CONSTITUTIONAL COURT OF ZAMBIA 2021/CCZ/A0021

CONSTITUTIONAL COURT REGISTRY

HOLDEN AT LUSAKA

(Appellate Jurisdiction)

IN THE MATTER OF: ARTICLES 73(1) AND (3) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF ARTICLES 70 (1) (a) (b) (c) AND (d) AS READ TOGETHER WITH ARTICLE 52 (1) (2) AND (3) OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF THE LAWS OF ZAMBIA

AND

IN THE MATTER OF: SECTION 97 (1) (2) (c) OF THE ELECTORAL PROCESS ACT NO. 35 OF 2016 OF THE LAWS OF ZAMBIA

BETWEEN:

JOSEPH MALANJI APPELLANT

AND

CHARLES ABEL MULENGA 1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA 2ND RESPONDENT

Coram: Sitali, Mulenga, Mulonda, Munalula and Mulongoti JJC on 10th February, 2022 and 24th February, 2022

For the Appellant: Mr B. Mwelwa of Linus E Eyaa and Partners with Mr. J. Chibwe of Messrs Ferd Jere and Co.

For the 1st Respondent: Mr M. Kasaji of Messrs CL Mundia and Company

For the 2nd Respondent: Mr B.M. Musenga with Mr M.Bwalya, in-house counsel, Electoral Commission of Zambia

RULING

Munalula JC., Delivered the Ruling of the Court

Cases referred to:

1. Sentor Motors Ltd and 3 Other Companies SCZ Judgment No. 9 of 1996
2. Ladd v Marshall [1954] 1W.L.R. 1489
3. Zambia Revenue Authority v Hitech Trading Company Limited SCZ Judgment No. 40 of 2000
4. Saluja v Gill (T/a as P Gill Estate Agents Property Services) and Another (2002) EWHC 1435 (Ch) 24

Legislation referred to:

Constitutional Court Act No. 8 of 2016
Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia
Constitutional Court Rules Statutory Instrument No.37 of 2016

Work referred to:

Rules of the Supreme Court, 1999 (White Book)

This Ruling relates to a Notice of Motion seeking an Order to produce the Applicant's grade 12 certificate at the hearing of the Applicant's appeal against a decision of the High Court nullifying his election as Member of Parliament for Kwacha Constituency. The Notice of Motion was filed on 20th January, 2022 pursuant to section 25 (1) (b) of the Constitutional Court Act No. 8 of 2016 (henceforth "the Act").

In the Affidavit in Support of the Notice of Motion, the Applicant deposed that he was in possession of the mandatory minimum qualification of a grade 12 certificate and had successfully filed his nomination as Member of Parliament for Kwacha Constituency. He deposed further, that the grade 12 certificate was confirmed by the Examination Council of Zambia on 16th March, 2021. Exhibited in the Affidavit was a letter entitled "confirmation of

grade 12 certificate – equivalent" together with the related general certificate of education (GCE) qualifications as three separate certificates.

The Applicant filed a List of Authorities and Skeleton Arguments in support of the Notice of Motion as well as an Affidavit and Skeleton Arguments in Reply which counsel for the Applicant augmented at the hearing. The gravamen of the Applicant's arguments was that by virtue of section 25 (1) (b) (i) and (ii) this Court has the power at the hearing of an appeal, to order the production of any document, exhibit or other thing or call for the examination of a witness.

The case of **Sentor Motors Ltd and 3 Other Companies**[1] was cited in support of the plea that the Court must not abdicate its responsibility to adjudicate on all matters in issue. It was contended that as the apex court in constitutional matters, this Court is *sui generis* and is not bound by common law principles or by the authorities cited by the Respondent. Hence, the only two tests to be applied were "necessity" and "expediency", in the interest of justice.

On this basis, the Court was implored to call for the production of the Applicant's grade 12 certificate and, if desired, to call the Director of the Examinations Council of Zambia to validate the grade 12 certificate. That this

be done in the interest of justice and in the public interest as it would prevent the holding of a costly and unnecessary by election in Kwacha Constituency.

The 1st Respondent opposed the application by filing an Affidavit in Opposition to the Notice of Motion for an Order to produce the grade 12 certificate on 28th January, 2022. He deposed that the documents that the Applicant seeks to produce could have been obtained and produced with reasonable diligence at the trial before the lower court.

In the accompanying Skeleton Arguments, it was not disputed that this Court has the power under section 25 (1) (b) of the Act to order the production of documents and exhibits or call witnesses. However, it was contended that the power is not unlimited. That the Applicant is attempting to re-litigate the matter which was before the High Court and it would not be in the interest of justice to allow him to do so. That what was at issue was whether this was a proper case in which the Court should exercise its discretion to allow the Applicant to produce the intended documents.

The basis of the 1st Respondent's contention was that an appellate court rarely admits fresh and/or further evidence on appeal. That it can only do so, if the principles of non-availability, relevance and reliability, as laid down in **Ladd v Marshall**[2] apply. That the Applicant needed to show that the

evidence could not have been obtained with reasonable diligence for use at trial; that the evidence, if given, will have an important influence on the result at trial; and that the evidence must be credible, though it need not be incontrovertible.

It was contended that the authors of the Rules of the Supreme Court, 1999 edition (henceforth the "White Book") cited **Ladd v Marshall**[2] with approval in Order 59 rule 10. Further, that both **Ladd v Marshall**[2] and Order 59 rule 10 were cited with approval by the Supreme Court of Zambia in the case of **Zambia Revenue Authority v Hitech Trading Company Limited.**[3]

The 1st Respondent reasoned that the imposition of strict requirements that prohibit the production of fresh evidence on appeal advances public policy considerations that litigants must present their entire case at trial. The case of **Saluja v Gill (T/a as P Gill Estates Agents Property Services) and Another**[3] was cited in support of the claim that a matter should be heard at once and not piecemeal so as to be relitigated on appeal.

It was opined that allowing the application would open a *Pandora* box for all lower courts as it would be a total departure from the common law principles followed by the lower courts which are bound by this Court. The 1st

Respondent thus concluded that the Motion must be found to have no merit and be dismissed accordingly.

The 2nd Respondent did not file any process in response to the Motion and left it to the Court to guide accordingly.

We have considered the Notice of Motion, the affidavits and skeleton arguments both written and oral in support of the Notice of Motion and in Reply as well as the 1st Respondent's affidavit in opposition and supporting skeleton and oral arguments.

The issue as we see it is whether this is an appropriate case in which the Court should grant the order sought; it being an order to produce the Applicant's grade 12 certificate and /or in the alternative to call the Director of the Examinations Council of Zambia to come and attest to the validity of the certificate. We say so because section 25 (1) (b) (i) and (ii) of the Act gives this Court a discretionary power to order the production of a document, exhibit or other thing and / or in the alternative, to call a witness at the hearing of an appeal.

Section 25 (1) (b) reads:

> **25 (1) The Court <u>may,</u> on the hearing of an appeal-**
> **(b) where <u>necessary and expedient in the interest of justice-</u>**

> **(i) order the production of a document, exhibit or other thing connected with the proceedings, the production of which appears to the Court necessary for the determination of the case.**
> (ii) **order a witness who would have been a competent and compellable witness at the trial to attend and be examined before the Court, whether he was or was not called at the trial, or order the examination of the witness to be conducted in the manner provided by the rules before any judge of the Court or before an officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any deposition so taken before the Court;**(emphasis added)

The power to make the order sought is therefore not in doubt. What is at issue is whether doing so in this case would be appropriate.

It is trite that discretion ought to be exercised judiciously. As provided in section 25 (1) (b) of the Act, allowing the production of documents or calling witnesses during the hearing of an appeal must be in furtherance of necessity and expediency in the interest of justice. The question is – what does furthering necessity and expediency in the interest of justice entail?

To answer the question, we found it helpful, to look to Order 59 rule 10 of the White Book, which we may resort to by virtue of Order I rule 1(1) of the Constitutional Court Rules (henceforth the "Rules"). Order I rule 1 (1) of the Rules reads:

> **1 (1) The jurisdiction vested in the Court shall, as regards practice and procedure be exercised in the manner provided by the Act and these Rules, the Criminal Procedure Code or any other written law, or by such rules, orders or directions of the Court as may be made under the Act, the Criminal**

> **Procedure Code or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and the law and practice applicable in England in the Court of Appeal up to 31st December, 1999.**(emphasis added)

Having shown that we may resort to the White Book and specifically to Order 59 rule 10 sub-rule 2 we wish to cite it in full. It reads:

> **The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of trial or hearing) shall be admitted except on special grounds.**(emphasis added)

We also wish to cite the relevant portion of the related explanatory Notes. Note 59/10/11 on applications for leave to adduce further evidence reads as follows:

> **Where there has been a "trial or hearing on the merits" (see para. 59/10/12) fresh evidence cannot be admitted before the Court of Appeal unless:**
>
> **(i) "special circumstances" have been established (r. 10 (2)). To establish "special circumstances" the applicant must satisfy the three conditions laid down in Ladd v Marshall, see para59/10/13 *et seq.*); or**
>
> **(ii) It is one of the exceptional cases where the Ladd v Marshall conditions do not apply, or apply only in a modified form (see para. 59/10/13 *et seq*); or**
>
> **(iii) "the evidence relates to matters which have occurred after the date of the trial or hearing"(see para. 59/10/18 below)**

The case of **Ladd v Marshall**[2] being at the heart of Order 59 rule 10, it is only fitting, at this stage, that the relevant portion of the Court's decision is also cited. It reads:

> **In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be credible although it need not be incontrovertible**

The sum of all this is that the reception of fresh evidence during the hearing of an appeal in this Court is exceptional.

This is so because the admission of such evidence has the potential to undermine the principle that litigation ought to come to an end. That an appeal should not be a second trial. We adopt as our own, the principles that for fresh evidence to be admissible it should not have been obtainable with reasonable diligence at the time of trial. That it must also be both significant and credible. This to us is the import of "necessity" and "expediency" in the interests of justice as laid out in section 25 (1) (b).

We are fortified in taking this approach by section 25 (1) (b) (i) and (ii) of the Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia which is in all material aspects identical to section 25 of the Act. It reads:

25. (1) On the hearing of an appeal in a civil matter, the Court-
(b) may, if it thinks it necessary or expedient in the interests of justice-
(i) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;
(ii) order any witness who would have been a competent and compellable witness at the trial to attend and be examined before the Court, whether he was or was not called at the trial, or order the examination of any such witness to be conducted in manner provided by rules of court before any judge of the Court or before any officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any deposition so taken before the Court;(emphasis added)

The fact that section 25 (1) (b) as set down in the Supreme Court Act is on all fours with section 25 (1) (b) in the Act is significant. As the 1st Respondent rightly argued, this Court is exercising appellate jurisdiction over matters determined by the lower court which is an integral part of the general court hierarchy and is bound by the decisions of this Court and the Supreme Court. To assign the provision in the Act a special meaning is not only unhelpful but it will also not augur well for the system as a whole. There ought to be a uniform understanding of the provisions.

We say so alive to the Applicant's suggestion that as the apex Court in constitutional matters, we must not be hindered by common law principles in coming to a just decision. Our short answer to this line of thought is that we are sitting as an appellate court. The question before us is procedural. It is not a constitutional question *per se*. We are therefore at liberty to adopt a

procedure which we find to be sound and fair particularly where the procedure is already an established and effective part of the legal system that is the purview of the Constitution which we are mandated to interpret. We sit at the top of a system steeped in the common law traditions which include the principle that there must be finality to litigation. Hence, the need to restrict the admission of fresh evidence during the hearing of an appeal except in exceptional circumstances. It is a principle that we agree with and have adopted accordingly.

With this in mind, we now turn to the specific request by the Applicant. We note that the Applicant's intended exhibits were, according to the Applicant's own testimony, duly presented to the 2nd Respondent at nomination. This was before the impugned election. They were therefore already at hand at the time of the trial.

To permit their production at this time would therefore defeat the principle that the fresh evidence sought to be admitted on appeal should not have been obtainable with reasonable diligence at the time of the trial. This Application has therefore not met the requirements for necessity and expediency in the interests of justice required by section 25 (1) (b) of the Act.

We find that the Notice of Motion for an order to produce the Respondent's grade 12 certificate and / or to order the attendance of the witness to validate the said certificate has no merit and it is dismissed.

Each party is to bear their own costs.

A.M. Sitali

Constitutional Court Judge

M.S. Mulenga

Constitutional Court Judge

P. Mulonda

Constitutional Court Judge

M.M. Munalula (JSD)

Constitutional Court Judge

J.Z. Mulongoti

Constitutional Court Judge