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The discrete legal issue to be decided by the Court was whether the continued stay in office by the Vice President, Cabinet Ministers, Provisional Ministers and Deputy Ministers – after the dissolution of Parliament on 11th May, 2016, and after the enactment of the Constitution of Zambia Amendment Act No. 2 of 2016, was ultra vires the constitution and therefore unconstitutional. If unconstitutional, a follow up issue was whether the salaries, allowances, and emoluments drawn by the above officials during their unlawful stay in office should be repaid. The case was filed as three separate causes, but by consent of the parties, the court consolidated the causes and determined them simultaneously. Steven Katuka, suing as Secretary General of the United Party for National Development (UPND), and the Law Association of Zambia (LAZ) acted as petitioners in the matter.

The Constitutional Court was faced with the unenviable task of interpreting constitutional provisions that were on their face, ambiguous and even somewhat contradictory. The need for interpretation arose from the change in constitutional dispensations brought about by the enactment of a new constitutional amendment in January 2016.

The Court's Ruling

The position of the Vice President

Dealing with the position of the Vice President first, the Court held that the Vice President's stay in office after the dissolution of Parliament was constitutional. The court reasoned that it could not have been the intention of the legislature to risk a power vacuum and consequent constitutional crisis if the office of the President fell vacant. In such a

circumstance, article 106 (5) (a) of the Constitution stipulates that the Vice President assumes office. The Court was also guided by the pre-amendment position in which the Vice President continued in office notwithstanding the dissolution of Parliament. Based on this reasoning, the Court held that the Vice President continued to hold office legally.

The position of Cabinet Ministers and Provincial Ministers

On the question of Cabinet Ministers and Provincial Ministers, the Court fixated quite intently on the circumstances under which the office of a Minister or Provincial Minister falls vacant, specifically, articles 116 (3) (e) and (117) (2) (d), which hold that the office of Minister falls vacant if, among other eventualities, "...another person assumes the office of President." The Court was of the view that these provisions are ambiguous and obscure and capable of more than one interpretation, and that it was therefore necessary to adopt a purposive interpretive approach, since a literal interpretation of these sections, the Court reasoned, would contradict articles 116 (1) and 117 (1), which state that Ministers are to be drawn from Members of Parliament.

Using a purposive approach, the Court held that it could not have been the intention of Parliament for the tenure of cabinet and Provincial Ministers to survive the dissolution of Parliament, since a departure from the pre-constitutional amendment position (that Ministers vacate their office once Parliament is dissolved) was too important to be left to speculation. If, the Court reasoned, the legislature intended that Ministers continue in their office despite the dissolution of Parliament, this should have been stated explicitly. Using this interpretive approach, the Court concluded that the continued stay in office of cabinet and Provincial Ministers was contrary to the spirit of the amended Constitution, and that consequently, the Ministers were holding office illegally.

The position of Deputy Ministers

Regarding Deputy Ministers, the Court first acknowledged that the office of Deputy Minister did not exist under the new Constitution. After so acknowledging, the only issue left for determination was whether section 7 (2) of Act no. 1 of 2016, which makes transitional arrangements for the continuation in office of certain officials until such appointments are terminated by the President, applied to Deputy Ministers. In deciding the issue, the Court held that section 7 (2) mandated that the termination of an appointment as Deputy Minister must be in accordance with the 1991 Constitution. Under that Constitution, the position of Deputy Minister expired upon the dissolution of Parliament or upon the termination of the appointment by the President, whichever came earlier. Therefore while the position of Deputy Minister temporarily continued after the enactment of the new constitution (by virtue of the transitional arrangements espoused in s 7), when Parliament was dissolved on the 11th of May, 2016, the position of Deputy Minister was terminated as well. The Court further held that the transitional period envisaged by article 7 (2) of the Constitution was from the date of enactment of the new constitution to the dissolution of Parliament. Having so held, the Court held that those holding the office of Deputy Minister after the dissolution of Parliament were doing so illegally since that position terminated when Parliament was dissolved.

Commentary

The Court's reasoning on the status of the Vice President and the Deputy Ministers is sound. However, while the Court's conclusion that the continued stay in office of cabinet and Provincial Ministers was illegal is equally sound, recourse to a purposive interpretation of articles 116 (3) (e) and 117 (2) (d) was not necessary, since a literal interpretation of the articles does not lead to an absurdity, neither do these articles contradict articles 116 (1) and 117 (1). The meaning of articles 116 (1) and 117 (1) is not in dispute; the office of Minister is tied to one's status as a

Member of Parliament (MP). In other words, being an MP is a necessary condition of being a Minister. When the status of an MP is lost, the status of Minister is lost as well. The analysis can end there.

Articles 116 (3) (e) and 117 (2) (d), which state that the office of a Minister and Provincial Minister becomes vacant when “another person assumes the office of President”, are not relevant to the question of whether Ministers and Provincial Ministers maintain their offices upon the dissolution of Parliament. Articles (116 (3) (e) and 117 (2) (d) address the vacancy of the office of Minister and Provincial Minister in circumstances other than when Parliament is dissolved. The issue of the office of Minister or Provincial Minister falling vacant cannot arise once Parliament has been dissolved, since for all intents and purposes, all Ministerial positions are vacant at that point.

I share the Court’s mystification at the wording of articles 116 (3) (e) and 117 (2) (d), namely, “if...another person assumes the office of President”. While the poor draftsmanship of these sections obscures their meaning, the interpretation of these provisions was not necessary to determine the legal issue in this case. Still, it is surprising that an Act specifically promulgated to provide for transitional arrangements (no. 1 of 2016), does not explicitly spell out the fate of cabinet and Provincial Ministers once Parliament is dissolved under the new constitutional arrangement.

Significance

This maiden Constitutional Court case is hugely significant in at least two ways; first, in making a ruling against the executive. The Constitutional Court, in that watershed moment, demonstrated its willingness to act as a check on executive power. Through their readiness to hand down a decision with serious political ramifications, the Court maintained fidelity to their core function as custodians of the Constitution. Second, the case sends a strong warning to those that wield state power and enjoy state benefits to do so in accordance with the law. Interestingly, the Court

alluded to the fact that since the Members of Parliament affected by this decision signed the Constitution, they should have been aware of the provisions that impacted them. While the Court's reasoning in this regard cannot be assailed, the poor draftsmanship of the Constitution and the attendant ambiguities and obscurities are a major cause of concern. If the interpretation of the relevant provisions proved challenging for the jurists on the Constitutional Court, one can only expect non-jurists to be even more confounded.

All in all, this case not only clarifies the law on an important issue, it also highlights the critically important oversight role that the Constitutional Court was fashioned to play in Zambia's democracy.

