THE LEGALITY OF THE OFFICE OF THE VICE-PRESIDENT UPON DISSOLUTION OF NATIONAL ASSEMBLY IN ZAMBIA: AN APPRAISAL

BY

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Being a Directed Research Essay submitted to the University of Zambia School of Law in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LL.B) degree.

THE UNIVERSITY OF ZAMBIA

LUSAKA

2013
DECLARATION

I, ERIC MUNENE HANZIBA, do hereby declare that this Directed Research Essay is my authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of the Bachelor of Laws degree. All other works in this essay have been duly acknowledged. No part of this work may be reproduced or copied in any manner without the prior authorisation in writing of the author. All the errors and shortcomings are mine.

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ERIC MUNENE HANZIBA
ABSTRACT

The Constitution aptly provides for the office of Vice-President with a condition that the Vice-President is appointed from amongst the members of National Assembly. Without this forum, the basis of having this office considered valid becomes questionable legally. The aim of this research was to evaluate the basis of legality of the office of the Vice-President upon dissolution of National Assembly in Zambia. This research primarily involved desk research. Firstly, the essay introduced the concept of rule of law and how it fits in constitutional observance especially in a democratic state such as Zambia. This research further considered in a comparative analysis how other jurisdictions have drafted their constitutions specifically provisions pertaining to the office of Vice-President in order to have them operate effectively without having their legitimacy questioned at anytime.

Additionally, the case of Wynter Kabimba v Attorney General and Another was analysed and criticized for the contribution made to the Zambian jurisprudence and shortcomings it has stemming from the reasoning of the High Court. It was found that a plethora of case law on constitutional interpretation in Zambia have employed the literal rule of interpretation unless where an absurdity or ambiguity is apparent then the purposive approach has been applied. The research concluded that there is need to adhere to the principles of rule of law when interpreting the Constitution especially when applying the rules of statutory interpretation.

The research further outlined some recommendations which can prevent the office of the Vice-President being interfered with by the courts in terms of its legality. These recommendations include; the amendment of the Article 45 of the Constitution by clearly spelling out that the office holder shall not hold any other public office, that the Vice-President shall be the running mate of the President in an election so as to have him elected by the electorate and that the courts should avoid applying other rules of statutory interpretation when construing the Constitution save where there is a grave danger in result that warrants their invocation.
DEDICATION

This is dedicated to my dearest parents, Joshua Mweetwa Hanziba and Victoria Syacumpi Hanziba for the love, care and support given me all my life but more so for reminding me that I am destined for greatness.

To my siblings Chipo and Sandra, you are the best sisters one can have. For the support, encouragement and prayers given to me, I will forever be indebted to you. I love you all unconditionally!
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To begin with, without God every effort is but sinking sand. I would like to thank the Lord for calling me to this noble profession that I may be a voice of justice. Glory is given to His name!

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CHAPTER ONE

1.0 GENERAL INTRODUCTION

1.1 INTRODUCTION

This chapter seeks to give an overview of the research, the statement of the problem, the justification of the study and the methodology employed. It begins by giving a lengthy introduction to the problem before highlighting the problem and the conclusion arrived at. The entire essay is primarily desktop as it reviews literature supporting the research ranging from journals, articles, books, case law and internet in order to give an up to date position of the law in so far as constitutional interpretation is concerned. Running as a strand in the research is the interpretation of Articles 45 and 71 of the Constitution in light of the decision in Kabimba v Attorney General and Another.

The subsequent chapters discuss the approaches to constitutional interpretation employed by the court; followed by an analysis of the decision in the Kabimba case then a comparative analysis of the Zambian provisions as regards the office of Vice-President with the Ghanaian and Kenyan constitutional orders will be considered before giving a general conclusion of the research and recommendations to be effected.

Zambia has strove to provide a sound blue print as regards statutory and constitutional interpretation that guarantees strict observance of the rule of law. However, this process has not been easy to achieve owing to interpretation principles that have had to be applied or revived differently at the time of each case. The inability to have a consistent set of legal principles in same or similar cases has been due to lack of precision in the law which has consequently led to the rule of law being regarded as the rule of men. Despite the flaws of lack of precision, certainty
and predictability must not be compromised at any given time as they are so pivotal to any legal system.¹

It is then safe to submit that law when interpreted in an impartial and holistic manner, can guarantee certainty. It has been argued by many and truthfully so that predictability and certainty are the cornerstone of rule of law in a good legal system². However, it must noted from the outset that certainty is not synonymous with precision in that the law cannot foresee certain happenings as can other discourses like mathematics as was stated in the case of *Seaford Count Estates Ltd v Asher*³:

> When a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts, which may arise, and even if it were, it is not possible to provide for them in terms being free from all ambiguity. The English language is not an instrument of mathematical precision. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity.

Following the above cited case, it can be argued that lack of precision in the law has an adverse effect on the observance of rule of law to the extent of flaws that a legal instrument may have. In the case of *Kabimba v Attorney General and Another*⁴, the gap in the constitution as regards the office of the Vice-President is cited as prompting the High Court to use the purposive approach rule due to the absence of express provisions determining the continued occupation of the Vice-President in office when National Assembly has been dissolved pending elections. This however

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³ [1949] 2 K.B. 481
⁴ 2011/HP/749
need not be an excuse for the judiciary not to construe the law in conformity with the rule of law and the sanctity that attends the constitution.

In a democratic dispensation like ours, there is need to uphold all democratic tenets especially those that pertain to the rule of law. Rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standard.\(^5\) In order to enhance the rule of law, the Constitution, which is the supreme law of the land should be respected and applied judiciously. This can be done by ensuring that there is precision in the Constitution with minimal or no gaps as it provides a framework under which institutions of government must operate.

Despite the lack of a provision which explicitly spells out the status of office of the Vice-President after dissolution of National Assembly which the court considered to be a gap in the constitution\(^6\), such a gap in the Constitution need cannot be a subject of statutory interpretation no matter how negligible it may be especially where strict adherence to the rule of law is at stake or can be rendered ineffective. This basically means that the constitutionality of this office must stem from the provided provisions in the constitution so as to guarantee occupation of that office immaterial of prevailing circumstances.

It is in light of the aforesaid that the legality of the office of the Vice-President upon dissolution of National Assembly in Zambia will be evaluated in an effort to champion rule of law by considering strict adherence to the Constitution.

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\(^6\) Kabimba v Attorney General and Another (2011/HP/749) p. 11
The office of the Vice-President is a creation of the Constitution pursuant to Article 45(1) of the Republican Constitution.\textsuperscript{7} For this office to be legally tenable there is a requirement that must be satisfied in accordance with Article 45(2). The requirement is that the Vice-President must be appointed by the President from amongst the members of the National Assembly. This position of the law with regard to the appointment being made from amongst members of National Assembly is indisputable because it is expressly stated without any ambiguity.

The question of legality arises when National Assembly is dissolved in accordance with Article 71(1) of the Constitution which provides as follows:-

Every member of the National Assembly, with the exception of the Speaker, shall vacate his seat in the Assembly upon dissolution of the National Assembly.

It should also be read with Article 88 (6) (c) which provides that:

(6) Subject to clause (9) the National Assembly-

(c) The President may dissolve the National Assembly any time.

The above mentioned provisions imply that since Article 45(2) is a factor that must be strictly observed to uphold the validity of the office of the Vice-President, without it the Vice-President remaining in office upon dissolution of National Assembly may be rendered unconstitutional.

It is against this background that the case of Wynter Kabimba v Attorney General and Another\textsuperscript{8} was decided. The applicant in his capacity as Secretary General for the Patriotic Front petitioned the High Court to declare the continued stay of the Vice-President in office unconstitutional because it flew in the teeth of Article 71(1) read together with Article 45 (1) and (2) of the Republican Constitution. It was however submitted by the Attorney General in his

\textsuperscript{7} Chapter 1 of the Laws of Zambia
\textsuperscript{8} 2011/HP/749
arguments that the purpose of having the office of the Vice-President was to act as assurance and insurance should any mishap befall the President.

The High Court acknowledged the lacuna in the Constitution hence applied rules of statutory interpretation particularly the purposive approach. Judge Wood in agreement with the purposive approach acknowledged the dictum of Lord Denning in the case of Seafood Court Estates Ltd v Asher⁹ as was adopted by the Supreme court in the case of Attorney General and Another v Lewanika and Others¹⁰ where the Supreme Court held at page 175 that:

In the instant case we have studied the judgment of the court below and we find it sound and correct by applying the literal interpretation. However, it is clear from the Shariz and Nothman cases that the present trend is to move away from the rule of literal interpretation to the ‘purposive approach’ in order to promote the general legislative purpose underlining the provisions.

The above consideration of such purposive construction should take into account such factors as the objectives of the provision in question, the circumstances operating at the time when the interpretation has to be determined, the future implications of the interpretation, and the impact of the interpretation on future generations and also new developments and changes in society.¹¹

Additionally, the High Court when adopting the purposive approach in the Kabimba v Attorney General considered the case of South Dakota v North Carolina¹² where Justice White of the Supreme Court when dealing with interpretation of their Constitution had this to say,

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⁹ [1949] 2 KB 481
¹⁰ (1993/94) ZR 164
¹² (1940) 149 USA 268: 48 ED 448
I take it to be an elementary rule of Constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effect the great purpose of the instrument.

It should be noted that ordinarily, where a court is called upon to adjudicate on the effect of a legislative measure, it is concerned only with the validity of the measure, its meaning and application. It is not concerned with its wisdom or even its reasonableness as these normally, are matters purely for the legislature.¹³

Furthermore, this research seeks to evaluate whether having the office of the Vice-President without National Assembly strictly adheres to the law particularly the Constitution by applying statutory rules of interpretation.

The paper will further discuss the practice in Ghana and Kenya in a comparative analysis before rendering a comprehensive legal position.

It is with the aforesaid in mind that this paper aims to take an in-depth consideration of the basis of the legality of the office of the Vice-President upon dissolution of National Assembly in Zambia in light of the decision in Wynter Kabimba v Attorney General and Another.

1.2 STATEMENT OF PROBLEM

The Constitution of Zambia which is the Supreme law makes provision for the office of the Vice President of the Republic of Zambia. This office has a two-fold mandate in that the constitution

¹³ Per Chief Justice Blagden in the case of Kachasu v Attorney General (1967) ZR 145
expressly provides the official functions and the delegated functions that the President may
assign. Article 45(1) provides that:

There shall be an office of the Vice-President of the Republic.

However, for this office to be valid at law, the Vice President must be appointed from the
members of the National Assembly. Clause 2 of Article 45 provides that:

The Vice-President shall be appointed by the President from amongst the members of the
National Assembly.

Article 71 (1) read with the tenor of Article 88 (6) (c) of the Constitution provides that:

Every member of the National Assembly, with the exception of the Speaker, shall
vacate his seat in the Assembly upon dissolution of the National Assembly.

Article 88 (6) (c) in addition provides that:

(6) Subject to clause (9) the National Assembly-

(c) The President may dissolve the National Assembly any time.

The above cited provisions of the Constitution imply that Article 45 (2) which is a subsidiary
prerequisite for the validity of the Office of the Vice-President is non-existent when National
Assembly has been dissolved thus creating a gap in the law because no person outside National
Assembly can occupy the office.

Following dissolution of National Assembly then the positions that derive their authority from
this forum must cease to exist. That being the case, the application of rules of statutory
interpretation cannot be the best means of attending to the gap because of the sanctity of the
piece of legislation in question.
of National Assembly the office of the Vice-President is still regarded as legally acceptable to continue being occupied. This arises from the consideration taken by the High Court that provisions of the constitution need not be construed in isolation but in context.

1.3 OBJECTIVE OF THE STUDY

The general objective of this study is to take an in-depth evaluation of the basis of the legality of the office of the Vice-President upon dissolution of National Assembly in Zambia with special reference to the rule of law and Constitution interpretation. The study further aims to revisit the case of Wynter Kabimba v The Attorney General and Another to underline the contribution it has made to Constitutional law on status of the office of Vice-President upon dissolution of National Assembly in Zambia and explore the case for its strengths and weaknesses.

1.4 SPECIFIC OBJECTIVES

1. To consider the basis of the legality of the office of the Vice-President in Zambia when National Assembly has been dissolved.
2. To evaluate the role that rules of statutory interpretation play in Constitutional Interpretation
3. To understand the implication of the decision in the case of Wynter Kabimba v The Attorney General and Another.
4. To compare and contrast the Constitutions of Ghana and Kenya with the Zambian one in order to evaluate how the office of the Vice-President operates in other jurisdictions.
1.5 SIGNIFICANCE AND JUSTIFICATION OF THE STUDY

The study is justified on the basis that it significantly contributes to the Zambian Constitutional order even as Zambia makes strides to having a legitimate and long lasting Constitution. Additionally, the study will improve the understanding of the effectiveness of the Executive branch of government with special reference to the office of the Vice-President.

From a practical point of view, Zambia has experienced a misfortune befalling the President though at the time National Assembly was still in existence and active thus was not as complicated as may be experienced in the later years. It is because of this experience that the present gap needs to be attended to so that any contentions ensuing can be affectively resolved. It then follows that since the office of the Vice-President is of great importance in the governance system then its legality or constitutionality should not at any point be questioned.

1.6 RESEARCH QUESTIONS

1. What is the position of the law with regard to the office of the Vice-President?

2. To what extent does the National Assembly affect the legality of the office of the Vice-President?

3. What other incidental factors may lead to the office in question be considered constitutional?

4. Is the application of rules of interpretation the best resort for the court when attending to such a gap in the constitution?

5. How have Constitutions of other jurisdictions avoided such unfortunate circumstances from occurring?
CHAPTER TWO

2.0 APPROACHES TO CONSTITUTIONAL INTERPRETATION

2.1 INTRODUCTION

This chapter examines the approaches that can be employed to interpret the Constitution of Zambia in light of constitutional supremacy and upholding its principles. The chapter also gives an in-depth analysis of the purposive approach and the literal interpretation school of thought.

The Constitution carries two different meanings: the abstract and the concrete. A constitution in the abstract sense is the system of laws, customs and conventions which define the composition and powers of organs of the state, and regulates the relations of the various state organs to one another and to the private individual. In contrast, a constitution in the concrete sense is the document in which most important laws are authoritatively ordained. It is in light of this understanding that a constitution is said to be of higher dignity than an ordinary enactment and is often perceived as the ‘supreme law of the land.’ Article 1(3) of the 1991 Constitution of Zambia (as amended in 1996) provides:

This Constitution is the supreme law of Zambia and if any other law is inconsistent with this constitution, that other law shall to the extent of the inconsistency, be void.

Thus, the Constitution is the basic law or charter of the state which sets out the manner in which a nation is to be governed.

In a sense, constitutional observance clearly entails upholding of the constitutional tenets with an understanding that it is the charter of higher dignity than any other legal instrument. It is without

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2 Chanda, Zambian Constitutional Law: Cases and Materials. p. 10
3 Chanda, Zambian Constitutional Law: Cases and Materials. p. 10
doubt that to argue otherwise defeats the spirit and the letter of Article 1(3) of the Constitution but more so the principles of rule of law.

In addition, it should be noted from the outset that while the constitution is supreme, it does not exist in a vacuum as the subsidiary legal instruments are there to complement it. The constitution to be observed requires recognition of other laws that support a particular principle so that its observance should not lead to any absurdity let alone inconsistency. In view of this, the theme of Constitutional observance still runs as a golden strand in this research as it is the basis for evaluating the judgment of the court in the case under discussion.

2.2 CONSTITUTION OBSERVANCE AND INTERPRETATION

The Constitution of Zambia does prescribe an interpretive methodology. That methodology is to read and apply the document’s written words and phrases, taken in context, as they would have been understood by reasonably informed readers of such a document at the time they were written. This methodology is set forth in the preamble and Article 1(3) of the Zambian Constitution just like the United States Constitution preamble. The suggested mode of interpretation and expected results should be one which follows its concise language found in the preambular paragraphs and subsequently in Article 1(3) of the Constitution of Zambia. It provides in its express terms that it is the written text of the Constitution that has been adopted by the people and that it is authoritative and binding. “We the people…do hereby enact and give ourselves this Constitution.” “This Constitution is the supreme law of the land.”

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5 Preambular paragraph
6 Article 1(3) of the Constitution of Zambia, chapter 1 of the Laws of Zambia
In *Attorney General and Movement for Multiparty Democracy v Lewanika and 4 others*¹¹, the four respondents were members of the Movement for Multi-party Democracy on whose ticket they stood for elections. They won the elections and took their seats in the National Assembly. They subsequently resigned from the party prompting official notification of the vacancies of their seats to the Speaker by the National Secretary pursuant to Article 71 (2) (c) of the Constitution. The respondents then petitioned the High Court contending that although they had resigned from the party on whose ticket they won the election, they were still Members of Parliament as such the court should declare the Speaker’s decision that their seats were vacant null and void. The High Court applying the literal interpretation to the provisions of Article gave judgment in their favour hence the appeal. The Supreme Court in its decision on the crossing of the floor by members of National Assembly, added the words ‘or vice-versa’ to Article 71 (2) of the Constitution thus reversing the lower court’s decision.

The act of adding words to the provision for all intents and purposes is the sole responsibility of the legislature as such the Supreme Court’s decision amounted to a legislative act though in form of interpreting the provision. The reasoning behind this argument is that while the court is called upon to interpret the law and make changes, it is not called upon to alter a sacrosanct document such as a constitution.

The foregoing reasoning has been clearly articulated by the Supreme Court of Zambia in several cases. Among the notable ones is *Miyanda v Handahu*¹² where the Supreme Court said;

> It is not what the legislature meant to say or what their supposed intentions were with which the court would be concerned; the court’s duty is to find out the expressed intentions of the legislature. When the language is plain and there is nothing to

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¹¹ (1993-1994) ZR 164
¹² (1993-1994) ZR 187

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suggest that any words are used in technical sense or that the context requires a
departure from the fundamental rule, there would be no occasion to depart from the
ordinary and literal meaning and it would be inadmissible to read into the terms
anything else on grounds such as of policy, expediency, justice or political exigency,
motive of the framers and the like.

This meaning is in strict conformity with the maxim, ‘expressio unius est exclusion alterius’
which would mean the express mention of a thing excludes things which are not mentioned.\(^{13}\) In
Kabimba v Attorney General and Another, the express stipulation of all members of Parliament
ceasing to be members of National Assembly with the exception of the speaker and that the Vice-
President is appointed from amongst members of National Assembly excludes those not so
expressed. In applying a literal construction when no good reason exists for proceeding
otherwise, as in this case, the court cannot be entitled to infer omissions on the part of the
legislature and the court is bound to give every word and every phrase a meaning.

Similarly, in Mazoka and 2 others v Mwanawasa, Electoral Commission of Zambia and
Attorney General\(^{14}\) the Supreme Court stated that:-

It is trite law that the primary rule of interpretation is that words should be given
their ordinary grammatical and natural meaning. It is only if there is ambiguity in the
natural meaning of the words and the intention cannot be ascertained from the words
used by the legislature, that recourse can be had to other principles of interpretation.

This argument is anchored on the cardinal principle of the sanctity of the constitution which has
to be guarded jealously.\(^{15}\)


\(^{14}\) (2005) ZR 138

\(^{15}\) Majority judgment in The Attorney General v Mutuna and 2 others. Supreme Court Appeal No. 088/2012
The judiciary has a special role in our system with respect to constitutional interpretation. This is because it is the province and duty of the judiciary to say what the law is. In addition, interpretation gives the legal backing to the already laid down rules and procedures. The landmark decision in Marbury v Madison, the Supreme Court of the United States exercised its interpretive role by clarifying the need of uniformity in interpretation. The reasoning is that the courts as well as other institutions are bound by the constitution and must clearly interpret the law with consistency whenever called upon to do so.

The interpretive authority of the courts is rooted on one hand in the judiciary by virtue of protected tenure and independence it enjoys or is supposed to enjoy from the political branches and public passions of the moment. Insulated from partisan pressures, the judiciary bears a responsibility to render decisions without fear or favour towards the political majority. This argument resonates with Article 91 (2) and (3) of the Constitution which provides that:

(2) The Judges, members, magistrates and justices, as the case may be, of the courts mentioned in clause (1) shall be independent, impartial and subject only to this Constitution and the law and shall conduct themselves in accordance with a code of conduct promulgated by Parliament.

(3) The Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament.

As Alexander Hamilton said, independent courts serve as an “excellent barrier to the encroachments and oppressions of the representative body,” and they play a “peculiarly essential” role in safeguarding individual rights and liberties.

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17 5 U.S 137 (1803)
19 Chapter 1 of the Laws of Zambia
Following the above considerations, it should be noted that formal principles governing constitutional observance and interpretation seek to attend to its provisions in the precise words used, no more and no less.

Additionally, the constitution needs to be read as a whole and with care in order to arrive at a decision that will fundamentally observe its underlying principles. This in a way ensures that the provisions of the constitution have a determinate meaning all the time, and that this predictable meaning is discoverable from the plain or ordinary meaning of the words used.²¹

2.3 EVALUATION OF THE CANONS OF STATUTORY INTERPRETATION

The rules of statutory interpretation have been attacked as inconsistent, uncertain, and undesirable, both in what they say and how they are applied by the courts. Some of these criticisms have been directed at the rules generally, others at only certain types of rules, especially the plain meaning rule and those rules pertaining to the use of extrinsic aids in the interpretive process. If such attacks are justified, then the effect of statutes is unpredictable, because there is no way of telling in advance what rules of interpretation a court will choose to follow or ignore. The law of statutory interpretation becomes a bag of tricks from which courts can pull respectable-sounding rules to justify any possible result that the judges desire.²²

2.3.1 CONTEXT RULE (CONTEXTUAL APPROACH)

This rule relates to understanding the meaning of a word in the context in which it is presented. Thus in order to interpret a word it may be necessary to look at the entire section, statute or even

previous legislation on the same point. In Mudenda v The Attorney General, the applicant was detained under the regulation 33(1) of the Preservation of Public Security Regulations. The grounds under which she was detained are that she while acting with others indulged in the illegal and illicit trafficking in precious stones like emeralds. The High Court in rejecting the application reasoned that there was no vagueness in the words ‘like emeralds’ when read in context as there were only two types of precious stones that could be construed that way.

From this rule, every word employed needs to be appreciated in the context of usage so as to meet its intended purpose. It has been reduced into a maxim ‘Noscitur a sociis’, which means: a word may be known by the company it keeps.

The court must be alive to the fact that words may have an ordinary meaning but not intended to apply so in the legal instrument.

2.3.2 FRINGE MEANING RULE

This canon denotes that although words have a core of meaning that is relatively fixed, they have a fringe of uncertainty when applied to practical situations. In order to clarify this fringe meaning, it is necessary to look at the policy implicit in the Act. This in a way makes the judge a legislator rather than an interpreter. The words of the statute as they stand, do not give an answer to the question before the judge; and the question is therefore legislative rather than interpretative. To achieve the intended purpose of the words, the rational approach would be to say candidly that the question, being legislative, must be settled with the help of the policy

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24 (1979) ZR 245
26 M.M. Munalula, Legal Process: Zambian Cases, Legislation and Commentaries, p. 166
implicit in the Act, or by reference to convenience or social requirements or generally accepted principles of fairness.\textsuperscript{28}

In appreciating the jurisprudential basis of this rule, the Supreme Court of Zambia in Attorney General \textit{v} Luguru\textsuperscript{29} explained how policy can influence this rule. The respondent was a Tanzanian national employed in the Zambian civil service. After his request to buy his house as a sitting tenant was rejected, he brought an action before the Lands Tribunal, which ordered the sale of the house to him within a specified period. In reversing the decision of the Tribunal, the Supreme Court held that the circular intended to empower Zambians who were sitting tenants.

The reasoning was not necessarily wrong in the core meaning of the preamble of the circular save the factors surrounding the facts should have been given due regard to arrive at a better judgment.

\textbf{2.3.3 PURPOSIVE APPROACH}

Faced with a problem in interpretation, a court must not only draw on its skill and integrity to produce appropriate outcomes; it must also offer consistent and acceptable explanations of how its outcome was reached and these explanations must be grounded in a coherent and acceptable theory of the judicial mandate in interpreting legislation.\textsuperscript{30} This in a way has been the claim of the mischief rule or the purposive approach.

This rule advocates that statutes operate in a time-scale and are generally of indefinite duration. This rule is also known as the rule in Heydon's case.\textsuperscript{31} As stated by Anyangwe\textsuperscript{32}, the mischief

\textsuperscript{28} M.M. Munalula, Legal Process: Zambian Cases, Legislation and Commentaries, p. 166
\textsuperscript{29} (SCZ No. 20/2001)
\textsuperscript{30}Ruth Sullivan, Statutory Interpretation in the Supreme Court of Canada. Faculty of Law, University of Ottawa. p. 1
\textsuperscript{31} (1585) 3 Co. Rep. 8
rule or purposive approach directs that if the words are not plain, or in a case of statutory obscurity, or if the statute leads to an unintelligible result, then the judges are called upon to make such construction as shall suppress the mischief and advance the remedy. This statement is in harmony with the holding in Lane v London Electricity Board\textsuperscript{33}, where the House of Lords held that the practical utility of the mischief rule depends to some extent upon the means that the courts are entitled to employ in order to ascertain what mischief the Act was intended to remedy. To this end, judges may use this rule to add words to the statute in order to give it meaning intended by Parliament.\textsuperscript{34}

To achieve this, disputed words are subjected to the scrutiny of principle, purpose (policy), scope and object of the statute as a whole just to see what mischief was intended to be offset.\textsuperscript{35} A summary of guidelines under mischief rule can be reduced to the following questions\textsuperscript{36}:

i. What was the law before the making of the Act?

ii. What was the mischief and/or defect for which the law at the time did not provide?

iii. What remedy was appointed by Parliament to cure mischief or defect?

iv. And what is the meaning of the remedy so appointed?

Clearly, when the above questions are answered carefully, then the court can apply the appropriate rule of interpretation to cure the mischief.

The contention arises where the constitutional interpretation is subjected to such a rule where an express mischief or an apparent one for that matter is non-existent. Lamer, C.J. of the Supreme Court of Canada in The Ontario v Canadian Pacific Ltd\textsuperscript{37} stated that, the first task of a court

\textsuperscript{33} [1955] 1 ALL ER 158
\textsuperscript{34} R v Immigration Appeals Adjudicator, ex parte Crew, The Times, 26 November 1982
\textsuperscript{35} Ruth Sullivan, Statutory Interpretation in the Supreme Court of Canada. Faculty of Law, University of Ottawa. p. 11
\textsuperscript{36}M.M. Munalula, Legal Process: Zambian Cases, Legislation and Commentaries, p.167
\textsuperscript{37} [1995] 2 S.C.R 1028 at p. 1049-50
construing a statutory provision is to consider the meaning of its words in the context of the statute as a whole. If the meaning of the words when they are considered in this context is clear, there is no need for further interpretation. The basis for this general rule is that when such a plain meaning can be identified this meaning can ordinarily be said to reflect the legislature’s intention. The best way for the courts to complete the task of giving effect to the legislative intention is usually to assume that the legislature means what it says, when this can be clearly ascertained.

It has been stated by the courts that rules of statutory interpretation are called into effect to resolve the ambiguities, obscurities and uncertainties in a statute. The rules of statutory interpretation are only employed on a case to case basis as there is no rigid mode of applying them. It would be truer to speak of conflicting approaches and guidelines supported by dicta. In Cutler v Wandsworth Stadium Ltd it was stated that, “must be remembered, however, that the courts have laid down, indeed, not rigid rules, but principles which have been found to afford some guidance when it is sought to ascertain the intention of Parliament.”

In a sense, the court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it. Judges vary in the extent to which they are prepared to modify the words of an Act to arrive at a just end sensible result. Some judges insist that statutes are to be applied literally, however absurd the consequences, it will be for Parliament to put the absurdity

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38 D. Mazumba, Statutory Interpretation and its Implication for Zambian Courts with Special Reference to Kasonde and others v Attorney General. Obligatory Essay (2005), School of Law at the University of Zambia. p. 3
39 D. Mazumba, Statutory Interpretation and its Implication for Zambian Courts with Special Reference to Kasonde and others v Attorney General. Obligatory Essay (2005), School of Law at the University of Zambia. p. 3
40 [1949] AC 398 at 410
right. Others more liberal in their approach, will modify the words to prevent the absurdity, this is sometimes called the ‘golden rule’.

The general accepted understanding is that ‘what the law is what the judge actually declares to be law’ hence the need to apply correct rules of interpretation which will reflect the true intention of the legislature. Unfortunately, courts seem to swing from one type of statutory interpretation to another, one day interpreting a statute very narrowly and another day favouring a broad approach. It then begs the question, with such inconsistencies of interpretation, should the constitution be subjected to similar rules of interpretation especially on a discourse such as the validity of a critical office of the Vice-President? The answer is certainly in the negative because of the great importance attached to the constitution. The court then should adopt a systematic and rational approach when it concerns the constitution.

Given the above considerations, constitution observance is somewhat negated when the rules of interpretation are misplaced in application. It further shows why the constitution should have its own inherent interpretation rules to avoid decisions made by the judge presiding over the matter before the court.

Conversely, Friedmann argues that judges should be accorded adequate and sufficient freedom and flexibility when interpreting the legal position. While this position is appreciable, regard should be had when it comes to the type of document being subjected to judicial interpretation. A similar position has been upheld by Justice Odoki in the Ugandan case of Ssemogerere and

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41 D. Mazumba, Statutory Interpretation and its Implication for Zambian Courts with Special Reference to Kasonde and others v Attorney General. Obligatory Essay (2005), School of Law at the University of Zambia. p.3
42 Michael Steven Green, Legal Realism as Theory of Law, 46 Wm. & Mary L. Rev. 1915 (2005), accessed from http://scholarship.law.wm.edu/wmlr/vol46/iss6/2 on 10th July, 2013 at p. 1921
others v Attorney General\textsuperscript{44}, that the inevitable law-making function inherent in the courts could only be achieved by giving the courts flexibility to interpret the law in liberal and not ‘straight jacket’ rules of interpretation. He further asserts that this is even more imperative when interpreting the supreme law of the land—the Constitution as it reflects the extent of Republic’s respect for the rule of law.

In light of the Mhlungu case\textsuperscript{45}, the court stated that it leads to injustice and limits the courts’ ability to interpret the law as need may arise. As a result of this argument, the purposive approach school of thought suggests a methodology that was stated by Mahomed, C.J in Government of the Republic of Namibia and Another v Cultura 2000 and Another\textsuperscript{46}, where the words of Lord Wilberforce were emphasised that:

A Constitution is an organic instrument. Although it is enacted in the form of a statute it is \textit{sui generis}. It must broadly, liberally and purposively be interpreted so as to avoid “the austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.

The argument therefore, is one of judicial liberal approach to the interpretation of the Constitution so as to make it effective in response to societal needs.

2.3.4 LITERAL RULE

Granted that words have certain elasticity of meaning, the general rule remains that the judges regard themselves as bound by the words of the statute when these words clearly govern the

\textsuperscript{44} [2005] 1 LRC 50
\textsuperscript{45} Mhlungu and 4 others v The State, case No. CCT /25/94
\textsuperscript{46} (1994) SA 407(NASC) at 418
situation before the court. The words must be applied with nothing added and nothing taken away.\textsuperscript{47}

It is, nevertheless, difficult to reconcile the literal rule with the “context” rule.\textsuperscript{48} Understanding the meaning of words from their context is the ordinary approach in legal parlance and in ordinary life. The context not only includes other words used but the whole human or social situation in which the words are used. It should be noted that one practical reason for the literal rule is that judges are now deeply afraid of being accused of making political judgments at variance with the purpose of Parliament when it passed the Act.\textsuperscript{49} Cozens-Hardy, M.R. said in \textbf{Camden (Marquis) v IRC}\textsuperscript{50} that:

It is for the court to interpret the statutes as best it may. In doing so the court may no doubt assist themselves in the discharge of their duty by any literally help they can find, including of course the consultations of the standard authors and reference to well known and authoritative dictionaries.

The position of literal interpretation therefore, is that in construction of the statute, words should be taken in their literal meaning which is not necessarily the dictionary sense but the sense in which the words are used in common parlance.\textsuperscript{51}

From the literal meaning point of view, an appropriate solution must first, conform to the legislative text: the clearer and more precise the text, the greater the weight it receives; second, carry out the intention of the legislature: the more cogent and compelling the evidence of the legislative intent, the greater the weight it receives and lastly, produce an outcome that is just and

\textsuperscript{47} Munalula, Legal Process: Zambian Cases, Legislation and Commentaries. p. 168
\textsuperscript{48} Munalula, Legal Process: Zambian Cases, Legislation and Commentaries. p. 168
\textsuperscript{49} Munalula, Legal Process: Zambian Cases, Legislation and Commentaries. p. 168
\textsuperscript{50} [1914] 1 KB 641 at p. 647
\textsuperscript{51} Mutale v Attorney General (1976) ZR 139
reasonable the more important the public values invoked and the more intensely they are engaged, the greater the weight they receive.\textsuperscript{52}

Notwithstanding the above arguments in favour of purposive approach as adopted by the High Court in the case of Kabimba v Attorney General and Another, the Supreme Court of Zambia has clearly outlined the approach to be applied when interpreting the constitution. This was clearly stated in the case of The Attorney General v Mutuna and 2 others\textsuperscript{53}. The majority judgment observed that;

\begin{quote}
We are alive to the fact that there are a number of schools of thought on the legal interpretation of legal context. The first school of thought provides that the legal interpretation of a legal context is totally dependent on the nature of that legal context. This school of thought provides for example that the system of interpretation which applies to the constitutional interpretation is different from the system of interpretation which applies to other legal documents such as wills, contracts and deeds. The other school of thought is known as the purposive system is that there is a general approach of interpreting all legal documents.

According to a plethora of authorities in Zambia, our approach has been to apply the first school of thought which is that the legal context of the document dictates the method of interpretation. So constitutional documents are interpreted differently from contracts or will.
\end{quote}

It is, therefore, common cause, as demonstrated by the cases of Miyanda v Handahu\textsuperscript{54}, Mazoka and 2 others v Mwanawasa, Electoral Commission of Zambia and Attorney General\textsuperscript{55} and Chiluba v Attorney General\textsuperscript{56} that the Zambian courts have applied literal rule of interpretation to constitutional texts. According to this approach, the primacy rule of interpretation applicable

\begin{footnotes}
\item[52] Ruth Sullivan, Statutory Interpretation in the Supreme Court of Canada. Faculty of Law, University of Ottawa. p.7
\item[53] Supreme Court Appeal No. 088/2012
\item[54] (1993-1994) ZR 187
\item[55] (2005) ZR 138
\item[56] (2003) ZR 153
\end{footnotes}
in construing the constitution is that the words should be given the ordinary grammatical and
natural meaning and that is only where there is ambiguity in the natural meaning of the words
used that the court may resort to purposive interpretation of the constitution.\(^{57}\)

The Supreme Court in **Attorney General v Mutuna and 2 others** went further by stating that:

> The fundamental rule of interpretation of all enactments to which all other rules are
subordinate is that they should be construed according to the intent of the parliament
which passed the law. Such intent is that which has been expressed and when the
language used is plain and there is nothing to suggest that any words are used in a
technical sense or that the context requires a departure from the fundamental rule,
there would be no occasion to depart from the ordinary and literal meaning and it
would be inadmissible to read into the terms anything else on grounds such as of
policy, expediency, political exigency, motive of the framers and the like.

Therefore, every article in our constitution has to be interpreted so as to align itself with what is
regarded as the cardinal principle underpinning our constitution. It is trite that one may apply a
purposive construction of the constitution only where there is ambiguity.\(^{58}\)

The best approach therefore is one of construing the constitution using literal interpretation
school of thought unless an ambiguity arises then other rules can be invoked.

### 2.4 CONCLUSION

The chapter has examined the approaches to constitutional interpretation. It has discussed in
depth that the literal interpretation school of thought is given priority over the other rules because
the intention of the court is to construe the provisions using the plain meaning. Where the literal
rule of interpretation produces an absurd result, the court adopts the contextual approach, which

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\(^{57}\) Majority judgment in **Attorney General v Mutuna and 2 others**, Supreme Court Appeal No. 088/2012

\(^{58}\) Majority judgment in **Attorney General v Mutuna and 2 others**, Supreme Court Appeal No. 088/2012
proposes that due regard must be given to the words used in the legal instrument. Lastly, the purposive approach is employed to have a general appreciation of the entire constitution. This is a more liberal approach in that it allows the court to construe the constitution to meet the dynamic needs of society.

It is the considered view of this chapter that the best approach when construing the constitution should be the plain meaning method as it brings out the intention of the legislature. This has been clearly demonstrated by case law primarily from the Zambian jurisdiction and other common law jurisdictions. Notwithstanding this, where it is apparent that an absurd or ambiguous result will be produced from the interpretation, the purposive approach can be used.

Chapter three will revisit and critique the reasoning of the court in Kabimba v Attorney General and Another. It will further attempt to show how the function of the court to make law when interpreting the law needs to be checked in the context of rule of law.
CHAPTER THREE

3.0 AN ANALYSIS OF KABIMBA V ATTORNEY GENERAL AND ANOTHER

3.1 INTRODUCTION

This chapter attempts to evaluate the case of Wynter Kabimba v The Attorney General and Another in depth so as to understand the contribution it has made to constitutional law and the shortcomings it may have. This critique will further examine how farfetched this decision can go as regards its application on subsequent decisions that may challenge the validity of this office in light of the gap that presently exists in the Zambian Constitution.

Revisiting the case of Kabimba v Attorney General and Another also means examining the decision for what it reflects of the many facets of constitutional law in a developing democracy which governs the relationship between National Assembly and the Executive branch for all intents and purposes. It should equally be reflective of the recent past practice in Zambia and as evidently seen in other jurisdictions with whom our constitutional order is similar or capable of comparison.

The Zambian legal system is one that relies so much on the doctrine of stare decisis, meaning maintain until otherwise is decided. The implication of this doctrine in law development is that unless the decision made by the higher court is overturned, it remains law. In light of the case under consideration, the decision of the High Court is law until otherwise is decided. The critique

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1 2011/HP/749

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arises on whether the manner in which the case was decided was best considering the jurisprudential effects it has on the development of law and the legal system in its entirety.

3.2 AN ANALYSIS AND CRITIQUE OF THE CASE

The brief facts of the case are that, the applicant in his capacity as Secretary General of the Patriotic Front by original notice of motion sought the following which is relevant to the research:

1. A declaration that the respondent ceased to be a member of National Assembly and Vice-President of the Republic of Zambia upon dissolution of Parliament by the Republican President.

2. A declaration that the continued occupation by the second respondent of the office of the Vice-President and use of government resources following the dissolution of Parliament was illegal and unconstitutional.

The applicant in his affidavit deposed that he was advised that the Vice-President of the Republic of Zambia is appointed by the President from amongst members of the National Assembly. In addition, where National Assembly has been dissolved, all members with the exception of the Speaker vacate their seats. He further submitted that upon dissolution of Parliament the second respondent ceased to hold a seat in the National Assembly upon which his membership he was appointed to the office of Vice-President. As a result the respondent ceased to be a member of the National Assembly as well as being Vice-President of the Republic of Zambia.

The President on the occasion of the dissolution of Parliament stated that although he had dissolved Parliament and Cabinet, he would run government with the Vice-President and Permanent Secretaries.
The learned Attorney General filed a brief affidavit in opposition to the originating notice of motion. He stated that the Constitution of the Republic of Zambia has provisions which permit the Vice-President of the Republic to continue in office after dissolution of the National Assembly.

With regard to the main application, the Applicant relied on Article 45 (1), (2) and (3), Article 88 (6) (C) and Article 71 (1) of the Constitution of Zambia. The applicant submitted that Article 45(3) of the Constitution can only be invoked in circumstances where there is a vacancy in the office of President during the life time of Parliament and another person assumes the office of President after an election. Currently there is no vacancy in the office of President to warrant the second respondent to remain in office as Vice-President of the Republic.

The Attorney General began his submissions by urging the High Court to adopt a purposive approach when interpreting Constitutional provisions. He submitted that provisions of any Constitution require to be interpreted with both delicacy and purpose. He further submitted that the Constitution has to be read as a whole and that he objective for doing so was to ensure as humanly possible, that no singular provision of the Constitution should swallow or vanquish any other provision. The end result should be to achieve interpretation that brings about the synergy between individual provisions of the Constitution.

He referred the High Court to the Botswanan case of Attorney General v Dow⁴ in which judge Martin Horwitz of the High Court said:

The very nature of a constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing

⁴ (1994) (b) BCLR1
on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution.

Another case the Attorney General referred to is the Ugandan case of *Dkikuusooka Majidu and Others v Attorney General*⁵ where the court held that:

All provisions relevant to an issue are to be brought into perspective to give effect to or not derogate from the intention of the constitution; and the purpose and effect of the provisions is relevant in determining constitutionality.

The Attorney General submitted that if a purposive interpretation is applied to the responsibilities of the Vice-President as provided in Articles 36 (3) (a), 38 (2), 39 (1) and (2) (a), one commonality is glaringly apparent; the constitution undoubtedly meant for the office of Vice-President to serve as assurance and insurance that no vacuum occurred in the event of a mishap befalling a President. The office of the Vice-President seeks to ensure that at no time must there be no person to discharge the functions of a President.

The High Court observed that the correct interpretation in the circumstances is the purposive approach because of the glaring indication of the serious gaps in our constitution which need to be addressed with the urgency they deserve. The High Court adopted the words of Lord Diplock in *Jones v Wrotham Park Settled Estates*⁶, where he summed the trend away from the purely literal towards the purposive construction of statutory provisions in this way:

I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction, even where this involves reading into the Act words which are not expressly included in it.

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⁵ Petition No. 10 of 2009
⁶ [1980] AC 74 at 105
Following the observations made by the High Court the applicant’s application was dismissed. Though not considered as a landmark decision, the jurisprudential basis of the decision makes interesting reading especially where constitutional observance and interpretation is concerned.

3.3 LEGAL POINT OF VIEW OF THE DECISION

The High Court in making a decision made interesting points of reference that need to be reviewed. The starting point is Article 71 of the Constitution, which provides that;

> Every member of the National Assembly, with the exception of the Speaker, shall vacate his seat in the Assembly upon a dissolution of the National Assembly.

It is clear that the intention of the legislature is to indicate who should remain in office upon dissolution of National Assembly. The lack of ambiguity makes the interpretation of this provision flexible on the part of the judiciary without need to invoke the rules of statutory interpretation. From the practical point of view, government has always upon dissolution of National Assembly operated with the aid of non-constitutional office bearers such as Permanent Secretaries which the court opined to be creating a power vacuum considering Articles 44 (5) and 137 (1) which provide for resignation and removal of the Vice-President from office.

The emphasis is that the literal school of thought is considerably the best approach the High Court should have adopted when construing the Constitutional provisions under consideration. The remarks made by Lord Green in Re a Debtor are apt to this argument. Lord Green stated that:

> If there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used.

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7 Chapter 1 of the Laws of Zambia  
8 [1948] 2 ALL ER 533
It is submitted that the ruling in the Kabimba case is inconsistent with the foregoing reasoning in that there is no trace of ambiguity which required the High Court to interpret the constitutional provisions to suit the declaration made by the President. It is then safe to argue that the words in Article 71 are precise as such should be interpreted as they are.

The correct interpretation therefore is to the effect that Articles 45 and 71 of the Constitution should be given the plain and grammatical meaning. The office of the Vice-President is one that derives its authority from the National Assembly. Article 45 clearly shows that the Vice-President must be appointed from amongst members of National Assembly. Understanding Article 71 in consideration of Article 45 implies that once National Assembly is dissolved, then all the positions that derived their validity from this forum must equally cease to occupy these offices for lack of legitimacy.

The fact that the Constitution expressly states that there shall be a Vice-President of the Republic of Zambia who shall be appointed from amongst members of National Assembly clearly shows that any person though competent to occupy this office but is not a member of National Assembly either by nomination or election does not qualify for such an appointment. The functions and delegated duties are consequential to the valid appointment.

It can be argued therefore that though the High Court did not alter the Constitution by addition of express words, the extent of interpretation is what warrants the questioning of the decision in light of the explicit manner the Articles in question are drafted. To avoid this, the High court should have interpreted the provisions in the original meaning of the constitutional text. This is the only way of constitution observance that will promote upholding tenets of good governance and rule of law.
Further, *Maxwell on Interpretation of Statutes*, the learned author writes that:

It is corollary to the general rule of literal construction that nothing be added to or taken away from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.

Given the argument above, the starting point for the High Court was supposed to be establishing whether the words in Articles 45 and 71 read with other supporting provisions were unmistakable, clear and precise. If the words are definite, then they should be construed in their ordinary sense.

A careful analysis of the Kabimba case will show that the broader approach taken by the High Court flies in the teeth of Articles 71, 45 and 88 (6) (c) of the Constitution. It is equally interesting to note that the court did acknowledge the gap in the constitution. Judge Wood at page 11 of the judgment stated that, "This is glaring indication of the serious gaps in our Constitution which need to be addressed with the urgency they deserve." Clearly, the judge is on point in that a living document such as the constitution need not be subjected to canons of interpretation especially where the office of the Vice-President is concerned but a literal approach with careful recommendation to the legislature for amendment would be the most appropriate if not best.

Arguably, this would defeat the inherent mandate given to the court to interpret the law and as the legal realist would argue, provide a solution even when the law is silent or when there is a gap. Even then, the extent of interpretation should not usurp the powers of the legislature.

It should be noted that ordinarily, where a court is called upon to adjudicate on the effect of a legislative measure, it is concerned only with the validity of the measure, its meaning and

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application. It is not concerned with its wisdom or even its reasonableness as these normally, are matters purely for the legislature.10

This position is supported by the case of Mayor and St. Mellon v Newport Corporation11 where Lord Denning said, “we sit here to find out the intention of Parliament and of ministers and carry it out and, we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.” The House of Lords on appeal rejected Lord Denning’s reasoning. Lord Simon stated that it was “naked usurpation of the legislative function under the thin guise of interpretation.” Clearly, the High Court was trying to fill in the gaps in the constitution which the court felt Parliament had intended.

How then was the court to rule? This question can only be objectively answered if looked at using the lenses of literal interpretation considering that the provisions are precise and plain. It is evident that the purposive approach was invoked to sustain the argument that Vice-President needs to stand in for the President should any misfortune occur. Without this approach, the absence of National Assembly makes the status of the office non-existent.

3.4 SEPARATION OF POWERS

The doctrine of separation of powers is one that A. V Dicey12 espoused with emphasis on the need to act in accordance with the law. Though from a narrow interpretation of his arguments, this research does incline itself with the need to show distinctly the operations of the three organs of government. The Legislature pursuant to Article 62 is vested with the mandate to make law whereas the Judiciary is ordained to interpret the law as made by the drafters in order to give

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10 Per Chief Justice Blagden in the case of Kachasu v Attorney General (1967) ZR 145
11 [1952] AC 189 at 191
meaning. It then should be appreciated that in interpreting and applying the Constitution, the judiciary must exercise independence from politics and reflect the common will in order to secure the democratic legitimacy of its decisions.

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in Anthony Ritho Mwangi and Another v The Attorney General\textsuperscript{13} where the court stated:

Our Constitution is the citadel where good governance under the rule of law by all the three organs of the state machinery is secured. The very structure of Separation of Powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though it seems to be omnipotent, it is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law.

3.5 THE IMPORTANCE OF THE CASE IN THE CONTEXT OF RULE OF LAW

3.5.1 INTERPRETATION OF ARTICLE 71

This provision gives guidance as regards dissolution of National Assembly and the consequence of this act, which is the cessation to be members of Parliament. In addition to, every occupant of an office which needs the backing of membership to the National Assembly equally ceases to hold that position. This interpretation is unmistakable as this is evident in the practice of Cabinet Ministers whose appointments are made from amongst members of National Assembly. No doubt there is a lacuna in this Article when read with Article 45 in so far as the office of Vice-

\textsuperscript{13} Nairobi High Court Criminal Application No 701 of 2001
President is concerned. Needless to say that though this lacuna is apparent, the constitution does not at any point contemplate whether read subject to other provisions or literally the continued stay of the Vice-President in office once the National Assembly has been dissolved. This conclusion is arrived considering the case of Inland Revenue Commissioner v Hinch\(^\text{14}\) where it was stated that:

We must look for the intention of Parliament…but we can only take the intention of Parliament from the words it has used in the Act.

3.5.2 CONTRIBUTION OF THE CASE TO THE ZAMBIAN JURISPRUDENCE

The gap which brings rise to this case has stood out as one of the most crucial legal debates as regards the office of the Vice-President which in the words of the court should be attended to with the urgency it deserves. In a way, this case has contributed to constitutional law by exposing the weaknesses of the Zambian constitution.

Secondly, the case clearly demonstrates that courts see themselves as having power to fill in the gaps so as to do what Parliament would have done had they had the situation in mind\(^\text{15}\). Arguably, this position may be correct but it creates uncertainty in the law in that the courts can add or subtract words in a provision so as to achieve a desired outcome. This goes against the attributes of a good legal system especially one of certainty.\(^\text{16}\) This discretion if left unchecked can be used arbitrarily. Further, due to uncertainty arising from the liberal interpretation powers of the judiciary, there can be a miscarriage of justice and irreparable breakdown of the legal system in its development. As a way of averting this, the court should apply the rules of statutory interpretation judiciously and with caution so as produce a better result.

\(^{14}\) [1960] AC 748 at 767
\(^{15}\) Kammins Ballrooms Co. Ltd v Zenith Investment (Torquay) Ltd [1971] AC 850
Additionally, the High Court must be appreciated for the role it played in bringing to light the possible ways of rectifying the lacuna that has existed for long a time. It should be commended in that without its critical view of how the Articles in question interact there would be no need to champion the rule of law by way of amendment.

3.6 CONCLUSION

This chapter has shown the reasoning behind the decision that was made in Kabimba v Attorney General and Another. The basis of the reasoning was to construe the Constitution as a whole with a realization of the essence of this office. Additionally, it was evident to the High Court the intention of legislature of having a Vice-President would be defeated without invoking purposive approach. By making an analysis and critique as to how it contributes to the knowledge gap created since it was decided, it has demonstrated the need to have had the provisions construed using the literal rule of interpretation.

The next chapter gives a comparative analysis of the Zambian constitutional order specifically on the provisions that pertain to the office of Vice-President with those of Ghana and Kenya. It will begin by underscoring the Zambian provisions then the Ghanaian and subsequently the Kenyan one before rendering a comprehensive conclusion of the chapter.
CHAPTER FOUR

4.0 A COMPARATIVE ANALYSIS OF THE ZAMBIAN CONSTITUTIONAL PROVISIONS AS REGARDS THE OFFICE OF VICE-PRESIDENT WITH THE GHANAIAN AND KENYAN CONSTITUTIONAL PROVISIONS

4.1 INTRODUCTION

This chapter compares the constitutional order of Zambia with that of Ghana and Kenya as regards the office of the Vice-President. The aim is to stress the important provisions with regard to the manner the office of the Vice-President operates. It will equally seek to compare the three Constitutions by bringing to light how this office has operated in the absence of National Assembly.

Zambia has strove for years to have a legitimate constitutional order that will stand the test of time as well as effectively meet the basic tenets of democracy and the rule of law. One such provision that has recently been heavily criticized is Article 45 which provides for the appointment of the Vice-President from amongst the members of National Assembly. The clear consequence is that when National Assembly has been dissolved, the validity of this office becomes questionable.

Arising from the above reasoning, it has been asked whether such an office should be dependent on National Assembly to be valid immaterial of its importance. The answer has been and is an emphatic no! For this gap to be cured, rules of statutory interpretation have been invoked which in reality need not be the case.
4.2 COMPARISON OF JURISDICTIONS

4.2.1 ZAMBIA

Article 45 of the Zambian Constitution provides that:

45 (1) There shall be an office of the Vice-President of the Republic of Zambia.

(2) The Vice-President shall be appointed by the President from amongst the Members of the National Assembly.

(3) Subject to the provisions of this Constitution the Vice-President shall vacate that office upon the assumption by any person of the office of President.

The foregoing provisions are the basis of the office of the Vice-President in Zambia and upon which the contention of having a non-member of National Assembly is arising from. The difficulty that comes with these provisions is that the Vice-President holds this office in connection with the Assembly. The challenge that arises then is that when this forum is dissolved then the validity of the office becomes inconsistent with the law following the express provisions of the Constitution.

On a comparative basis with other constitutional orders, the Zambian Constitution lacks an express provision guiding the status of the office of Vice-President on dissolution of Parliament and with regard to occupying other public offices that may have a nexus with a forum such as National Assembly. In comparison with the Bulgarian Constitution, Article 68 (1) provides that:

A member of the National Assembly shall not occupy another state post, nor shall engage in any other activity which the law defines as incompatible with the status of a member of the National Assembly.
Ghana as a country has avoided the gap that Zambia has by way of having the Vice-President be a running mate with the President during an election so that the authority to occupy such an office comes from the electorates instead of National Assembly which can be dissolved at anytime. This clearly shows that the office in Ghana has legitimacy in that being an assurance and insurance to the President in case of a mishap is not misplaced by virtue of provisions embedded in the Constitution.

4.2.3 KENYA

Article 147 of the Kenyan Constitution provides that,

(1) The Deputy President shall be the principal assistant of the President and shall deputise for the President in the execution of the President’s functions.

(2) The Deputy President shall perform the functions conferred by this Constitution and any other functions of the President as the President may assign.

(3) Subject to Article 134, when the President is absent or is temporarily incapacitated, and during any other period that the President decides, the Deputy President shall act as the President.

(4) The Deputy President shall not hold any other State or public office.

The current Kenyan Constitution was enacted in 2010 after consideration of the gaps that were in existence in terms of the decentralization of the governance system. One recommendable provision is that provided for in Article 148. It equally provides for the Vice-President as a running mate of the President during an election. Unlike the Ghanian Constitution, clause 4 of Article 147 of the Constitution of Kenya makes mention that the Vice-President should not hold any other state or public office.
This position is not due to bad drafting as it stems from the realization that the office of the Vice-President is of great importance to subject it other responsibilities that may negatively influence its optimum operation.

Careful reading of the Ghanaian and Kenyan Constitutions demonstrates that there is no link between National Assembly or any other forum that can be dissolved by the President with the office of the Vice-President being affected. This is the approach that this research suggests Zambia should take as a way of avoiding application of rule of statutory interpretation to sustain such an office at law.

4.3 CONCLUSION

The chapter has compared the Constitutions of Ghana and Kenya with Zambian Constitution to identify how these jurisdictions operate the office of the Vice-President. Beyond that, the chapter has highlighted from the Bulgarian constitution the detachment from any other institution this office needs to be if it is to operate effectively. A similar position has been identified in the constitution of Kenya.

The next chapter makes a conclusion of the entire research and makes recommendations from the observations made in the study.
CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 GENERAL CONCLUSION

The ultimate objective of this research has been to determine whether the Zambian Constitution does allow for the continued stay in office of the Vice-President upon dissolution of National Assembly and if so at what point considering the construction of provisions that are linked to the existence of this office. It has been clearly established that there is a gap in the Constitution as regards the office of the Vice-President because what is provided for is the appointment and the functions that arise when National Assembly is in existence. Upon dissolution, the law suggests that all office bearers of positions attached to National Assembly must cease to hold office.

Chapter one introduced the research by giving a general overview, statement of the problem, the methodology used and the findings of the paper. It looked at the constitutional provisions that provide for the office of Vice-President and the effect of dissolution of National Assembly. The chapter further established that the lack of precision in the constitution plays a retrogressive role in the development of both a good constitutional order and a holistic legal system.

The chapter two discussed the approaches to constitutional interpretation as employed by the Zambian courts. From the overview of case law, it was established that the literal rule of interpretation is given priority over any other rule because of the inviolable nature of the constitution. Whereas the plain and grammatical meaning is recommended the courts are alive to the fact that the Constitution is a living document as such should be construed purposefully, especially in accordance with societal needs and dynamics.
Chapter three examined the reasoning behind the case of **Kabimba v Attorney General and Another** where the High Court adopted the purposive approach instead of the literal interpretation of the provisions because it resulted in the continued stay in office of the Vice-President being regarded unconstitutional. The case was criticized because the words did not invite the High Court to apply any rule of interpretation as they are plain and precise.

Chapter four analysed the Constitutional provisions of Ghana and Kenya to understand how the office of the Vice-President operates. It was evident that the Vice-President’s office had legitimacy because it did not have any link to the National Assembly which could be dissolved anytime even at the credence of the President.

The research in chapter one further looked at the constitutional provisions that provide for the office of the Vice-President and what happens in an event National Assembly is dissolved. It highlighted the disadvantage of having the Vice-President’s appointment from amongst the members of Parliament as the Constitution is silent as to whether he should continue occupying that office. From a constitutional law point of view, that office lies in limbo after dissolution as such the status quo is one of having him vacate this office like Cabinet Ministers.

When the courts invoke the rules of statutory interpretation to guarantee the continued stay in office of the Vice-President, the rule of law disregards such an attempt because legality must always be in accordance with what the law plainly provides. The attractiveness of the purposive approach cannot be ignored; however, it becomes misplaced when provisions are not too wide to lead to absurdity let alone any inconsistency with the law save to meet an intended objective suggested by the courts.
5.2 RECOMMENDATIONS

The chapter seeks in part to advance recommendations that will promote legitimacy of the office of the Vice-President and the approach to constitutional interpretation by the courts. The recommendations include; the amendment of the Article 45 of the Constitution by clearly spelling out that the office holder shall not hold any other public office, that the Vice-President shall be the running mate of the President in an election so as to have him elected by the electorate and that the courts should avoid applying other rules of statutory interpretation when construing the Constitution save where there is a grave danger in result that warrants their invocation.

Amendment of Article 45 of the Constitution

In order to clearly avoid the doubt of the nexus between National Assembly and the office of the Vice-President, clause 2 must be amended by stating that such an appointment will be made from outside National Assembly so that no uncertainties are created after dissolution of this forum.

Running Mate Clause

Constitution needs to include a provision that will make the Vice-President a running mate President during an election so that the people can have a say as regards who occupies this office. This step will equally cover the gap that currently exists as to what happens in an event a tragedy befalls the President after Parliament has already been dissolved. The draft constitution has made progress in that direction.
c) Not to hold Public Office

The office of the Vice-president is of great relevance in running of affairs in any given country. Having him occupy several public offices waters down the effectiveness of this office because optimum attention is not given in the governance system. It is desirable and recommended that at no given point should the Vice-President discharge functions relating to any public office save his.

d) Constitutional Interpretation

The constitution is indeed a living document yet with rigid principles underlying in it. One such principle is that it is the authoritative, written and binding text to all people. In this vein, the courts must be careful by construing the provisions in a manner that will guarantee it remaining the supreme law of the land. The plain and grammatical meaning must not be departed from as it is an inherent principle of constitutional construction.

5.3 CONCLUSION

This chapter has given a summary of the entire research and how it fits in the concept of rule of law especially where constitutional observance is concerned. It has demonstrated from the decision in Kabimba v Attorney General and Another in so far as the legality of the office of Vice-President upon dissolution of National Assembly in Zambia is concerned the shortcomings, contribution made to the Zambian jurisprudence and its effect on the interpretation of Articles 45 and 71 of the Republican Constitution.
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