

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/1238

**B E T W E E N:**

CHISHIMBA KAMBWILI

PLAINTIFF**AND**DAVIES MWILA (being sued as Secretary
General of Patriotic Front Party)**DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 16th day of
March, 2018**

For the Plaintiff : Mrs. B. Munthali, Messrs CL Mundia & Company
For the Defendant : Mr. M. Lungu, Messrs Lungu Simwanza & Co. and
Mr. M. Chileshe, Messrs Eric Silwamba, Jalasi &
Linyama Legal Practitioners

R U L I N G

Cases Referred To:

1. *Leopold Walford (Z) Limited v Unifreight (1985) Z.R 203*
2. *Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party (1978) ZR 388, Secretary General of the United National Independence Party v Elias Marko Chipimo (1983) ZR 125 and Dr. Ludwig Sondashi v Brigadier General Godfrey Miyanda MP (sued as National Secretary of the Movement for Multi-Party Democracy) SCZ Judgment No. 1 of 1995*
3. *The Attorney General, The Movement for Multi-Party Democracy v Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine SCZ Judgment No. 2 of 1994*
4. *Ludwig Sondashi v Brigadier General Godfrey Miyanda MP (sued as National Secretary of the Movement for Multi-Party Democracy) SCZ Judgment No. 1 of 1995*

Legislation Referred To:

1. High Court Act, Chapter 27
2. Rules of the Supreme Court 1999

This is the Defendant's application to set aside originating process pursuant to Order VII Rule 1 and Order XI of the High Court Rules read together with Order 2 Rule II, Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court on the following grounds:

- (i) *Whether a constitutional challenge of expulsion from a political party as envisaged by the provisions of, inter alia, Articles 60 and 72 of the Constitution of Zambia, Constitution of Zambia Act Chapter 1, Volume 1 of the Laws of Zambia can competently be commenced by Writ of Summons and Statement of Claim.*
- (ii) *The Writ of Summons is irregular as the Plaintiff has sued by a Country Advocate as Principal Advocate who has not added the name or firm and place of business and electronic mail address of the Agent which is not more than ten kilometres from the Principal Registry at Lusaka.*
- (iii) *The purported Writ of Summons is not duly endorsed with the Plaintiff's full addresses i.e. physical, postal and electronic address in terms of the amended High Court Rules as only the Plaintiff's Principal Advocate's address has been furnished.*

The application is supported by an Affidavit sworn by **Eric Suwilanji Silwamba**. He states that the Plaintiff issued originating process *videlicet* Writ of Summons and Statement of Claim. Further

that the Writ of Summons and Statement of Claim were issued by a Country Advocate under the name and style of Messrs Caristo Mukonka, Legal Practitioners of Broadwalk Building, Broadway, P.O. Box 70971, Ndola. That the electronic address for the firm is mukonkac@yahoo.com

The deponent avers that the Writ of Summons and Statement of Claim served upon the Defendant is irregular in a material particular because the Plaintiff's Advocates have not furnished an address for service, which is within ten kilometres from the Principal Registry at Lusaka. Further, that the Plaintiff's full addresses are not endorsed on the Writ of Summons.

The deponent avows that he filed a Conditional Memorandum of Appearance in the Principal Registry, marked exhibit "**ESS1**." That on 16th August, 2017, he filed a Notice to raise issue *in limine*. The deponent avers that this is a fit and proper case for this Court to set aside originating process for irregularity, hence this application. He further avows that the Plaintiff will not be prejudiced by a setting aside order which is in the interest of justice.

Chishimba Kambwili the Plaintiff filed an Affidavit in Opposition where he states that the issues raised in the Notice to Raise Preliminary Issue had been cured in his amended Writ of Summons marked exhibit "**CK1**." That the Notice of Appointment of an Agent within the radius of ten kilometres from the High Court Principal Registry has equally been cured.

The deponent avers that the irregularities in his originating process have all been cured and the application to set aside his Writ of Summons is no longer justified. He insists that he employed the correct procedure in commencing his action by way of Writ of Summons because he is merely challenging his expulsion from his political party under private law. Further, that his action has nothing to do with the Republican Constitution as contended by the Defendant.

Learned State Counsel filed Skeleton Arguments where he submitted that the Writ of Summons and Statement of Claim are grossly incompetent as the Country Advocate who is the Principal Advocate has not furnished the name of the firm, its place of

business; and address of the Principal Advocate's Agent, no more than ten kilometres from the Principal Registry in Lusaka.

Counsel referred me to the case of **Leopold Walford (Z) Limited v Unifreight**¹, where Silungwe CJ as he then was, held that:

“In our view, Order VII Rule 1 is clear in its terms and requires, not only that the address of the Plaintiff's advocate shall be endorsed on the Writ, but also that the address of the Plaintiff shall similarly be endorsed thereon. The relevant part of the Order reads as follows:

1. (1) **The solicitor of the Plaintiff suing by solicitor shall endorse upon the writ of summons:-**
 - (a) **The address of the Plaintiff;**
 - (b) **His own name or firm and his own place of business and the postal address thereof.**

As can be seen from what has been set out above, it is necessary for the Plaintiff's address, as well as that of his advocate, to be endorsed on the writ.”

Counsel submitted that the Plaintiff's failure to comply with the provision rendered the Plaintiff's process irregular and it was liable to be set aside. He called in aid Order 2 Rule 1 of the Rules of the Supreme Court, which reads:

“(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.”

Counsel stated that from the authorities, it was very clear that the Plaintiff instituted originating process that is defective and it was liable to be set aside for irregularity. He prayed to Court to exercise its jurisdiction and set aside the originating process for irregularity and for costs.

State Counsel for the Defendant further submitted that Articles 60 and 72 of the Constitution of Zambia, Constitution of Zambia Amendment Act envisaged constitutional challenge where a person had been expelled from a political party. He contended that the Plaintiff's action should have been commenced in the Constitutional Court not by Writ of Summons and Statement of Claim.

Counsel extensively quoted the provisions of Articles 60 and 72 of the Constitution and buttressed his submissions by citing the cases of **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v United National Independence Party, Secretary General of the United National Independence Party v Elias Marko Chipimo and Dr. Ludwig Sondashi v Brigadier General Godfrey Miyanda MP**

(sued as National Secretary of the Movement for Multiparty Democracy)².

Counsel affirmed that political parties are registered under the Societies Act, Chapter 119 and regulated thereunder, however the contest of a political party expulsion attracted Constitutional reference. He went on to submit that since the Plaintiff was contesting his expulsion from the Patriotic Front, a political party on whose ticket he was elected as Member of Parliament; it was appropriate for him to seek remedy before the Constitution Court as provided by Articles 72 and 128 of the Republican Constitution and by way of Petition.

Counsel cited the case of **The Attorney General, The Movement for Multiparty Democracy v Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga³** as the authority for his proposition. He then referred me to Article 128(2) of the Constitution of Zambia, which provides that:

“128. (2) Subject to Article 28(2) where a question relating to this Constitution arises in a Court, the person presiding in that Court shall refer the question to the Constitutional Court.”

Counsel further submitted that apart from challenging his expulsion from the Patriotic Front, the Plaintiff was also seeking refuge in the provisions of Article 72 of the Constitution of Zambia. Hence, the Constitutional Court offered him the correct forum. He prayed to Court to exercise its jurisdiction by setting aside the originating process for irregularity and for costs.

I have earnestly considered the application together with the Affidavits and Skeleton Arguments filed herein. There were three grounds raised in the Defendant’s application, which in my view, are quite interrelated. I will therefore deal with grounds (ii) and (iii) of the Summons at the same time. They are recapitulated herebelow:

- (ii) *The Writ of Summons is irregular as the Plaintiff has sued by a Country Advocate as Principal Advocate who has not added the name or firm and place of business and electronic mail address of the Agent which is not more than ten kilometres from the Principal Registry at Lusaka.*
- (iii) *The purported Writ of Summons is not duly endorsed with the Plaintiff’s full addresses i.e. physical, postal and electronic address in terms of the amended High Court*

Rules as only the Plaintiff's Principal Advocate's address has been furnished.

In my view, the Ruling of Hon. Justice P. C. M. Ngulube (as she then was) dated 17th November, 2017, dealt with the issues in grounds (ii) and (iii). She declined to disallow the amendments that the Plaintiff made to his Writ of Summons and Statement of Claim and by implication, the issues complained of in grounds (i) and (ii) were cured. Hence, I find no need to further entertain the issues through this application. In order to make progress, I grant the Plaintiff leave to file his Amended Writ of Summons and Statement of Claim within ten (10) days from the date of this Ruling.

In relation to ground (i), the Defendant submitted that the Plaintiff's action was premised on a Constitutional challenge. Thus, his commencement of action by Writ of Summons and Statement of Claim was irregular and incompetent. The Plaintiff contended that he was merely challenging his expulsion from a political party, which is a private law matter.

In the very lengthy Skeleton Arguments, Learned Counsel submitted that the Plaintiff's action was regulated by Articles 60 and 72 of the Constitution of Zambia and copiously reproduced the provisions of the law. Placing reliance on Supreme Court cases, State Counsel reiterated that the Plaintiff's claim was Constitutional and ought to have been determined by the Constitutional Court.

In the case of **Ludwig Sondashi v Brigadier General Godfrey Miyanda MP (sued as National Secretary of the Movement for Multiparty Democracy)**⁴, Gardner JS as he then was held *inter alia* that:

“Dr. Sondashi did indicate that he was concerned that the conduct of the Tribunal in the Movement for Multi-Party Democracy should be the subject of scrutiny by the Courts and we assure him that the Courts have power to investigate private tribunals and institutions which have made orders, such as expulsion orders, to ascertain whether they had the power to make the order, whether they did so in accordance with such power and whether they followed the rules of natural justice, there is no doubt, therefore, that the Appellant is entitled to come before the Courts; the only question is what manner of instituting proceedings should he adopt, the proper course, as we have indicated would have been to issue a writ claiming a declaration and an injunction if appropriate.”

I have considered Counsel's contention that the provisions of Article 72 of the Constitution presents new circumstances from the

time that the Ludwig Sondashi case was decided. Article 72(2) (e) of the Constitution provides that:

- “(2) The office of Member of Parliament becomes vacant if the member-**
(e) is expelled from the political party, which sponsored the member for election to the national Assembly.”

Further, Article 72(5) of the Constitution reads:

- “(5) Where a Member of Parliament is expelled as provided in clause (2) (e), the member shall not lose the seat until the expulsion is confirmed by a Court, except where the member does not challenge the expulsion in Court and the period prescribed for challenge lapses, the member shall vacate the seat in the National Assembly.”**

Counsel for the Defendant contended that the Plaintiff should have approached the Court by Petition insisting on the principles set out in the case of the **Attorney General, The Movement for Multi-Party Democracy v Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine³**.

It is incontrovertible that the office of Member of Parliament is created by the Republican Constitution. It also lists the circumstances under which a Member of Parliament can lose his seat. However, the Constitution does not prescribe the manner in

which an expelled Member of Parliament should approach Court. Rather, it provides that where an expelled Member of Parliament challenges his expulsion, such expulsion must be confirmed by an Order of Court. Until then, the Member of Parliament remains in his seat. Therefore, I find that the Constitutional provisions have no effect on the principle of law elucidated in the Ludwig Sondashi case. The principle being that, an expelled Member of Parliament should challenge an expulsion via a Writ claiming a declaration and not a Petition.

In consequence, I hold that the Defendant's application to set aside the Plaintiff's originating process lacks merit and dismiss it forthwith. I award costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal is granted, however, the leave will not arrest the proceedings in this case.

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Dated this 16th day of March, 2018.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE