

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
AT THE CONSTITUTIONAL COURT REGISTRY
(CONSTITUTIONAL JURISDICTION)

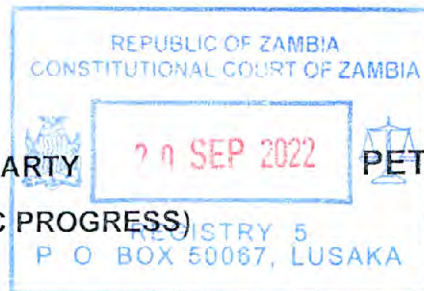
2022/CCZ/002

IN THE MATTER OF: THE DECISION OF ELECTORAL COMMISSION OF
ZAMBIA TO COMPEL CANDIDATES FILING FRESH
NOMINATIONS TO PAY NOMINATION FEES TWICE.

IN THE MATTER OF: ARTICLE 52(6) OF THE REPUBLICAN CONSTITUTION
AND SECTION 8(1)(b) OF THE CONSTITUTIONAL
COURT ACT No. 8 OF 2016.

BETWEEN:

SEAN TEMBO (SUING IN HIS CAPACITY AS PARTY
PRESIDENT OF THE PATRIOTS FOR ECONOMIC PROGRESS)



AND

THE ELECTORAL COMMISSION OF ZAMBIA

RESPONDENT

CORAM: Sitali, Mulenga, Musaluke, Chisunka and Mulongoti, JJC

On 16th June, 2022 and 20th September, 2022

For the Appellant:

In Person

For the Respondent

Ms. T.K. Phiri and M. Bwalya-In house Counsel-ECZ

JUDGMENT

Mulongoti, JC, delivered the Judgment of the Court

Cases referred to:

1. *Lubunda Ngala and Jason Chulu v Anti-Corruption Commission Selected Judgment No. 4 of 2016*
2. *Bizwayo Newton Nkunya v Lawrence Nyirenda and The Electoral Commission of Zambia (2019/CCZ/005)*
3. *Micheal Mbuyu Mutwena v The Attorney General 2021/CCZ/005 (Unreported)*
4. *Law Association of Zambia v The Attorney General (2008) Vol 1 Z.R. 21*
5. *Khalid Mohamed v The Attorney General (1982) Z.R. 49*
6. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172*
7. *Nkandu Luo v Doreen Sefuke Mwamba and The Attorney General CCZ Selected Judgment No. 51 of 2018*
8. *Abuid Kawangu v Elijah Muchima CCZ Appeal No. 8 of 2017*
9. *The Attorney General v EB Johns Machinist Limited SCZ Judgment No. 26 of 2000*
10. *Gervas Chansa v The Attorney General (2019/CCZ/004)*
11. *Christopher Lubasi Mundia v Sentor Motors Limited (1984) Z.R 66*
12. *London Passenger Transport Board v Moscrop (1942) A.C 332*

Legislation referred to:

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The Constitutional Court Rules Statutory Instrument No. 37 of 2016*
3. *The Electoral Process (General) Regulations, Statutory Instrument No. 63 of 2016*

[1.0] Introduction

[1.1] By a Petition filed into this Court pursuant to Article 52(6) of the Constitution and section 8(1)(b) of the Constitutional Court Act. Mr. Sean Tembo, (the petitioner herein) is challenging the decision by the Electoral Commission of Zambia, (the respondent herein) requesting the petitioner and other eligible candidates to pay nomination fees for the Kabwata Constituency by-election, twice.

[2.0] Background facts

[2.1] The background facts are stated in the petitioner's affidavit in support of the Petition as follows:

[2.2] On 18th November, 2021 Mr. Levy Mkandawire the United Party for National Development (UPND) Member of Parliament (MP) for Kabwata Constituency, in Lusaka, passed on and the seat was declared vacant.

[2.3] On 13th December, 2021 the respondent announced that the by-election for the Kabwata Constituency would be held on 20th January, 2022.

- [2.4] It was announced further that nomination papers for candidates should be filed on 28th December, 2021 together with statutory declarations and nominations fees of K15,000 for male candidates and K13,500 for females.
- [2.5] Accordingly, the petitioner's party the Patriots for Economic Progress (PEP) identified a Mr. Henry Muleya as its candidate for the said by-election. And, on 28th December, 2021, Mr. Muleya duly complied with the legal requirement for filing nominations including payment of K15,000.
- [2.6] That on 7th January, 2022, a Mr. Francis Libanda, a candidate in the said by-election on the United Progressive Party (UPP) ticket withdrew from the by-election in line with Article 52(6) and informed the respondent. This prompted the respondent to hold a press briefing on 10th January, 2022, informing the public that the by-election for Kabwata Constituency had been canceled because of the UPP candidate's withdrawal.
- [2.7] On 14th January, 2022, the respondent issued a press release announcing 3rd February, 2022 as the new date for the Kabwata by-election and that candidates should file their nominations on 19th

January, 2022 with all aspirants being required, to again pay nomination fees of K15,000 for males and K13,500 for females.

[2.8] The petitioner avers that the decision to subject the candidates to paying nomination fees twice for the same election flies in the teeth of democratic principles of fairness and accountability, amounts to unjust enrichment and is irrational as it disadvantaged small political parties such as the PEP which have limited financial resources.

[2.9] Furthermore, that if another candidate were to withdraw after the second round of nominations, the petitioner would be required to pay nomination fees for the third time and if again there is a withdrawal after the third round of nominations, they would be required to pay nomination fees for the fourth time and so on which is unfair.

[3.0] Relief Sought

[3.1] Consequently, the petitioner seeks the following relief:

- (a) *A declaration that the decision of the respondent to compel candidates to pay nomination fees twice for the same by-election is null and void*
- (b) *A declaration that the nomination fees paid by the candidates prior to the cancellation of the by-election be deemed to be valid for purposes of the fresh nominations that are scheduled for 19th January, 2022.*

- (c) *A declaration that compelling candidates to pay nomination fees twice is unfair*
- (d) *Costs for this suit*
- (e) *Any other order that the Court deems fit.*

[4.0] Petitioner's Skeleton Arguments in Support

[4.1] In the skeleton arguments in support of the petition, the petitioner referenced Article 52 (6) of the Constitution and submitted that while the said article requires that the respondent should cancel an election and fresh nominations be filed upon the death, resignation and disqualification of a candidate, the said article does not compel candidates to pay nomination fees again when the said nomination fees were already paid prior to the cancellation.

[4.2] It was the petitioner's submission that the respondent fell short of the values and principles of constitutionalism as provided by Articles 8 and 9 of the Constitution, when it compelled the political parties to pay nomination fees twice.

[5.0] Respondent's case

[5.1] The respondent filed an answer in response to the petition in which it admits paragraphs 2 to 4 of the petition with regard to the death of the UPND MP on 18th November, 2021, its announcement of the

by-election to be held on 20th January, 2022 and payment of nomination fees.

[5.2] The respondent also admitted that the UPP candidate withdrew from the by-election on 7th January, 2022, and that pursuant to Article 52(6) of the Constitution it cancelled the by-election slated for 20th January, 2022, announced a new date of 3rd February, 2022 and requested candidates to file fresh nominations including nomination fees.

[5.3] The respondent denied the allegation that this decision flies in the teeth of democratic principles and accountability, amounts to unjust enrichment, and is irrational as it disadvantaged small parties.

[5.4] The respondent's answer was accompanied by an opposing affidavit sworn by the Chief Electoral Officer, Kryticous Patrick Nshindano. He deposed that the petition and its accompanying affidavit do not disclose any alleged violation of the Constitution on the part of the respondent.

[5.5] Furthermore, that it was the mandate of the respondent to prescribe nomination fees under the Electoral Process (General) Regulations, 2016, the Electoral Process Act and the Constitution

of Zambia, and that in line with Article 52(6) of the Constitution, it is a requirement that after cancelation of an election, the respondent is obliged to hold fresh nominations for eligible candidates which requires aspiring candidates to meet requisite conditions for nominations including payment of nomination fees as prescribed.

Respondent's Skeleton Arguments

[5.6] The respondent filed its skeleton arguments on 28th January, 2022. It submitted that the jurisdiction of the Constitutional Court is provided for by Article 128(1) of the Constitution and Section 8 (1) of the Constitutional Court Act and therefore for a person to competently approach the Court to exercise its original jurisdiction, the constitutional violation alleged to have been committed and the provision requiring interpretation must be set out.

[5.7] It is argued that the petition is incompetently before this Court as the facts set out in the petition and the accompanying affidavit do not disclose any constitutional violation or constitutional provision requiring to be interpreted. That the petitioner had not cited any constitutional provision that the respondent had violated but rather challenged the respondent's mandate to prescribe nomination fees

as provided by Regulation 12 of the Electoral Process (General) Regulations of 2016.

[5.8] Counsel further submitted that this Court should take judicial notice that the essence of the petitioner's claim had been rendered academic given that the nominations which were being challenged, had since passed. According to counsel this Court ably guided litigants bent on engaging the Court in pursuit of academic exercises in the case of **Micheal Mbuyu Mutwena v The Attorney General**³ in which it stated that it disapproved of engaging it in academic exercises. To augment the submission of the disapproval by courts to engage in academic exercises, counsel referred us to the case of **Law Association of Zambia v The Attorney General**⁴ in which the Supreme court expressed similar sentiments.

[5.9] It was further submitted that the burden of proof lay on the petitioner to prove the allegation that the respondent had breached the Constitution by providing the exact provision that had been breached. The cases of **Khalid Mohamed v The Attorney General**;⁵ **Wilson Masauso Zulu v Avondale Housing Project Limited**;⁶ **Nkandu Luo v Doreen Sefuke Mwamba and Attorney General**;⁷ and **Abuid Kawangu v Elijah Muchima**⁸ were cited in support of the proposition that the

burden lay with the petitioner. That the petitioner had failed to prove his allegations against the respondent and thus the Petition be dismissed with costs.

[6.0] Petitioner's Reply

[6.1] In the skeleton arguments in reply, the petitioner submitted that the petition had clearly set out that the respondent had violated Article 52 (6) of the Constitution when it compelled eligible candidates to pay the nomination fee twice for the same election. That the Petition had shown how the violations had been committed by the respondent through its decisions as announced on 28th December, 2021 and 14th January, 2022 respectively.

[6.2] Submitting on the definition of a by-election as provided by Article 266 of the Constitution, the petitioner contended that the election that was earlier scheduled for 20th January, 2022 and rescheduled by operation of Article 52 (6) to 3rd February, 2022, was one and the same election, and not two separate elections. The petitioner contended that a candidate in a single by-election can only pay a nomination fee once, and a decision beyond that, contravenes the Constitution.

[6.3] Referencing the case of **Lubunda Ngala and Jason Chulu v Anti-Corruption Commission**,¹ the petitioner submitted that this Court guided in that case that in interpreting Constitutional provisions, no single text should be read alone but rather, the provisions must be read and considered together. In this regard, the petitioner submitted that before cancellation of an election by the respondent, candidates who were duly nominated are eligible candidates for that election or by-election. That the eligible candidates, having already complied with Article 70 (1) and 71 of the Constitution, which includes payment of a prescribed election fee, could not therefore, be required to pay the same fee for the second time.

[6.4] The petitioner submitted that the decision by the respondent to have eligible candidate pay nomination fee twice for the same election, breached Article 52(6) as read together with Articles 70(1) and 71 of the Constitution. In support of the submission that the respondent breached the Constitution, reference was made to the case of **Bizwayo Newton Nkunika v Lawrence Nyirenda and The Electoral Commission of Zambia**² in which, according to the petitioner, this Court allowed a petition on an alleged violation of the Constitution to be heard on its merits.

[7.0] The Hearing

[7.1] At the hearing, the petitioner augmented his written skeleton arguments. He submitted that when an election is cancelled by operation of Article 52 (6) of the Constitution, the fresh election that is called is not a different election but rather it is the same election that was simply adjourned to a different date. As a demonstration he referred to the provision of Article 72 (8) of the Constitution which provides that:

Where a vacancy occurs in the National Assembly, the Speaker shall, within seven days of the occurrence of the vacancy, inform the Electoral Commission of the vacancy, in writing, and a by-election shall be held in accordance with Article 75.

[7.2] He argued that the use of the term, '*a by-election*,' denotes that only one by-election can be held when a vacancy occurs in the National Assembly and not two, three or four by-elections. And, that it is not necessary to refer to any dictionary to prove that the word, '*a*,' refers to the singular. It is contended that if only one by-election can take place when a vacancy occurs in the National Assembly then it follows that in cases where that one by-election is cancelled by operation of Article 52 (6) of the Constitution and a fresh nomination is undertaken, the fresh by-election is not a new by-election but is

simply the same by-election which was merely adjourned to a later date.

[7.3] The petitioner further argued that one by-election should equal to one payment of nomination fees.

[7.4] He further amplified that, an election is a cycle, in the case of a by-election that cycle begins when the Speaker of the National Assembly declares a particular seat vacant, that is when the by-election begins. It is argued that the petitioner is not requesting the National Assembly to make a fresh declaration of that seat being vacant, as it is a single declaration, which entails there is only one by-election which might be adjourned or cancelled one or two or three times, but the fact that it has been adjourned or cancelled does not mean that it is now a new election because it is based on the same declaration by the Speaker of the National Assembly of that seat being vacant.

[7.5] Ms. Phiri, the respondent's counsel augmented the written skeleton arguments. Learned counsel submitted that where an act is invoked under Article 52(6), there is a mandate on the respondent to cancel the election and conduct fresh nominations. The import of the provision is that the whole process has to be re-done and the

aspiring candidates have to abide by the requirements as provided in the Constitution.

[7.6] Mr. Bwalya, co-counsel for the respondent augmented that Article 57 of the Constitution provides that *where a vacancy occurs in the office of Member of Parliament, mayor, council chairperson or councillor, a by-election shall be held within 90 days of the occurrence of the vacancy*, while Article 72(8) provides for the Speaker notifying the respondent of the vacancy. Once the respondent is notified of that vacancy an election shall be held within 90 days of the occurrence of that vacancy. Article 52 (6) which is the article in contention mandates the Electoral Commission to cancel the election: The operative words, being '*cancel the election*' then require the filing of fresh nominations by eligible candidates, and that election shall be held within 30 days of the filing of the fresh nominations.

[7.7] On the issue of huge costs being incurred by the political parties as there is no limit as to how many times the respondent may cancel an election, counsel asked us to take judicial notice that the holding of fresh nominations is equally a cost on the respondent and on public funds. We were urged to give a literal interpretation of Article 52 (6) and dismiss the Petition for lack of merit.

[8.0] Analysis and Determination

[8.1] We will consider first the respondent's submission that the petition is incompetently before us because it does not state the constitutional provisions alleged to have been violated by the respondent and the provisions requiring interpretation have not been set out.

[8.2] As the issue of whether the matter is competently before us goes to jurisdiction, we wish to reproduce Article 128 of the Constitution which provides for jurisdiction of this Court as follows:

128(1) subject to Article 28, the Constitutional Court has original and final jurisdiction to hear-

- (a) a matter relating to the interpretation of this Constitution;*
- (b) a matter relating to a violation or contravention of this Constitution;*
- (c) a matter relating to the President, Vice President or an election of a President;*
- (d) appeals relating to election of Members of Parliament and councilors; and*
- (e) whether or not a matter falls within the jurisdiction of the Constitutional Court.*

[8.3] Furthermore, Article 128(3) provides *inter alia* that where a person alleges that an action, measure or decision taken under law

contravenes the Constitution, the person may petition the Constitutional Court for redress.

[8.4] In addition, the Constitutional Court Rules (CCR) which regulate the practice and procedure of the Court provide under Order IV Rule 1(1) and (2) as follows:

(1) Except as otherwise provided in the Constitution, the Act and these Rules, all matters under the Act brought before the Court shall be commenced by a petition in Form 1 set out in the schedule.

(2) A petition shall disclose-

(a) the petitioner's name and address

(b) the facts relied upon;

(c) the constitutional provision allegedly violated; and

(d) the relief sought by the petitioner. (emphasis added)

The said Form I which is set out in the schedule to the CCR at page 464 shows the Form which the petition should take. It clearly shows what should be in the heading of the petition *inter alia* as follows:

IN THE MATTER OF ARTICLE...

IN THE MATTER OF ALLEGED CONTRAVENTION OF....

(insert article)

It also shows the part where the allegations upon which the petitioner relies should be stated.

[8.5] It is therefore imperative that a person who petitions this Court alleging contravention of the Constitution must clearly state in the petition which article is allegedly contravened and how so.

[8.6] Our perusal of the petition in *casu* reveals that the petition does not expressly state which article the respondent allegedly violated, contrary to the petitioner's contention that it does. The petition is simply entitled:

IN THE MATTER OF THE ELECTORAL COMMISSION OF ZAMBIA TO COMPEL CANDIDATES FILING FRESH NOMINATIONS TO PAY NOMINATION FEES TWICE" AND "IN THE MATTER OF ARTICLE 52(6) OF THE REPUBLICAN CONSTITUTION AND SECTION 8(1) (B) OF THE CONSTITUTIONAL COURT ACT NO. 8 OF 2016.

Equally in the contents or body of the petition no allegation of any constitutional violation is alluded to.

[8.7] It is not enough for the title of the petition to state under which article of the Constitution the Court is purportedly moved without stating the alleged contravention as we are not expected to discern from the title of the petition what the alleged contravention is. The

petition must clearly state which article is allegedly contravened in the heading and the body. In the absence of a clear allegation in the petition, of what article of the constitution has been contravened, this Court cannot provide redress to the petitioner.

[8.8] We note that in his written and oral submissions, the petitioner argued that Article 52(6) of the Constitution was violated when the by-election was cancelled and the eligible candidates were required to pay nominations fees again. However, in his petition, the petitioner did not allege that the respondent contravened Article 52(6) of the Constitution when it cancelled the Kabwata constituency by-election and requested eligible candidates to file fresh nominations and pay nomination fees again. It is trite that skeleton arguments are supportive of the contents of a petition and cannot fill out a gap in a petition where no clear allegation of a contravention of a specific provision of the constitution is made by the petitioner.

[8.9] We have stressed in many of our decisions including in the case of **Gervas Chansa v The Attorney General**¹⁰ that our jurisdiction as a Court is specific as we are confined to determining constitutional questions. Therefore, constitutional matters must be properly

pleaded for us to exercise our jurisdiction. Additionally, the general principles of civil procedure and the need to alert the other party of the case it will be expected to answer at the trial, must be met, as held by the Supreme Court in **Christopher Lubasi Mundia v Sentor Motors Limited**¹¹ which is persuasive to us that:

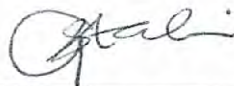
The functions of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the Court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed the parties are bound by their pleadings and the Court has to take them as such. As was stated by Lord Russel of Killowen at page 347 in the case of LONDON PASSENGER TRANSPORT BOARD V MOSCROP¹²: ...Any departure from the course of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied by the relevant amendments, so that the exact cause of action alleged, and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be deemed to be amended or treated as amended. They should be amended in fact. (Emphasis added)

- [8.10] Thus in *casu* the oral and written submissions cannot amend the petition. Further Order IV Rule 1(2)(c) of the Rules set out in paragraph 8.4 of this Judgment clearly states in mandatory terms that a petition shall disclose the constitutional provision allegedly

violated. Therefore, the petitioner needed to clearly state the constitutional provisions allegedly breached by the respondent and the facts relied upon clearly set out in the petition and affidavit verifying it. The petitioner instead of applying to amend after the respondent raised issue, opted to state the alleged contraventions in his skeleton arguments which is procedurally wrong.

[8.11] Therefore, in the absence of a clear constitutional issue raised in the petition, we agree with the respondent that the petition is incompetently before us especially in light of the nature of the relief sought at paragraph (a), (b) and (c) of the petition.

[8.12] The petition is accordingly dismissed. Each party to bear their own costs.



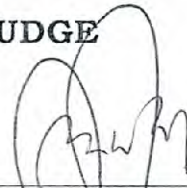
A.M. SITALI
CONSTITUTIONAL COURT JUDGE



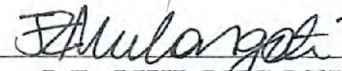
M. S. MULENGA
CONSTITUTIONAL COURT JUDGE



M. K. CHISUNKA
CONSTITUTIONAL COURT JUDGE



M. MUSALUKE
CONSTITUTIONAL COURT JUDGE



J.Z. MULONGOTI
CONSTITUTIONAL COURT JUDGE