

IN THE CONSTITUTIONAL COURT OF ZAMBIA

2022/CCZ/0019

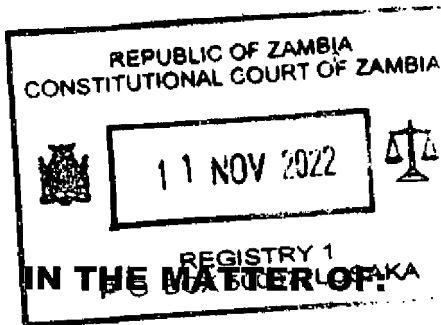
HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

**IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO.2 OF 2016 OF THE
LAWS OF ZAMBIA .**

**IN THE MATTER OF: THE ELECTORAL COMMISSION ACT
NO.35 OF 2016 AS AMENDED BY ACT NO.5
OF 2019**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
ARTICLES 3, 8 AND 92 (1) AS READ
TOGETHER WITH ARTICLES 216 AND 242
OF THE CONSTITUTION OF ZAMBIA
(AMENDMENT) ACT NO.2 OF 2016 OF THE
LAWS OF ZAMBIA**



**IN THE MATTER OF: ALLEGED CONTRAVENTION OF SECTION
5 (3) AND SECTION 6 (1) OF THE
ELECTORAL COMMISSION OF ZAMBIA
ACT NO.25 OF 2016 AS AMENDED BY ACT
NO.5 OF 2019**

**IN THE MATTER OF: ACTIONS BY THE PRESIDENT OF THE
REPUBLIC OF ZAMBIA AS REGARDS THE
REMOVAL OF THE VICE CHAIRPERSON
OF THE ELECTORAL COMMISSION OF
ZAMBIA**

BETWEEN:

EMILY JOY SIKAZWE

PETITIONER

AND

ATTORNEY GENERAL

RESPONDENT

JUSTICE ESAU CHULU(RTD)

INTENDED 2ND RESPONDENT

Before: Hon. Lady Justice J.Z Mulongoti in Chambers on the 11th day of November, 2022

For the Petitioner : Mr. S. Sikota SC, of Central Chambers

For the Respondent: Mr. C. Watopa, State Advocate, Attorney General's Chambers

For the Intended 2nd Respondent: Mr. N. Ng'andu of Shamwana and Company

R U L I N G

Cases referred to:

- 1. *Mike Hamusonde Mweemba v Zambia State Insurance Corporation (2006) Z.R 101***
- 2. *Corpus Legal Practitioners v Mwandani Holding Limited SCZ Judgment No.50 of 2014***
- 3. *Sachar Narendra Kumar v Josephs Brown Mutale SCZ Appeal No.8 of 2013***
- 4. *Attorney General v Delson Chibaya and Others SCZ Appeal No.70 of 2011***
- 5. *Wise v EF Hervey Limited SCZ Judgment No.18 of 1985***
- 6. *Sharp v Wakefield (1891) AC 17 at 179***
- 7. *Suhayl Dudhia v Samir Karia and Citi Bank Zambia Limited SCZ Appeal No. 107 of 2015***
- 8. *Joseph Malanji and Bowman Lusambo v The Attorney General and Electoral Commission of Zambia 2022/CCZ/0018***

Legislation and works 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. *Halsbury's Laws of England, vol.37 4th edition, paragraph 256, page 82***

[1] The Attorney General, the respondent herein, applied for joinder of the intended second Respondent to the petition before the Court. The application was made by summons pursuant to Order 5 rule 4 (b) of the Constitutional Court Rules (CCR). The summons was accompanied by an affidavit deposed to by the Solicitor General Marshal Muchende, SC. The essence of the affidavit is that the petition raises issues against the intended second respondent who was the Chairperson of the Electoral Commission at the time he signed the employment contract for the petitioner, Emily Joy Sikazwe, for the position of Vice Chairperson.

[2] It was further deposed that it has become imperative to join the intended second Respondent because when he signed the contract he was on a frolic of his own and he would be affected by the outcome of these proceedings.

[3] In support of the application the Attorney General filed skeleton arguments. It was argued that Order 5 rule 4 (b) of the CCR gives this Court unbridled authority to join any person to the proceedings to enable it adjudicate upon and settle the matter. Further, reliance was placed on the

persuasive case of **Mike Hamusonde Mweemba v Zambia State Insurance Corporation**¹ wherein it was held that:

A Court can order joinder if it appears to the Court or Judge that all persons Who may be entitled to or claim some share or interest in the subject matter of suitor who maybe likely to be affected by the result require to be joined.

[4] Reliance was further placed on the cases of **Corpus Legal Practitioners v Mwanandani Holding Limited**² and **Sachar Narendra Kumar v Josephs Brown Mutale**³ to the effect that joinder can be made at any stage of the proceedings to enable all parties who may be affected by the outcome to be joined.

[5] It was argued further that the intended second respondent was on a frolic of his own when he gave the petitioner a contract of employment which was more than the period made by the President as appointing authority, contrary to the Supreme Court decision in the case of **Attorney General v Delson Chibaya and Others**⁴ which holds that parties cannot contract themselves out of a statutory provision. I was urged to grant the application for joinder as it is appropriate to do so in the circumstances of this instant case.

[6] The petitioner, Emily Joy Sikazwe, objected to the application for joinder via an affidavit in opposition deposed by herself. She averred that the petition

does not raise any issues against the intended second respondent as she has no claims against him neither would he be affected by the outcome of the petition. In addition, that if the intended second respondent is joined, the petitioner would be prejudiced as she would have to recast her case and make extra copies of all the documents. Furthermore, that adding another party to the action would lengthen the time it would take to dispose of the matter. Importantly, also, that the respondent has not demonstrated how the intended second respondent would be affected by the petition and neither has the intended second respondent indicated that he wished to be a party to the petition.

[7] The petitioner also filed skeleton arguments in opposition. She reproduced the constitutional questions raised in the petition (numbered (i) to (ix)) *inter alia*, whether the independence of the Electoral Commission of Zambia has been maintained as envisaged by Article 216 of the Constitution, whether the President did not breach the Supremacy of the Constitution by overthrowing, suspending or illegally abrogating the Constitution in issuing his letter dated 7th June 2022 to the petitioner and whether in issuing that letter the President did not breach Article 8 of the Constitution by not following the national values and principles of good governance. It was argued in that regard that what is in issue, therefore, is the President's actions

to interfere with the workings of a constitutional body which is supposed to be independent.

[8] The petitioner further argued that the case of **Mike Hamusonde Mweemba**¹ is inapplicable as it was based on tort whilst her case is in contract law. She admitted that Order 5 rule 4 (b) allows for joinder however, it was argued that the respondent has not demonstrated why it was necessary to add the intended second respondent. And that if they wished to get evidence from him, the proper action would be to call him as a witness and not bring him in as a passenger to an action which makes no claim against him.

[9] It was further argued that the facts of **Corpus Legal Practitioners v Mwandani Holding Limited**² are very different from the instance case.

[10] That in that case the plaintiff was seeking to join the intended 6th defendant against whom they were making a claim which is not the case herein. While the case of **Sachar Narendra Kumar v Josephs Brown Mutale**³ destroys the respondent's case for joinder because the Supreme Court further held that:

It is therefore our considered view that even though the application was within time and the law allows the respondent to add or substitute a party, it would not be in the

interest of justice in the current case to add AT Computers at this late hour simply because the rules of court allow such joinder. We would be failing in our duty as the Court, if we allowed all kinds of applications simply because a party is within his rights to do so. We say so as we are not persuaded that it would be in the interest of justice to order the joinder of AT Computers Limited as the interest of justice also demands that cases must come to finality.

[11] The petitioner also submitted that the respondent does not raise any reasonable claim against the intended second respondent. The case of **Wise v E.F Hervey Limited**⁵ was cited to support that argument as held that:

The learned judge referred to *Letung v Cooper* and cited with approval the meaning assigned to the phrase ‘cause of action’ by Lord Diplock when he said the words meant simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The learned trial judge referred to Order 1 S /1/ZA R.G.C 1 9 T9 Edition, in which the words cause of action have been said to refer to every fact which it will be necessary for a party to prove, if traversed, to his right to the judgment of the Court. We agree entirely with these expositions of the legal requirements as to what should be alleged in order to disclose a cause of action.” (underlined for emphasis)

[12] In conclusion, it was submitted that no cogent reason or cause of action against the intended second respondent has been advanced as to why the retired justice Chulu must be dragged out of quiet retirement and

unnecessarily paraded before the Court. Accordingly, that the application for joinder should be dismissed with costs.

[13] For his part, the intended second respondent filed an affidavit in opposition in which he deposed that he signed the petitioner's contract of employment in his capacity as then Chairperson of the Electoral Commission of Zambia and thus he does not have any personal interest in the current proceedings.

[14] In his skeleton arguments, the intended second respondent argued that although Order 5 rule 4(b) of the CCR empowers the Court to join a party whose presence before the Court may be necessary in order for it to adjudicate and settle the matter, the power is discretionary and not absolute and ought to be exercised judiciously. The case of **Sharp v Wakefield**⁶ was relied upon which holds that:

An extensive power is confined to the justice in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion..; according to law, and not humor. It is to be, not arbitrary, vague, and fanciful but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself...

[15] It was further argued that the issue of joinder has been pronounced in a plethora of authorities such as **Suhayl Dudhia v Samir Karia and Citi Bank**

Zambia Limited⁷ where the Supreme Court laid down the following conditions:

1. **There must be a person who may be entitled to or claim some share or interest in the subject matter of the suit or may be likely affected by the suit;**
2. **The person's presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon;**
3. **The affidavit in support or the pleadings must establish a nexus with the person sought to be joined to the proceedings.**

[16] Additionally, that in **Joseph Malanji and Bowman Lusambo v The Attorney General and Electoral Commission of Zambia**⁸ this court summed up the position as follows:

It is trite for a party to be joined to proceedings, the Court must satisfy itself that such a party possess sufficient interest in the subject matter before Court.

[17] Accordingly, that the rationale for an order of joinder is to ensure that all interested parties to the suit are before Court so that all matters in dispute maybe completely determined and adjudicated upon. The argument that the intended second respondent was on a frolic of his own when he signed the petitioner's contract of employment is acknowledged, however, it is argued that there is nothing to suggest that when the intended second respondent signed the contract, he did not do so in good faith. Furthermore, that the

case of **Attorney General v Delson Chibaya**⁴ is not applicable to the case of the intended second respondent.

[18] In sum, the intended second respondent contends that the respondent has not demonstrated that he has sufficient interest in the matter to warrant the joinder. There is no claim against him and no nexus between the petition and the intended second respondent. It is the prayer of the intended second respondent that the application is destitute of merit and it should be dismissed with costs payable forthwith.

[19] At the hearing of the application, the state advocate, Mr. Watopa, relied on the respondent's affidavit in support of the application sworn by the Solicitor General, Marshal Muchende, SC.

[20] Mr. Sikota, SC, who appeared for the petitioner relied on the petitioner's affidavit in opposition and skeleton arguments. In augmenting, he relied on the **Suhayl Dudhia**⁶ case highlighting that the Supreme Court further stated that:

It would not augur well for administration of justice to haul an intended joinder through the court system at great cost without a scintilla of evidence what interest it has and how it may be affected by the results.

[21] Learned State Counsel maintained that in the case in hand there isn't any scintilla of evidence of what interest the intended second respondent has

and how he will be affected by the outcome. Moreover, since the petitioner has stated that she has no claims against the intended second respondent.

[22] Counsel for the intended second respondent, Mr. Ngandu, also relied on the intended second respondent's affidavit in opposition and skeleton arguments. To augment, he submitted that the respondent has failed to demonstrate interest of the intended second respondent. And, that the respondent would suffer no prejudice if the intended second respondent is not joined to the proceedings.

[23] In reply, the learned state advocate, Mr Watopa, submitted that in the **Suhayl Dudhia** case the Court also stated that:

The person's presence before court is necessary to ensure that all matters in dispute maybe effectively determined.

[24] It was thus contended that the intended second respondent's presence is necessary for the Court to deal with the dispute because as Chairperson as he was on a frolic of his own when he gave the petitioner the second contract for a period more than that given by the appointing authority being the President, as it is settled law that parties cannot contract outside the provisions of statute. In addition, that it is in the interest of justice that the intended second respondent be joined to the proceedings.

[25] I have considered the application, submissions and the decisions relied on. It is settled that the purpose of joinder of a party is to join a party which has sufficient interest in the matter and is likely to be affected by the outcome or decision of the matter. Flowing from Order 5 rule 4(b) of the CCR and the authorities cited the Court has discretionary power to join a party or not to the case. According to Halsbury's Laws of England volume 37, paragraph 256 at page 82, the circumstances of the case must justify the joinder, in that they raise a doubt as to which of the defendants is liable.

[26] The circumstances of this case are such that the petitioner filed a petition in this Court alleging, primarily, that the President contravened the provisions of, *inter alia*, Articles 216 and 242 of the Laws of Zambia as read with sections 5 (3) and 6 (1) of the Electoral Commission Act. I find it necessary to point out at this stage that this Court is a specialized court with exclusive jurisdiction to hear and determine constitutional matters as provided in Article 128 of the Constitution. Article 128 provides, in part that:

"128 (1) Subject to Article 28, the Constitutional Court has jurisdiction original and final jurisdiction to hear-
(a)-----
(b) a matter relating to the violation or contravention of the Constitution

[27] As already alluded to, the petitioner is alleging that the respondent via the President's actions contravened various articles particularly Articles 216 and 242 of the Constitution when by letter dated 7th June 2022, the

incumbent President terminated her contract of employment which was purportedly due to expire on 5th October, 2027. The petition thus, *prima facie* raises constitutional issues of alleged contravention of the said articles by the respondent.

[28] According to the petitioner, the termination of her contract is unconstitutional for breach of the Constitution. Without delving into the merits; the circumstances of this case are such that there is no doubt as to how the cause of action arose. Issues of how the contract was signed do not arise. The petitioner has no grievance, at least not in this Court, against her former employer of which the intended second respondent was the Chairperson. Neither has she made any claim or grievance against the intended second respondent in this court to warrant joinder. Her case is simply that termination of her contract resulted in contravention of the Constitution. This is the main matter to be determined by the full court, as to whether there was infact contravention of the Constitution when the respondent terminated the petitioner's contract.

[29] Furthermore, I am of the considered view that the application being made by the respondent is misconceived. As argued by the petitioner and the intended second respondent's counsel, the authorities relied on by the respondent to support the application are inapplicable in *casu*. It has not been

shown how the intended second respondent would be affected by the outcome or his interest in the matter. Neither has it been shown which statute was violated and nexus to the Petition or the Constitutional issues raised. The grounds upon which the respondent seek joinder of the intended second respondent are therefore, insufficient for me to exercise discretion to join him.

[30] The upshot of the preceding paragraphs is that the application for joinder is unsuccessful and accordingly dismissed. Each party to bear own costs.

Delivered at Lusaka this 11th day of November, 2022

A handwritten signature in black ink, appearing to read 'J. Z. Mulongoti', is written over a horizontal line.

**J. Z Mulongoti
Constitutional Court Judge**