

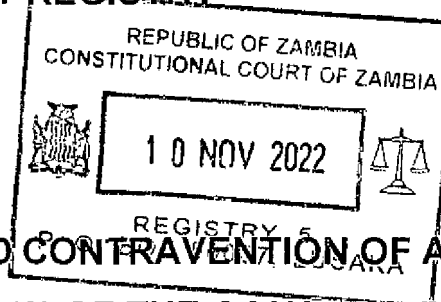
IN THE CONSTITUTIONAL COURT FOR ZAMBIA

2021/CCZ/0035

AT THE CONSTITUTIONAL COURT REGISTRY

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)



IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 2,
52 (4), 67 (3), 101, 103 (1) AND 128 (3) OF THE CONSTITUTION

AND

IN THE MATTER OF THE AWARD OF COSTS IN CAUSE NO.
2021/CCZ/0021

BETWEEN:

JOHN SANGWA

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

Coram: Sitali, Mulonda, Musaluke, Chisunka and Mulongoti, JJC. On
14th September, 2022 and 10th November, 2022

For the Petitioner: Mr. C. Ngoma and Ms. K Bwalya of Messrs.
Simeza, Sangwa and Associates

For the Respondent: Mr. F. K Mwale and Ms. K.F. Mumba -
Attorney General's Chambers

RULING

Musaluke, JC, delivered the ruling of the Court.

Cases referred to:

1. In Re Morgan Kachinga Chellah (1978) Z.R. 348
2. Zambia Privatisation Agency v Huddell Chisenga Chibichabo and Zamcargo Zambia Limited (2005) Z.R. 74
3. Raila Odinga and 2 Others v Independent Electoral & Boundaries Commission and 3 Others 2013 eKLR
4. Adrian Kamotho Njenga v The Hon. Attorney General and Others 2020 eKLR
5. Bizwayo Newton Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia 2019/CCZ/005

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 Act No. 8 of 2016
3. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016

Other works referred to:

1. The Rules of the Supreme Court of England 1965 ('the White book')
1999 Edition, Volume 1

Introduction

- [1] When we sat to hear this motion, our learned brother Justice Chisunka sat with us. He is currently on leave and therefore, this ruling is of the majority.
- [2] This is a ruling on the Respondent's Notice of Motion to raise preliminary issue filed on 29th June, 2022. The motion was made pursuant to Order 14A and Order 33 rule 7 of the Rules of the Supreme Court (White Book) 1999 Edition, Volume 1 as read together with Order 1 of the Constitutional Court Rules 2016. The motion raised the following preliminary issue:
- i. **Whether or not this Honourable Court is *functus officio* to determine the Petition herein having pronounced itself on the issue of costs in the case of John Sangwa v. Electoral Commission of Zambia and Attorney General 2021/CCZ/0021**

Background

[3] A brief background to the Respondent's motion is that on 9th June, 2021 the Petitioner took out a petition challenging the constitutionality of section 30 of the Constitutional Court Act No. 8 of 2016 for contravening Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution) to the extent that it confers on the Constitutional Court discretion to award costs in proceedings.

Respondent's Motion

[4] The crux of the Respondent's motion is that this Court has no jurisdiction to vary the order for costs under cause No. 2021/CCZ/0021 or rehear the same, having already pronounced itself on the issue of costs under the said cause.

[5] The Respondent contends that once this Court adjudicates over a matter, it becomes *functus officio* and as a result does not have jurisdiction to vary, rehear or re-determine the same issue. The provisions of Article 128 (4) of the Constitution, which provides that a decision of the Constitutional Court is not appealable to the Supreme Court was cited as authority for this preposition.

- [6] The Respondent further contends that this Court having heard the matter under cause No. 2021/CCZ/0021 and having made an order for costs in favour of the Respondents, lacks jurisdiction to hear and determine the Petitioner's petition which seeks among other things to vary this Court's order for costs. The Respondent cited the cases of **In Re Morgan Kachinga Chellah¹** and **Zambia Privatisation Agency v Huddell Chisenga Chibichabo and Zamcargo Zambia Limited²** on the principle that there must be finality in litigation.
- [7] Premised on these authorities, the Respondent submitted that this Court has no jurisdiction to hear and determine the Petitioner's petition as it was *functus officio*.
- [8] The Respondent accordingly, prayed that this is a proper case in which this Court should exercise its discretion and dismiss the petition at this preliminary stage.

Petitioner's opposition to the motion

- [9] The Petitioner filed his arguments in opposition to the notice of motion on 3rd September, 2022. The crux of the Petitioner's opposition to the Respondent's motion is threefold.

- [10] Firstly, that the Respondent's reliance on Article 128(4) of the Constitution which prevents decisions of this Court from being appealable to the Supreme Court, as authority for this Court being *functus officio*, is flawed as the Petitioner has not appealed the decision of this Court in Cause No. 2021/CCZ/0021 to the Supreme Court but that the matter herein was originated by way of petition before this Court.
- [11] Secondly, that under Cause No. 2021/CCZ/0021, the Court was never invited to determine the constitutionality of section 30 of the Constitutional Court Act to the extent that since it confers discretionary power to the Constitutional Court to award costs in proceedings before it, it contravenes Articles 2, 52(4), 67(3), 101, 103(1) and 128(3) of the Constitution. That this Court cannot therefore, be said to be *functus officio* on an issue it never determined.
- [12] Thirdly, that the petition herein seeks to preserve and protect the adjudicatory forum of governance and to uphold decorum and integrity in the scheme of justice delivery. The Court's attention was drawn to the Kenyan cases of **Raila Odinga and 2 Others v Independent Electoral & Boundaries Commission³** and **Adrian Kamotho Njenga v The Attorney General and Others⁴** in which the court opined that it

is a legal and constitutional obligation of any court, from the basic level to the highest level to preserve and protect the adjudicatory forum of governance and to uphold decorum and integrity in the scheme of justice delivery.

[13] On the strength of these authorities the Petitioner's submission was that, the compelling principle must be to do substantive justice, so that justice must not only be done, but must also be seen to be done in every litigation that comes before the court rather than lay emphasis on the principle of finality.

[14] Premised on the above, the Petitioner submitted that the petition herein is properly before Court and that the Court is not *functus officio* and urged us to dismiss the Respondent's motion and proceed to hear and determine the petition on its merits.

Consideration and determination of the motion.

[15] Without delving into the merits of the case, we have examined the arguments by the respective parties for and against the motion to raise a preliminary issues and the petition herein which was brought pursuant to the provisions of Articles 1(5), 3 and 128 of the Constitution.

[16] In the main, the petition seeks the following reliefs:

- a. a declaration that section 30 of the Constitutional Court Act, to the extent that it confers discretionary power in the Constitutional Court to award costs violates Articles 2, 52 (4), 67(3), 101(4), 103(1), and 128(3) of the Constitution and therefore null and void; and
- b. a declaration that the award of costs by the Constitutional Court in Cause No. 2021/CCZ/0021 contravened Articles 2, 52(4), 67(3), 101(4), 103(1) and 128(3) of the Constitution and therefore the award of costs is null and void;
- c. Order (of Certiorari) quashing section 30 of the Constitutional Court Act and the award of costs in Cause No. 2021/CCZ/0021.

[17] It is clear that reliefs (a) and (c) above are anchored on the outcome of the 1st declaration sought.

[18] We will therefore consider the first relief in the petition which seeks for a declaration that Section 30 of the Constitutional Court Act to the extent that it confers discretionary power in the Constitutional Court to award costs, violates Articles 2, 52(2), 67(3), 101(4), 103 (1) and 128(3) of the Constitution and is therefore null and void.

[19] This relief alleges a contravention of the Constitution and is anchored on Article 128 (3) which provides as follows:

Subject to Article 28, a person who alleges that –

(a) an Act of Parliament or statutory instrument contravenes this Constitution, may petition the Constitutional Court for redress.

[20] In cases brought before this Court that allege violation or contravention of the Constitution, this Court guided in the case of **Bizwayo Newton Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia**⁵ as follows:

We note that the Respondents have put up spirited arguments as to why they feel the Petitioner should be curtailed and not be allowed to proceed and present his arguments on the alleged contravention of the Constitution. Our mandate is that when an allegation of the violation or contravention of the Constitution is presented before Court, the allegation must be heard and determined. As the Petitioner has specifically alleged that the 1st and 2nd Respondents have contravened and continue to contravene Articles 70 (1) (d) and 72 ((2) (b) of the Constitution, these allegations ought to be heard and determined by this Court on their merit.

[21] We reiterate these sentiments in this case. The allegation made by the Petitioner that section 30 of the Constitutional Court Act to the extent that it confers discretionary power on the Constitutional Court to award costs, violates Articles 2, 52(2), 67(3), 101(4), 103 (1) and 128(3) of the Constitution and is therefore null and void must be heard and determined on the merits.

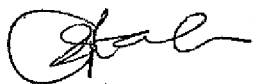
[22] We note that in fact the Respondent has at paragraphs 7 and 8 of the Answer (page 26 of the record of motion) responded to the allegations that section 30 of Constitutional Court Act contravenes the Constitution.

[23] Accordingly, we find that the petition is rightfully before this Court.

[24] Considering what we have said, we deem it inconsequential to consider the arguments as regards the issue of whether or not this Court is *functus officio* as regards Cause No. 2021/CCZ/002.

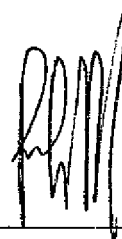
[25] The preliminary issue raised by the Respondent therefore, fails and is dismissed. This matter will proceed to trial and we send the record back to the single Judge to schedule the petition for hearing.

[26] We order each party to bear own costs.



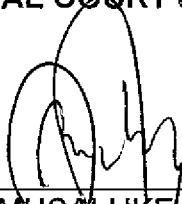
A. M. SITALI

CONSTITUTIONAL COURT JUDGE



P. MULONDA

CONSTITUTIONAL COURT JUDGE



M. MUSALUKE

CONSTITUTIONAL COURT JUDGE



J. Z. MULONGOTI

CONSTITUTIONAL COURT JUDGE