

Later in the evening the Court said this: *Can the petitioner take their place? The application by the petitioners is to be given time and opportunity to engage counsel. This Court recognizes that the lawyers have left them mid-stream for the reasons given whether they are correct or not whether (sic). Given the nature of the case that is before the Court, this Court has a job to do. And it is now almost midnight but then the matter has not been heard and there is still the petition before us, as the Court, and this petition must be heard and determined. So this means that we will go beyond the necessary prescribed period.*

This Court was prepared to hear the matter within the time stipulated by the Constitutional provisions but the unfolding event on this day has led to a situation where we have not been able to hear the matter today.

In view of this, we shall allow the petitioners to engage lawyers to represent them; meaning that this matter stands adjourned up to Monday 08:00 hours. And we wish to further order that each party namely the Petitioners have two days to present their case and the Respondent also have two days, and so we order. The Court stands adjourned.

The matter was adjourned to Monday and come Monday the Court came up with two rulings, a majority and a minority ruling.

The majority decision brought the proceedings to an "abrupt" end. The Court therefore reversed its Friday 2nd September, 2016 decision.

It will be noted that from the rulings quoted above the Court kept on changing its own decisions. This change or reversal of decisions amounted to inconsistencies on the part of the Court. It was these inconsistencies which prompted the Complainant to say the Constitutional Court and the Judiciary were brought into disrepute, ridicule or contempt and that this amounted to incompetence and gross misconduct.

We however, wish to state that one incidence of inconsistency cannot amount to incompetence let alone an act of gross misconduct. So the alleged "flip flopping" by the Respondents did not amount to incompetence or gross misconduct by them.

We now come to the issue of the Court's failure to properly guide the parties on the time frame.

The split decisions, made by the Court, were rendered without hearing the parties. Admittedly the majority ruling did state that the Court had not considered the concerns raised by the Attorney-General regarding the time frame under Article 101 (5) of the Constitution. One of the Rules of natural justice demand that both sides must be heard before a decision is made. The parties in this case ought to have been invited to be heard on the "stand" the Court had taken.

On the majority decision's reference to the concerns which the Attorney-General raised on the time frame, all we can say here is that when the Court adjourned the matter to Monday 5th September, 2016 it did so with full knowledge of what the Attorney-General had said. The Court still found it necessary to adjourn the matter to 5th September, 2016 which to us meant that the learned Attorney-General's concerns were rightly or wrongly overruled.

Admittedly the Court's rulings were interlocutory but then even interlocutory decisions are not subject to be reversed at will unless they are interim subject to non-fulfilment of some conditions. The single Judge's directions could be reversed by the full Court with an application by an aggrieved party. Consistency in decision making is very cardinal especially by superior courts whose decisions will need to be followed by subordinate or lower courts.

The Court ought to have given clear guidelines on the time frame. It did not do so despite the pronouncements that it was going to pronounce itself on that subject i.e on the interpretation of Article 101 (5) of the Constitution. We have already said elsewhere that it was not necessary for a formal application to have that Article interpreted because the 14 day time line was fundamental to the hearing of the presidential petition.

Further we note that from the way the computation of time was done by the Court, the parties did not have full use of the 14 days. The Court did not sit during the week-ends ("excluded days") but those days were counted within the 14 days.

Court proceedings being Court driven the Court should have given clear directions of what ought to have been done, especially that the Court on more than two occasions stated that "*it had a job to do*".

All in all on the complaint that the Court had failed to interpret Article 101 (5) of the Constitution, we must say that from the various pronouncements of the Court on the subject the Court must have done so though it did not come out clearly, in that it failed to pronounce itself formally as to when the time frame began running and when it was to end. The Judge President in her response to the complaint on the interpretation of Article 101(5) said that this was addressed in the majority ruling. The majority ruling may have addressed that issue but it is our view that this was done late in the day. It was like shutting the stable door after the horse had bolted. The Court should have addressed the issue at the very beginning.

It is clear that the Court interpreted the 14 days stipulation in accordance with sub-articles (a) and (d) of Article 269 of the Constitution.

The next ground of complaint by Mr. Sinkamba was that the Court failed to interpret Articles 98 and 104 (3) which deal with presidential immunity and the handing over of power to the Speaker when his election is challenged respectively. According to him this amounted to denying the petitioners the right to be heard as stipulated under Article 18(9).

These, for ease of reference state: 98 (1) *A person shall not institute or continue civil proceedings against the President or a person performing executive functions,*

as provided in Article 109, in respect of anything done or omitted to be done by the President or that person in their private capacity during the tenure of office as President.

104 (3) Where *an election petition is filed against the incumbent, under Article 103(1), or an election is nullified, Under Article 103(3) (b), the Speaker shall perform the executive functions, except the power to –*

(a) make an appointment; or

(b) dissolve the National Assembly.

18(9) *Any court or other adjudicating authority prescribed by law for determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*

The Articles were not part of the petition. In fact the responses from the Respondents show that the interpretation of Article 104(3) was a subject of another court action. None of the questions relating to the two provisions quoted above were brought before the Court in relation to the Presidential Election Petition proceedings.

As rightly pointed out by both the Respondents and their Counsel these could only be considered after a formal application was filed in terms of Article 128(1)(a) of the

Constitution of Zambia. The issues raised under Articles 98(1) and 104(3) of the Constitution were really not part of the issues in the petition which was before the Court. The question of failing to interpret these Articles did not arise and so this ground is misplaced. In fact this was a subject of another court action before the Constitutional Court and it was yet to be heard.

On the walk out from Court by some lawyers, we must state that we found no evidence to that effect. When the petitioners' lawyers left the Court they did so with leave of the Court. Even if they had walked out that could not be blamed on the Respondents.

With regard to the contemptuous behaviour of one advocate, although the Court did not deal with the contempt there and then, it decided to refer the matter to the relevant authority namely the Law Association of Zambia for possible disciplinary action. The Court cannot be faulted for the lawyers' behaviour because such behaviour could not be attributed to the Respondents.

As a rider we wish to implore the relevant authorities on the possibility of re-looking at the provisions of the law relating to Presidential petitions. We feel the time for pleadings should be excluded from the 14 days hearing time because this is a very short period. The time must also be clearly spelt out unlike the present where the Court has a choice to apply any of the sub-articles of Article 269 of the Constitution especially the application of sub-article (d) as it relates to the other sub-articles therein. This sub-article implies that where an act or proceeding is directed to be

done in a period exceeding six days, then all the "excluded days" falling within that time must be included.

Finally we wish to comment on Mr. Sinkamba's point where he demanded the removal of all the Constitutional Court Judges as contained in his letter of complaint.

We find no evidence upon which we can grant that demand. We find nothing wrong that the Judges did to warrant their removal from office. In any case not all the Constitutional Court Judges were involved in the Presidential Election Petition trial. We find no merit in the demand.

FINDINGS OF FACT

1. The single judge gave directions on 30th August, 2016 that the Presidential Election Petition hearing would start on 2nd September, 2016 and end on 8th September, 2016.

2. On 31st August, 2016 the single judge acknowledged that the 14 day time frame was ending on 2nd September 2016 but repeated what she said on 30th August,2016. She said the Presidential Election Petition would not come to an abrupt end on 2nd September, 2016.

3. On 1st September, 2016 she reversed the above direction when she stated that the hearing was to commence at 08:00 hours on 2nd September, 2016 and end at 23:45 hours.

4. The single judge guided the parties to make a formal application to the full bench on the interpretation of Article 101(5) on the computation of time.

5. No formal application was made by any of the parties to the Constitutional Court to interpret Article 101(5). Neither did the Court invite any of the parties to address it on the same.

6. The full bench had earlier during its sitting on 2nd September, 2016 ruled that the hearing would terminate that night at 23:45 hours. However, the Court reversed its position after the petitioners' advocates withdrew from the case and it directed that the trial would commence on Monday 5th September, 2016 giving each party two and half days to present and defend the petition respectively.

7. The above order was made despite the submissions by the Respondents' Advocates (in the petition) that the Court had no jurisdiction to extend the hearing, thus implicitly overruling the objections.

8. The Court was not addressed on 5th September, 2016 but it came up with the two decisions, a majority decision and a minority decision. The majority decision reversed the decision given just at or about mid-night on 2nd September.

9. The Presidential Election Petition came to an end as a result of the majority ruling.

CONCLUSION

The Respondents were inconsistent in some respect but in our view, that did not amount to incompetence or gross misconduct. Admittedly they did not pronounce themselves formally on the interpretation of Article 101(5) but we are satisfied that their directions to the parties were based on an interpretation of the Article.

Further the fact that the Respondents came up with two split decisions did not amount to incompetence or gross misconduct because this was a mere difference of opinions. A difference of opinion, as stated above, does not amount to incompetence or gross misconduct. We find that none of the findings of fact amounted to incompetence or gross misconduct under Article 143. We therefore, find no *prima facie* case against the Respondents.

Dated this 13TH day of OCTOBER 2017 at Lusaka.

.....

Justice Christopher S. Mushabati

MEMBER

.....

Geoffrey W. Simukoko

MEMBER