SAIPAR Case Review

Volume 3
Issue 1 *May 2020*

Article 9

5-2020

Daniel Pule and Others v Attorney General and Others Selected Judgment No. 60 of 2018

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Facts

The Constitutional Court was seized with an opportunity to deal with an issue of eligibility for elections to the office of the president. This matter arose out of the fact that the 2016 constitutional amendments introduced some notable changes regarding the tenure and term limitation on the office of president. What prompted the applicants to apply to the Constitution Court for interpretation on eligibility against the backdrop of the constitutional changes in 2016, was that in 2014, the office of the president fell vacant following the demise of the Fifth President, Mr Michael Sata. In accordance with the provisions of the constitution at that time, elections were held, and the then Minister of Home affairs, Mr Edgar Chagwa Lungu was elected to the office of president and completed the unexpired term of office of the departed president, which begun in 2011. It must be understood that at the time when Mr Lungu assumed the office of the president in January 2015, there was only a year and a few months remaining before the next general elections in 2016. Whilst in office, Mr Lungu, signed the Constitution Bill into law, which introduced a number of changes that also touched on term limitation for the office of president. The above chronicle of events is what set in motion the court process inviting the Constitutional Court to pronounce itself on the eligibility of Mr Lungu to stand as president in 2021; whether he could be said to have had already twice held office of president, firstly elected in 2015, and secondly re-elected in 2016.

Significance

Evidence regarding the imposition of term limits on public office holders can be traced as far back as the 7th century BC. At that time the citizens of the Greek state of Dreros-on-Crete prescribed a law that placed absolute restrictions on the number of times that any person can serve in the office of the state's chief magistrate.[2]

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[2] (Quoted in Raaflaub and Wallace, 2007:23)

Aristotle in one of his writings placed premium on the need for public offices to be held rotationally so to afford a chance to every citizen to aspire to hold public offices. He asserts:

> …the characteristics of democracy are as follows: the election of officers by all out of all; that the appointment to all offices, or to all but those which require experience and skill, should be made by lot.....that a man should not hold the same office twice, or not often, or in the case of few except military officers; that the tenure of all offices, or of as many as possible, should be brief.[3]

There are many reasons why the concept of term limit is characterised as a feature of democracy and an institutional barrier to personal rule and dictatorship. According to Linz, presidents exercise what he terms "uni-personal power", which can very easily be abused and potentially contribute to the demise of democracy[4]. This view is also echoed by Maltz when he contends that term limits are an important feature of presidential government, as they help to brake an electoral authoritarian regime's descent into outright dictatorship. The popularity of presidential term limits therefore reflects a recognition that this office, more than any other, needs to be rotated on a regular basis in order to ensure the survival of democracy.[5]

In many African states, it was after the cold war, that a broad consensus emerged in favour of democratisation and consolidation of democratic institutions. Some of the mechanisms adopted included strengthened legislature, decentralisation, and protection of judicial independence. Limits on the duration and number of terms a president may hold office is one of these mechanisms. They are now seen as part of the toolbox to protect democracy together with regular and fair elections, and the protection of fundamental rights embedded in African constitutional fabrics.[6]

However, this cherished toolbox of democracy is facing a serious strain in many African states. Presidential term limits have been put to their severest tests in Africa. The results have been mixed. In some cases they have survived, while in others, they have been made malleable so

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[3] Aristotle, the politics, Book VI, Section II

[5] Maltz, G. 'The Case for Presidential Term Limits' (2007) Journal of Democracy 128,142.

[6] HK Prempeh 'Progress and retreat in Africa: Presidents untamed' (2008) Journal of Democracy 109; HK Prempeh 'Presidential power in comparative perspective: The puzzling persistence of imperial presidency in post-authoritarian Africa' (2008) 35/4 Hastings Constitutional Law Quarterly 761.

as to gift an incumbent a third term. Modern third term bids are highly sophisticated and can be difficult to arrest especially where the courts are fronted to lender a veneer of legality by coming up with 'inventive' and highly questionable interpretations of the constitution. This was the case for President Pierre Nkurunziza of Burundi, where the Constitutional Court decided that, although the Constitution limits presidents to two terms, President Pierre Nkrunziza's first term did not count because on that occasion he was not elected by people of Burundi but by parliament.[7]

In Zambia, presidential term limitation first became a feature of the Zambian Constitution in 1991. The idea behind a term limit was to prevent a person from becoming a 'life president.' This was after witnessing the damaging effects of personal prolonged rule of the first President, Kenneth Kaunda.[8] Presidential term limit was and still remains a progressive feature of the Constitution, and has since become a fixed star of Zambia's constitutional democracy. Article 35 of the 1991 Constitution was couched as below:

> (1) Subject to clause (2) and (4) every President shall hold office for a period of five years.
>
> (2) After the commencement of this Constitution no person who holds or has held office as President for two terms of five years each, shall be eligible for re-election to that office.
>
> (3) For the purposes of clause (2) the period of two terms of five years each shall be computed from the commencement of this Constitution.
>
> (4) The President may, at any time by writing under his hand addressed to the Speaker of the National Assembly resign his office.
>
> (5) A person assuming the office of the President in accordance with this Constitution shall unless:
>
> (a) he resigns his office; or
>
> (b) he ceases to hold office by virtue of Article 36 or 37
>
> (c) the National Assembly is dissolved;

[7] Tull, Denis & Simons, Claudia (2017), 'The Institutionalisation of Power Revisited: Presidential Term Limits in Africa' (2017) Vol. 52, No.2 Africa Spectrum

[8] N, Simutanyi & M, Njekwa 'One Party Dominance and Democracy in Zambia' (Centre for Policy Dialogue,6 January2006) https://www.researchgate.net/publication/conference paper>accessed 16 April 2020.

> continue in office until the person elected at the next election to the office of President assumes office.

What one observes under the 1991 Constitution is that the limitation in holding of the office of president was based on having served two terms of five years each. Under this constitution, a person who held office for two terms of five years each became ineligible for re-election to the office. It can, therefore, be deduced that under the 1991 constitutional arrangement, if a president decided to resign in the fourth year of his second term of office, he would be eligible to come back at any time to contest the position of president on account that he did not serve the two terms of five years each as required by the constitution. Given this premise, it is safe to conclude that under the 1991 constitution, holding of the office of President was tied to the term of office.

In 1996, the 1991 Constitution was amended substantially, and these amendments touched on the office of president. In terms of Article 35, the constitution as amended in 1996 provided:

> (1) Subject to clause (2) and (4) every President shall hold office for a period of five years.
>
> (2) Notwithstanding anything to the contrary contained in this Constitution or any other law, no person who has twice been elected as President shall be eligible for re-election to that office.
>
> (3) The President may, at any time by writing under his hand addressed to the Speaker of the National Assembly, resign his office.
>
> (4) A person assuming the office of the President in accordance with this Constitution shall, unless:
>
> (a) he resigns his office;
>
> (b) he ceases to hold office by virtue of Article 36 or 37; or
>
> (c) the National Assembly is dissolved;
>
> continue in office until the person elected at the next election to the office of President assumes office.

The 1996 Constitution, as can be observed here, introduced a major change in wording. Admittedly, the tenure of office was maintained to be five years. However, unlike the 1991 Constitution, whose term limitation was based on holding office for two terms of five years

each, the 1996 amendment provided to the effect that any person who has been elected twice as president would not be eligible to contest for re-election. What is critical to appreciate is that the 1996 amendments delinked tenure office from term limit, which were previously united under the 1991 constitution. The effect of this change was that regardless of the period that one has served as president, it counts as a term as long such a person has been elected. For argument sake, if one was elected under the 1996 amendment as president, and after one week in office, decides to dissolve parliament, and general elections are held, the period of one week in the office would be regarded as a term on account that he has been elected to the office of President. Consequently, such a person would only be eligible for re-election to the office of President one more time. Explained differently, if a president decided to resign in his second term, say, after being in the office for only one year, such a person would be ineligible for re-election on account that he has been elected twice as president, notwithstanding that he only served for a year in his second term. In a nutshell, the 1996 constitution, term limitation was not based on length of a period that one serves in the office, but on account of how many times one has been elected to that office. And in this context, having been elected twice to the office of President, according to the 1996 constitutional amendment, cripples any person's presidential ambitions.

In 2016, there were substantial amendments to the constitution that equally reflected on the office of president in the following terms:

> Article 106.
>
> (1) The term of office for a President is five years which shall run concurrently with the term of Parliament, except that the term of office of President shall expire when the President-elect assumes office in accordance with Article 105.
>
> (2) A President shall hold office from the date the President-elect is sworn into office and ending on the date the next President-elect is sworn into office.
>
> (3) A person who has twice held office as President is not eligible for election as President.
>
> (4) The office of President becomes vacant if the President—
>
> (a) dies;
>
> (b) resigns by notice in writing to the Speaker of the National Assembly; or
>
> (c) otherwise ceases to hold office under Article 81,107 or 108.
>
> (5) When a vacancy occurs in the office of President, except under Article 81—
>
> (a) the Vice-President shall immediately assume the office of President; or

(b) if the Vice-President is unable for a reason to assume the office of President, the Speaker shall perform the executive functions, except the power to—

(i) make an appointment; or

(ii) dissolve the National Assembly;

and a presidential election shall be held within sixty days after the occurrence of the vacancy.

(6) If the Vice-President assumes the office of President, in accordance with clause (5)(a), or a person is elected to the office of President as a result of an election held in accordance with clause 5(b), the Vice-President or the President-elect shall serve for the unexpired term of office and be deemed, for the purposes of clause (3)—

(a) to have served a full term as President if, at the date on which the President assumed office, at least three years remain before the date of the next general election; or

(b) not to have served a term of office as President if, at the date on which the President assumed office, less than three years remain before the date of the next general election.

The tenure of office under the 2016 amendment still remains five years. There is, however, a fundamental change in terms of term limitation. While under the 1996 constitutional amendment, the limitation was based on having been elected twice, under the 2016 constitutional amendment, the limitation is premised on one having twice held office of president. Therefore, in terms of Article 106(3), a person who has twice held office as president is not eligible for re-election to that office. The change in terminology from 'elected twice' under the 1996 constitutional amendment to 'holding office twice' under the 2016 amendment is a response reflecting the introduction of the running mate clause in the Constitution. The introduction of the running mate clause in the Constitution now entails that a running mate can assume the office of president in the event that the office falls vacant without going through an election. Simply put, if the office of president falls vacant, under the present constitutional arrangement, the vice president automatically assumes the office of president to fill the vacancy without the need for elections.

What is, however, critical is the retention of the term limit under the 2016 constitutional arrangement. The term limit under the current constitution is not any different from the 1996 constitutional amendment, except that one uses 'twice elected' while the other one employs

'holding office twice.' The rationale in the distinctive employment of terms has already been explained above; the response to the introduction of running mate clause. The net effect of the discussion under the 2016 constitutional amendment in terms of term limitation is that a person who has twice held office as president is ineligible to stand for re-election.

Moving forward, arising from the introduction of the running mate clause in the 2016 constitution as amended, Article 106(6) provides for reckoning of time in circumstances when the vice president assumes power to fill the vacancy in the office of President. In other words, this provision provides the manner of computing what constitutes a full-term when the vice president or an elected person in lieu of the vice president assumes power to fill the vacancy in the office of president.

The gist of the provision is that if the vice president assumes power to fill the vacancy in the office of the president, and there are at least three years remaining before the date of the next general election, that period will count as a full term. In other words, as long as there are at least three years remaining before the next general elections, the vice president or an elected person who assumes office of the president midway will be deemed to have served a full term of five years notwithstanding that he/she will only have been in the office for less than five years. In a case such as this, in terms of eligibility, such a person can only be eligible for re-election to the office of president for a further one term. If on the other hand, the vice president, at the time of assuming power as president arising from the vacancy in the office of president, there are less than three years remaining, such a period will not be regarded as a full-term. Consequently, such a person will be deemed not to have held office at all, and as such eligible for election to the office of president twice. A lesson to be picked at this point is that where a person who occupied the office of vice president or any person in lieu of the vice president, assumes the office of president to fill the vacancy, and there are less than three years before the date of the general elections, such a period served will not count as a full term, as a result, a person who completes such a period will still have two chances to be elected as president.

As earlier stated in the introduction, the applicants requested the court to interpret Article 106 and pronounce itself on whether Mr Chagwa Lungu would be eligible to stand in 2021 following the demise of his 'second' term of office which started in 2016 September. In effect, the question was whether Mr Chagwa Lungu, who was first elected as President in January

2015 and got re-elected in re-elected in August 2016, would be eligible to stand for re-election as President in 2021.

The Constitutional Court suggestively regarded Mr Edgar Chagwa Lungu as one who assumed power under Article 106(6) and stated that since the period from 2015 January to 2016 August, was less than three years, the incumbent would not be regarded as having served a full term.

What is intriguing and strikingly questionable is why the Constitutional Court seemed to have fitted the incumbent within Article 106(6), when it is in fact very clear factually that the circumstances under which the incumbent assumed the office of president are completely different from those falling under Article 106(6). For avoidance of doubt, Article 106(6) relates to the vice president who automatically assumes the office of president to fill the vacancy on account of having been the running mate or a person who gets elected to fill the vacancy in the office of the president in lieu of the vice president.

Mr Edgar Chagwa Lungu was not in any of these circumstances for the Constitutional Court to extend the provisions of Article 106(6) to his case. He was neither the vice president nor was he elected to the office of the president owing to the inability of the vice president (running mate) to assume power automatically. In any case, Article 106(6) is a feature that responds to the relationship between the office of president and the vice president (as a running mate) where a vacancy occurs in the office of president. Now, there was no running mate clause under the 1996 constitutional amendment, under which Mr Edgar Chagwa Lungu was first elected. The question, therefore, is: how were these provisions that do not even with the stretch of imagination fit into Mr Edgar Lungu's circumstances palpably availed to him?

How then should have the Constitutional Court interpreted the circumstances of the incumbent and his eligibility to stand in 2021? Since we have discounted the constitutional provisions under Article 106(6) from applying to the facts under which the incumbent (Mr Edgar Chagwa Lungu) assumed the office of president, the Constitutional Court should have simply based its interpretation of the eligibility of the incumbent on Srticle 103(3) as read together with Article 106(2). Article 103(3) provides to the effect that a person who has twice held office as president is not eligible for election. Obviously, at this point, the question that arises is: what does 'holding office' mean? The answer seems to appear in Article 106(2), the said Article provides: "A president shall hold office from the date the president elect is sworn into office and ending

on the date the next president elect into office is sworn into office." From this provision, it becomes clear that holding office of president commences from the time that the president elect is sworn into office until the time another president elect is sworn into office. It inevitably follows, therefore, that a person who has been sworn into office as president is said to have held office. Arising from the factual and legal analysis above, the next question would be: was Mr Edgar Chagwa Lungu sworn into office in January 2015? The answer is a resounding yes. Mr Edgar Chagwa Lungu was sworn into office as president in January 2015 and ending the day when the next president elect was sworn into office in September 2016, who in this case was himself upon getting re-elected. The key in settling the question of holding office is the issue of being sworn into office. If a person was at any point sworn into office as president, then such a person has held the office of president from the period of being sworn into office until the next president elect is sworn into office. Holding office has nothing to do with the period one has served as president. To the contrary, holding office is linked to being 'sworn into office.' If one has been sworn into office as president, such a person has held office regardless of the period served. The issue of how long one has served as president only becomes necessary if such a person assumed the office of president as vice president to fill the vacancy in the office of president. In such a case it becomes necessary to invoke the provisions of Article 106(6), which looks at whether the remaining period before the next general elections are held is at least three years or less. It is only at this point that one would correctly assert that the term of office is attached to the holding of office. Article 106(6) is a 'locked' provision, which is only to be opened up in strict and specific circumstances as discussed above. Therefore, making a wholesale pronouncement on this provision that holding office is attached to the term office is adulterating the Constitution. If a person did not assume the office as president under circumstances spelt under Article 106(6), the length of time one has served as president has no bearing at all on 'holding office'. The implication is that under the current arrangement, apart from the assumption of office of the president under Article 106(6), a person cannot be sworn into office as president more than twice.

A closer look at the decision of the Constitutional Court reveals that this decision has the effect of nullifying term limits, which has been a cherished virtue since 1991. The interpretation that the Court places on Article 106(3) as read together with 106(6) has the capability of plunging the country into a constitutional crisis. To put this observation into context, paragraph 108 of the judgment on J 77, the Constitutional Court opined as follows:

> Previously, the limitation on eligibility for election to the office of president as provided in the repealed Article 35 was premised on the fact that a person had been twice elected, even, when the person was required only to serve the remainder of the term of office of his predecessor.
>
> Under the current constitutional regime, however, the holding of office as president is attached to the term of office as defined in Article 106(1) and (6) read together. While Article 106(1) provides the presidential term is 5 years, Article 106 (6) defines what constitutes a full-term

Further on J83, the Court reasoned as follows:

> It follows that the Sub-articles in Article 106 cannot be isolated from each other in interpreting the article. As we have already stated above, an interpretation that isolates the provisions touching on the same subject is faulty. Therefore to state that Article 106(3) applies to the term that straddled two constitutional regimes but that Article 106(6) does not, is to isolate 106(3) from the rest of the provisions in Article 106 which is untenable at law and is at variance with the tenets of constitutional interpretation, as all the provisions on the tenure of office of the president must be read together. We are of the considered view that the provision regarding the full-term must be applied to defining what is meant by twice held office under 106(3) in interpreting the provisions of that Article.

With due respect to the Constitutional Court, the above interpretation is a serious mutilation of the Constitution. It is incorrect to say that the holding office is now attached to the term of office. 'Holding office' is still independent of the term of office just like the term 'elected twice' under the 1996 constitution as amended had no bearing on the term of office. According to the Constitutional Court's interpretation, any person who serves in the office of president for less than three years would be regarded not to have held office. This position is extremely dangerous and has the effect of wiping out the concept of term limit. To unmask the absurdity of this interpretation, take for instance President B gets elected in 2016 and re-elected in 2021, if he decides to resign in 2023 after only exhausting 2 years 11 months of his five year mandate in his second term, remaining with 2 years 1 month before the next general elections, President B would be regarded as not having held office since the period he will have served is less than three years. The implication is that President B would be eligible to contest the election of

2026. And if he gets elected in 2026, he can as well decide to resign in 2028 before he clocks three years in office and return to stand again in 2031. If elected in 2031, there is nothing to stop him from resigning in 2033 so that he is eligible to stand again in 2036, and if on this occasion he decides to finish the term, President B will have ruled for a total of 16 years. In accordance with the interpretation of the Constitutional Court, there is nothing to stop this ingenious, but undesirable circumvention of the Constitution. Effectively, the interpretation of the Constitutional Court has robbed the Constitution of this critical bulwark of term limit, and potentially re-introduced 'life president' and its incessant evils. This is the crisis that this judgment creates; a constitutional crisis where the constitution lies helpless in as far as nipping off selfish personal and sectional interests is concerned.

Although what the Court said on J83 is not so fundamentally different from what appears on J77, which has been addressed above, it is important to point out a few things relating to the text on J83. Firstly, the Court holds that Sub-Articles 3 and 6 of Article 106 must be read together in order to get a holistic picture and meaning. This appears to be a wrong approach, because the two sub-articles are dealing with two distinct issues namely, limitation on eligibility (sub-article 3) and reckoning of time in considering what constitutes a term of office when a vice president or someone is elected in lieu of the vice president to fill the vacancy in the office of president (sub article 6). These two are distinct and have no bearing on each other at all. What is clear here is that Article 106(3) and (6) are only united in interpretation when dealing with the situation of filling up a vacancy in the office of the president and not at any other time.

Perhaps as a point hope, it is worthwhile to indicate that the interpretation of the Constitutional Court did not pronounce itself on the rights of the Mr Edgar Chagwa Lungu to stand as he was not a party to the case, and had not indicated firmly his intention to stand. Consequently, this case was largely hypothetical and an academic interpretation of the constitutional provisions dealing with the issue of eligibility. As a result, the Constitutional Court has a chance to extricate itself from this interpretation, which effectively obliterates the presidential term limit. In having a 'second bite at the cherry' the Constitutional Court in 2021, can unwrap itself from this web of constitutional crisis by declaring the incumbent ineligible to stand in line with the clear text and spirit of the Constitution.

In a nutshell, Zambia faces a pernicious third term campaign and the inexorable consequences thereof. Unlike the failed 2001 third term bid by the late President Chiluba, whose illegality was 'naked' to everyone's eye, the current third term bid is subtle and benign as it comes clad in some misplaced garments of legitimacy provided by the Constitutional Court. Yet, when stripped to its barest, it is simply a third term bid akin to Nkurunziza's of Burundi. This is a ferocious indictment on the Constitutional Court's ability to stand tall as the last bastion in defence of the Constitution.