

IN THE HIGH COURT FOR ZAMBIA
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA (CIVIL JURISDICTION-CONSTITUTIONAL)

2008/HP/1044

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF ZAMBIA (CAP/1)
 IN THE MATTER OF: ARTICALE 76
 IN THE MATTER OF: THE ELECTORAL ACT, NO. 12 OF 2006
 IN THE MATTE OF : SECTIONS 4(2), 12(1) (a) AND 13(1) OF THE ELECTORAL
 (CODE OF CONDUCT) 2006

BETWEEN:

ANTI-RIGGING ZAMBIA LIMITED (BY GUARANTEE) APPLICANT

AND

ZAMBIA NATIONAL BROADCASTING CORPORATION	1 ST RESPONDENT
TIMES PRINT PARK ZAMBIA LIMITED	2 ND RESPONDENT
ZAMBIA DAILY MAIL LIMITED	3 RD RESPONDENT
THE ELECTORAL COMMISSION OF ZAMBIA	4 TH RESPONDENT
ATTORNEY GENERAL	5 TH RESPONDENT

Before Honourable Madam Justice H. Chibomba this 29th day of October, 2008.

<i>For the Applicant</i>	: <i>Mr. K. F. Bwalya of KBF & Partners</i>
<i>For the 1st Respondent</i>	: <i>Mr. P. Songolo, Legal Counsel, Zambia National Broadcasting Corporation</i>
<i>For the 2nd Respondent</i>	: <i>Mr. J. Musonda, Assistant Legal Counsel, Times Print Park Zambia Limited</i>
<i>For the 3rd Respondent</i>	: <i>Mr. G. Zulu, Legal Counsel, Zambia Daily Mail Limited</i>
<i>For the 4th & 5th Respondent</i>	: <i>Mrs. M. C. Kombe, Acting Chief State Advocate, Attorney-General's Chambers</i>
	: <i>Mr. E. Kamwi, Legal Counsel, Electoral Commission of Zambia</i>
	: <i>Mr. M. Mukwasa, State Advocate, Attorney General's Chambers</i>

J U D G M E N T

By Originating Summons, the Applicant, Anti-Rigging Zambia Limited (by Guarantee) prays for the following relief from the 1st Respondent, Zambia National Broadcasting Corporation, the 2nd Respondent, Times Print Park Zambia Limited, the 3rd Respondent, Zambia Daily Mail Limited, the 4th

Respondent, the Electoral Commission of Zambia and the 5th Respondent, the Attorney-General:-

1. *A directive that the 1st, 2nd and 3rd Respondents who are public media must give equal and balanced coverage to all political parties.*
2. *That the allocating of unequal public air time on radio and Television to some political parties, particularly, the opposition by the 1st Respondent is contrary to the provisions of section 13 of the Electoral (Code of Conduct) 2006.*
3. *That the provision of unbalanced reporting towards the opposition by the 2nd and 3rd Respondents' newspapers is contrary to the provisions of section 12 of the Electoral (Code of Conduct) 2006.*
4. *That the 4th Respondent has an obligation to ensure that all the provisions of the Electoral (Code of Conduct) 2006 are adhered to by all stake holders.*
5. *Costs".*

At the hearing of the Originating Summons, the Learned Counsel for the Applicant relied on the Affidavit in Support and on the Skeleton Arguments filed on 10th October, 2008 and on the Further Skeleton Arguments filed on 21st October, 2008. Paragraphs 3, 4, 5, 6 and 7 of the Affidavit in Support provide that and I quote:-

3. *That the recent television and radio broadcasts by the 1st Respondent clearly show that the ruling party is given more campaign air time than any other political party, especially during News Time and Peak broadcasting time.*
4. *That the recent publications by the 2nd and 3rd Respondents in their Newspapers indicate unbalanced reporting of the campaigns in that the Movement for Multi-Party Democracy seems to receive more coverage than any other political party during this campaign period. See exhibits marked KMS1 collectively.*
5. *That I am advised by counsel and verily believe the same to be true that all public television, radio and in newspapers publications should allocate equal air time on television, radio and newspaper during any campaign period.*
6. *That I am advised by counsel and verily believe the same to be true that all print and electronic media should give fair and balanced coverage to all political parties, during the campaign period.*
7. *That I am further advised by counsel and verily believe the same to be true that the 4th Respondent has a duty to ensure that every one abides by the provisions of the Electoral (Code of Conduct) 2006 which the 4th Respondent has so far failed to do".*

On the other hand in opposing this Action, the Learned Counsel for the Respondents relied on their respective Affidavits in Opposition and on the Skeleton Arguments filed herein.

In accordance with the Affidavit in Opposition filed by the 1st Respondent, the 1st Respondent has adhered to the provisions of the Electoral Act and its Code of Conduct and has put a premium on accurate, fair, impartial and provision of balanced information on the election. The 1st Respondent referred to the News Bulletins attached as Exhibit "MM2" to the said Affidavit as supporting the claim that it has complied with the provisions of Section 12(1) of **Code of Conduct**.

Further that Regulation 13(1) of the Electoral (Code of Conduct 2006) has also been complied with and that all political parties are at liberty to purchase as much air time as they wish so long as they comply with the Code of Conduct.

In the Further Affidavit in Opposition filed on 20th October, 2008, it is averred on behalf of the 1st Respondent that coverage of this election has been done and that the Procedures for coverage of elections have been complied with as evidenced by Exhibits "MM1" to be said Further Affidavit which show that the opposition political parties and candidates have been covered.

On the other hand, the Learned Counsel for the 2nd Respondent relied on the Affidavit in Opposition filed on 15th October, 2008. Paragraphs 5, 6 and 7 thereof provide that and I quote:-

"5. *That in response to paragraph 4 of the Applicant's Affidavit in Support of Originating Summons, the 2nd Respondent avers that it has given equal and balanced coverage to all*

political parties during this campaign period as evidenced by articles appearing on front pages of its Newspaper dated 10th, 11th and 12th October, 2008. Now shown to me marked "CMI" collectively are copies of the said front pages of the newspaper.

6. That in response to paragraphs 5 and 6 of the Applicant's Affidavit in Support of Originating Summons, the 2nd Respondent avers that its newspaper has provided fair and balanced reporting of campaigns, policies, meetings, rallies and press conferences of all registered political parties and candidates during the period of campaigning.
7. That one senior reporter has been assigned to accompany each presidential candidate whenever they are going on campaign tours."

The Learned Counsel for the 3rd Respondent also relied on the Affidavit in Opposition filed on 15th October, 2008. Paragraphs 7, 8, 9 and 10 thereof provide that and I quote:-

- "7. That Paragraph 4 of the Affidavit in Support is hereby denied. The 3rd Respondent has been fair to all political parties in its reporting. There has not been any unbalanced reporting of the campaigns as alleged.
8. That all political parties are also freely allowed to pay and advertise as they wish in our Newspaper. The volume of these advertisements differ from one political party to another, thus creating a wrong perception of unbalanced coverage.
9. That with regard to Paragraphs 5 and 6 of the said Affidavit in Support, I am advised by Legal Counsel, and verily believe that there has not been any breach of the Electoral (Code of Conduct) 2006 by the 3rd Respondent with regard to the rule on providing fair and balanced coverage or reporting of activities of political parties.
10. That now shown to me and exhibited hereto marketed "GCI" are examples of coverage and reporting of political parties activities by the 3rd Respondent. The same show a fair, equal and balanced coverage to all parties".

The Learned Acting Chief State Advocate for the 4th and 5th Respondents relied on the Affidavit in Opposition filed on 16th October, 2008 and on the Further Affidavit in Opposition filed on 21st October, 2008. Paragraphs 5, 6 and 7 of the Affidavit filed on 16th October, 2008 provide that and I quote:-

- "5. That the 4th Respondent has not failed to carry out its duty of ensuring that every one abides by the provision of the Electoral Code of Conduct, Statutory Instrument No. 90 of 2006.
6. That the 4th Respondent has in fact taken all reasonable and practicable steps to not only publicize the Code of Conduct throughout the Republic of Zambia but also has provided conditions conducive to the observance of the Code as follows:-

- (a) *by the publication and distribution of the Electoral Code of Conduct to all stakeholders including the media.*
- (b) *By the sponsoring of programmes on Radio and Television in which the Presidential Candidates in the 30th October, 2008 can articulate and express their political opinions, debate their policies and the programmes of their political party's and canvas freely for membership and support from voters. The 4th Respondent has purchased air time on ZNBC and be shared equally by the candidates and some of them have since appeared on the media while others have neglected to do so.*
- (c) *By the holding of countrywide workshops for medial personnel in relation to the upholding of provisions of the electoral code. There is hereby produced and marked collectively "DNK 1" copies of documents to this effect."*

Paragraphs 5, 6, 7 and 8 of the Further Affidavit in Opposition filed on 22nd October, 2008 provide that and I quote:-

5. *That the 4th Respondent has established conflict management committees at both National and District level to administer the Electoral Code of Conduct as required by Section One Hundred and Eleven of the Electoral Act, No, 12 of 2006.*
6. *That the National Committee of Conflict Management has heard and resolved three complaints brought to its attention by the Electoral Commission from different political parties during this election and has other matters to resolve before the October, 30th Presidential elections.*
7. *That district committees have also heard and resolved several similar cases and continue to do so. Now shown and produced are documents to that effect marked "DNK" collectively.*
8. *That to the best of my information and knowledge, the Applicant has not lodged any complaint with any officer of the 4th Respondent or the National or any District Conflict Management Committee regarding the alleged unbiased coverage by the 1st, 2nd and 3rd Respondents."*

As afore-stated, the learned Counsel for the parties relied on arguments advanced in the Skeleton Arguments. These are on record. Article 76 of the Constitution which establishes the 4th Respondent provides that and I quote:-

"There is hereby established an autonomous Electoral Commission to supervise the registration of voters, to conduct Presidential and Parliamentary elections and to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National Assembly."

Regulation 4(2) of the Electoral (Code of Conduct) 2006 provides that and I quote:-

"The Commission and any member of the Zambia Police shall enforce the Code and shall promote conditions conducive to the observance of the Code."

Regulation 12(1) provides that:-

"12(1) All print and electronic media shall:-

- (a) Provide fair and balanced reporting of the campaigns, policies, meetings, rallies and press conferences of all registered political parties and candidates during the periods of campaigning."*
- (b) All public television and radio broadcasters shall allocate public air time equally to all political parties for their political broadcasts."*

The Applicant's contention is that the 1st, 2nd and 3rd Respondents have failed to comply with the provisions of Regulations 12(1) and 13(1) and (2) of the Code as they have failed to comply with the above provisions of the Code by allocating much more air time and coverage to the ruling party and its candidate than other political parties and that the unbalanced media coverage puts opposition candidates at a disadvantage.

The Applicant argued that the 4th Respondent has failed to ensure that the Code of Conduct is adhered to as expressly provided under Regulation 4(2) and has so far failed to enforce these Regulations. The Applicant alleged that all the Respondents have no defence for failing to adhere to the Code other than fear of loss of their jobs. That a declaration by this court will therefore, protect the Respondents to do their jobs without fear or favour.

On the other hand, the Respondents disputed the above allegations contending that they have complied with the provision of Regulation 12(1) and 13(1) and (2) of the Code claiming that each has provided equal air time and fair and balanced reporting of all the campaign activities of all political parties. Each of the Respondents attached Bulletins and Publications as proof of compliance with the Code.

Section 3 of the Electoral Act No. 12 of 2006 referred to in the 4th and 5th Respondents' Skeleton Arguments provides that and I quote:-

- (1) *This Act shall be administered and enforced by the Commission; provided that in the exercise of its functions under the Constitution and this Act, the Commission shall not be subject to the direction or control of any other person or authority.*
- (5) *"The Anti-Corruption Commission shall investigate and prosecute any corrupt practice committed under the Act in accordance with the Anti-Corruption Commission Act.*
- (6) *"The Zambia Police Force shall enforce law and order at a polling station and undertake any criminal proceedings, subject to subsection (2) in respect of any offence committed by any person in contravention of this Act or any regulations issued under this Act".*

Regulation 4(2) of the Electoral (Code of Conduct) 2006 provides that:
"The Commission and any member of the Zambia Police Force shall enforce the Code and shall promote conditions conducive to the observance of the Code."

It is contended by some of the Respondents that the Applicant has not exhausted the remedies provided under the Act and the Code for dispute resolution as no complaint has been made to either the Commission or the Committees established for this purpose by the Act and the Code. Section 3 of the Electoral Act provides that and I quote:-

"The Commission shall for purposes of resolving electoral disputes constitute such number of conflict management committees as the Commission may determine".

Reference was also made to Regulation 16(3) of the Electoral (Code of Conduct) 2006, Statutory Instrument No. 90 of 2006 which provides that and I quote:-

"All complaints arising during the election campaigns and elections shall be made to any officer of the Commission or to a conflict management committee at the place where the conduct complained against occurred."

In the Further Skeleton Arguments filed by the Applicant, it is contended inter alia, the conflict resolution mechanisms established under the Act and the Code excludes the Applicant as only political parties and candidates can use the mechanisms. Regulation 14(4) cited by the Applicant provides that and I quote:-

"Any candidate or political party wishing to make a complaint of unfair treatment or coverage in the course of the election campaign shall send that complaint in writing to the Commission".

Further that since this matter involves interpretation of a Constitutional provision, namely; Article 76, the High Court is the appropriate forum.

I have seriously considered this application together with the contents of the Affidavits filed herein on behalf of the parties hereto. I have also considered the arguments advanced in the respective Skeleton Arguments. This action raises a number of serious issues pertaining to the role of the public media, both print and electronic during an election campaign period in Zambia as enunciated in the Electoral Act and the Code of Conduct.

There is no doubt that by the provision of Regulation 12(1) of the Electoral Code of Conduct whose text I have given above, all print and electronic media is mandated to provide fair and balanced reporting of the campaigns, policies, meetings, rallies and press conferences of political parties and candidates during the campaign period. Regulation 13(1) and (2) provides that all public television and radio broadcasters shall allocate public air-time equally to all political parties for their broadcasting and that a political party shall not buy more than thirty minutes air-time on television or radio in one week.

The Applicant has by this action complained that the 1st, 2nd and 3rd Respondents have not complied with the above provisions during this campaign period. The 4th Respondent is alleged to have failed to ensure compliance by the above named Respondents with the provisions of the Code. The Applicant feels that a court Order as prayed in the Originating Summons would protect the Respondents' members of staff from fear of loss of their jobs if they complied with the provisions of the Code.

Although the Respondents in this matter did not raise the question of Locus Standi or indeed, challenge the mode of commencement of these proceedings by the Applicant, the manner in which this action has been couched as evidenced by the Applicant's prayers in the Originating Summons raises the question of locus standi and indeed, the question whether an Originating Summons is an appropriate mode of raising constitutional issues as the Applicant has done in this matter.

As afore-stated, the Applicant's complaint is that the public media, both electronic and print, has not provided fair and balanced coverage of the political campaigns of the opposition political parties as the Ruling Party and its candidate have been given much more coverage during the campaign period for the Presidential By-Election to be held on 30th October, 2008. It is argued that this is contrary to Article 76 of the Constitution of Zambia and the Electoral Code of Conduct and the Electoral Act. It is also argued that as a result, the opposition political parties and their candidates have been disadvantaged in their campaigns. It is also alleged that the Electoral Commission of Zambia has failed to enforce the provisions of the Act and the Code of Conduct and that the Respondents have no defence to this action.

That therefore, the Applicant's prayers in the Originating Summons should be granted.

On the other hand, the Respondents have, of course, disputed the allegation arguing that they have complied with the provisions of the Electoral Act and the Code of Conduct. The Respondents relied on the Exhibits attached to their respective Affidavits in Opposition to Support their contentions that they have complied with the Law.

The Respondents also claimed that this action is an abuse of the Court process as the Applicant did not exhaust the remedies established and provided for under the Act and the Code of Conduct for resolution of complaints of unfair treatment or coverage in the course of an election campaign as no complaint was made to either the Electoral Commission or to the Committees established there-under against any of the Respondents.

The Applicant has however, argued that Regulation 14(4) has excluded it from the mechanism provided for under Section 3 of the Act and the Code of Conduct for resolving electoral disputes as it is neither a political party nor a candidate in this election. Further that since the dispute involves interpretation of a constitutional provision, namely, Article 76, the High Court is the appropriate forum.

It can be seen from the provision of Article 76 of the Constitution under which the Electoral Commission of Zambia is established that one of the major functions of the Commission is to supervise elections in Zambia. It can also be seen from the provision of Regulation 16(3) of the Electoral Code of Conduct that all complaints of unfair treatment or coverage during an election campaign must be sent to the Electoral Commission or a Conflict

Management Committee established under Section 3 of the Electoral Act. In this case, the complaints allege violation of Regulations 12(1) and 13(1) and (2) of the Electoral (Code of Conduct) of 2006 under which all electronic and print media are required to provide fair and balanced reporting of all political parties and their candidates during the campaign period. The complaints also allege unequal allocation of air-time by the 1st Respondent which is one of the television and radio broadcasters in Zambia.

On the question why the Applicant did not use the electoral dispute resolution mechanism established by the Electoral Act and the Code of Conduct, the Applicant's contention that Section 3 of the Act excludes it from utilizing the mechanisms established under Regulations 16(3) of the Code of Conduct in my view, raises the question of the Applicant's Locus Standi that I referred to earlier. The question raised is: if the Applicant did not come under Section 3 of the Act and the Code of Conduct, then by what mechanism has the Applicant come? I pose this question because the Electoral Act and the Code of Conduct provide own mechanisms for resolving disputes arising there-under. The Applicant by its own admission did not apply this mechanism in this matter before coming to Court. I find that the Applicant has no locus standi before me since a party who alleges breach of the electoral rules during the campaign period must refer the complaint to the Commission or to a Conflict Management Committee established under that Statute. It can therefore, be said that the Applicant did not exhaust the remedies provided for under that Statute and the Code of Conduct. If the law has excluded the Applicant as argued in this case, then the Applicant has no locus standi.

The above finding inevitably raises the very question of jurisdiction of this Court over this dispute because if the Applicant cannot come under

Section 3 of the Electoral Act and the Code of Conduct as argued by the Applicant, then under what Law or rule has this action been brought? If the Applicant has come under Article 76 of the Constitution as canvassed in this case, then the Applicant has used a wrong mode of commencing this action as a Petition and not an Originating Summons is the appropriate mode for raising and determining constitutional issues. The court cannot determine constitutional issues by Originating Summons. This in my considered view is fatal to the Applicant's case. This position is supported by what the Supreme Court stated in the case of New Plast Industries Vs The Commissioner of Lands and the Attorney-General (2001) ZR 51 at page 55 where it was held that:-

"We are satisfied that the practice and procedure in the High Court is laid down in the Lands and Deeds Registry Act. The English White Book could only be resorted to if the Act was silent or not fully comprehensive. We therefore hold that this matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by the way of an appeal, the court had no jurisdiction to make the reliefs sought. This was the stand taken by this court in Chikuta v Chipata Rural Council (1) where we said that there is no case in the High Court where there is a choice between commencing an action by a writ of summons. We held in that case that where any matter is brought to the High Court by means of an originating summons when it should have been commenced by a writ, the court has no jurisdiction to make any declaration. The same comparison is applicable here. Thus, where any matter under the Lands and Deeds Registry Act, is brought to the High Court by means Judicial Review when it should have been brought by way of an appeal, the court has no jurisdiction to grant the remedies sought. On this ground alone, this appeal cannot succeed. It therefore becomes unnecessary for us to consider the ground of appeal which stated that the learned judge misdirected herself in law when she held that the procedure on appeal from the decision of the Registrar of Lands and Deeds is spelt out in section 89 of Cap 185. We uphold the learned trial judge on this issue as well".

The above applies in this case where I have been requested to determine a constitutional issue by way of Originating Summons when the law requires that a constitutional issue should come by way of Petition. It follows that I have no jurisdiction to grant the remedies sought.

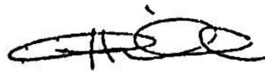
As can be seen from the above, the Applicant has no locus standi in this matter as it is neither a political party nor a candidate in the

forthcoming Presidential By-Election. Further, the Applicant has not pleaded infringement of any rights that it has suffered as a result of the Respondents' perceived failures to comply with the cited provisions of the Electoral Act and its Code of Conduct. What has been pleaded is that the opposition political parties have been disadvantaged by the Respondents' perceived wrongful acts or omissions. Yet, none of the opposition political parties is a party to this action nor did any file an Affidavit to this effect.

As stated above, the two issues raised are fatal to the Applicant's case. The same is dismissed with costs to the Respondents. The same are to be agreed and in default of such agreement, to be taxed.

Leave to appeal is granted.

Delivered at Lusaka, this 29th day of October 2008.



H. Chibomba
JUDGE