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

2021/HP/0502

IN THE MATTER OF: THE DECISION OF THE ELECTORAL COMMISSION OF ZAMBIA TO COMPEL PRESIDENTIAL CANDIDATES TO PHYSICALLY TRANSPORT THEIR SUPPORTERS TO THE ELECTORAL COMMISSION OF ZAMBIA OFFICES IN EACH PROVINCE FOR THE PURPOSE OF FILING PRESIDENTIAL NOMINATIONS

BETWEEN:

SEAN ENOCK TEMBO (Suing in his capacity as President for Patriots for Economic Progress) — APPLICANT

AND

ELECTORAL COMMISSION OF ZAMBIA — RESPONDENT

Before the Honorable Mrs. Justice C. Lombe Phiri in Chambers

RULING FOR LEAVE TO COMMENCE JUDICIAL REVIEW

Cases referred to:

1. **Dean Namulya Mung'omba Bwalya Kanyanta Ng'andu and Anti-corruption Commission v Peter Machungwa Golden Mandandi and Attorney-General (SCZ Judgement No. 3 of 2003)**

2. **Zambia Wildlife Authority, Mukela Manyando, Mubiana Munyinde And African Parts Zambia Limited V Muteeta Community Resources And Board Development Co-Operative Society (S.C.Z. Judgement No. 16 Of 2009)**
3. **Associated Provincial Pictures House Limited v Wednesbury Corporation [1948] 1 KB 223**
4. **Short v Poole Corporation [1926] Ch. 66, 90, 91**
5. **Derrick Chitala (Secretary Of The Zambia Democratic Congress) V Attorney General (1995) ZR S.J**

Legislation referred to

Order 53 of the Rules of the Supreme Court (White Book), 1999 Edition

This is a matter where the Applicant seeks leave of the Court to commence Judicial Review proceedings in relation to the decision of the Electoral Commission of Zambia requiring a candidate for the Presidential election to physically transport their supporters from each Province to the Electoral Commission of Zambia provincial offices. In pursing this application the Applicants filed into Court Exparte Summons for Leave to Apply for Judicial Review pursuant to **Order 53 of the Rules of the Supreme Court (White Book), 1999 Edition.** In support of the exparte summons an Affidavit was filed stating the facts upon which they rely in making the said application. The

Applicant also filed a Notice containing the statement in support of the application.

In the Notice containing the statement it was stated that the Applicant was the President of the Patriots for Economic Progress. It was stated that he was also a fully paid up presidential candidate for the August 12th General Elections. It was further stated that the decision being challenged was contained in a Media Briefing by the Chief Electoral Officer, Mr. P. Nshidanao. The said statement was quoted as follows:

> *"Article 100(j) of the Constitution provides for a presidential candidate to be supported by 100 supporters per province.*
>
> *To facilitate for the verification and capturing of details for the supporters of the presidential candidates the commission will facilitate for the pre-processing of supporters between 10th to 15th May, 2021.*
>
> *The pre-processing will be done from provincial centers in all ten provinces. A time table of presidential candidates who have paid (in full) the prescribed election nomination fee will be complied and publicized prior to dates or receiving nominations.*
>
> *The full payment of nomination fees for presidential candidates will be required to be made between 1st and 9th May, 2021. Thereafter details of supporters for presidential candidates will be processed between 10th to 15th May as highlighted above.*
>
> *In order to enhance adherence to Ministry of Health Covid-19 guidelines, not more than 20 supporters at a time will be allowed access to the pre-processing*

centres. In addition supporters are urged to ensure that the Covid-19 guidelines are observed."

The ground on which the relief is sought is that of irrationality. It is contended that the decision of the Electoral Commission of Zambia to compel presidential candidates to physically transport supporters to the provincial offices is so irrational that no reasonable tribunal could make such a decision.

In the affidavit in support it has been averred that it is unnecessary and unreasonable to require physical attendance of supporters when the information required by the Electoral Commission of Zambia can easily be collected using an ECZ approved template and submitted for verification. It is averred that transporting supporters to the provincial centers poses a health risk on the supporters in view of the covid-19 pandemic. Further, that it is an unnecessary cost on small parties, such as those to which the Petitioner belongs. That ferrying the numbers required will impose on the small parties duty to provide food, transport and refreshments for a total of 1,000 people across the country. Also that having people in such numbers congregate at one place poses a security risk on the supporters who would be required to physically travel owing to the high risk of political violence from other political parties. It was averred that during the Voter Registration process the Respondent collected all relevant information from registered voters therefore the Respondent would not have any challenges verifying the authenticity of the list of voters submitted to them. It was further averred that the Petitioner had written to the Respondent stating his concerns however he did not receive a firm position from the Respondent.

In the skeleton arguments it was submitted that the Court had been moved pursuant to the provisions of **Order 53 of the Rules of Supreme Court of England (Whitebook).** It was submitted that the Applicant had sufficient interest in the decision that was being challenged and that the relief sought directly affects him. It was also submitted that the Respondent was a public body which is amenable to judicial review of its administrative decisions.

LAW

In Zambia the procedure relied upon in making applications for Judicial Review is derived wholly from the Whitebook. This direction was provided for by the Supreme Court in the case of **Dean Namulya Mung'omba Bwalya Kanyanta Ng'andu and Anti-corruption Commission v Peter Machungwa Golden Mandandi and Attorney-General (SCZ Judgement No. 3 of 2003)**[1] where it was held inter alia that:

> *1. There is no rule under the High Court which Judicial Review proceedings can be instituted and conduced. Thus, by virtue of Section 10 of the High Court Act Chapter 27 of the Laws of Zambia, the High Court is guided as to the procedure and practice to be adopted.*
>
> *2. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC).*
>
> *3. Order 53 is comprehensive. It provides for the basis of Judicial review: the parties; how to seek the remedies and what remedies are available*

The procedure for obtaining leave is found in Order 53/3/2 which provides in mandatory terms as follows:

(2) An application for leave ***must*** *be made ex parte to a Judge by filing in the Crown Office –*

(a) a notice in ***Form No. 86A containing a statement of***

(i) the name and description of the applicant,

(ii) the relief sought and the grounds upon which it is sought,

(iii) the name and address of the applicant's solicitors (if any) and

(iv) the applicant's address for service; and

(b) an ***affidavit verifying the facts*** *relied on.*

It is further stated in Rule (3) (3) as follows:

(3) The Judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court; in any case, the Crown Office shall serve a copy of the Judge's order on the applicant.

On the basis of that provision this Court has decided to determine the leave application without a hearing.

In the case of **Zambia Wildlife Authority, Mukela Manyando, Mubiana Munyinde And African Parts Zambia Limited V Muteeta Community Resources And Board Development Co-Operative Society (S.C.Z. Judgement No. 16 Of 2009)**[(2)] it was held *inter alia* that :

6. *Where an applicant has presented an arguable case, the Court is perfectly entitled to grant leave to that applicant to allow for full investigations even after granting leave.*

7. *The requirement under common law for leave, underscores the importance of the protection which the Courts gives the public administrative bodies against vexatious, and hopeless claims by busy bodies.*

The remedy of judicial review is not concerned with the merits of the particular administrative or quasi judicial decision, but only with the decision making process to ensure that discretionary power is not abused and that the decision maker acts within the confines of the law. Leave should be granted if on the material then available the Court thinks, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant.

Under the heading of "irrationality" the Court is expected to consider the decision making process and see whether the decision was so outrageous in its defiance of logic, or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it. This principle was held in the case of **Associated Provincial Pictures House Limited v Wednesbury Corporation [1948] 1 KB 223**[3]. The Court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that:

- in making the decision, the defendant took into account factors that ought not to have been taken into account, or
- the defendant failed to take into account factors that ought to have been taken into account, or
- the decision was so unreasonable that no reasonable authority would ever consider imposing it.

The court held that the decision did not fall under any of these categories and the claim failed. As Lord Greene MR said (at 229),

> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in ***Short v Poole Corporation*** **[1926] Ch. 66, 90, 91**[4] gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another".

In the Zambian case of **Derrick Chitala (Secretary Of The Zambia Democratic Congress) V Attorney General (1995) ZR S.J**[5] the Supreme Court in delivering its decision affirmed the foregoing position on irrationality when it stated as follows:

"Next is the question of irrationality. We heard submissions that the decision not to set up a constituent assembly, which flew in the teeth of the recommendation of the commission, was unreasonable and was actuated by bad faith and improper motives. In law, a decision can be so irrational and so unreasonable as to be unlawful on "Wedsbury" grounds (see Associated Provincial Picture House LTD v Wedsbury Corporation (7)). The principle can be summarised as being that the decision of a person or body performing public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision. This principle should be applied with circumspection.

In this regard, the words of Lord Ackner in Reg v Home Secretary, Ex.p. Brind (8) are rather apt. He said:

"There remains however the potential criticism under the Wednesbury grounds expressed by Lord Greene M.R. (1948) 1 K.B. 223, 230 that the conclusion was "so unreasonable that no reasonable authority could ever have come to it." This standard of unreasonableness, often referred to as "the irrationality test," has been expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister

has exceeded his powers and thus acted unlawfully and the court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, though unattractively, described as a "perverse" decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision that is, to invite an abuse of power by the judiciary."

A perusal of the relevant documents and consideration of the arguments does not support that there is an issue of irrationality fit to go to a full hearing. There was here the danger of the court merely substitution its own views when the term of reference invited suggestions; the report observed that there were three possible methods of adoption and recommended on very good grounds one method. The Government game a number of reasons for wanting to proceed in a different manner. We can not say such reasons were "Wednesbury" unreasonable."

The Constitution of Zambia, as amended by Act Number 2 of 2016 establishes the Electoral Commission of Zambia in Article 229. For the avoidance of doubt the following is provided:

> 229. (1) There is established the Electoral Commission of Zambia which shall have offices in Provinces and progressively in districts.
>
> (2) The Electoral Commission shall—
>
> (a) implement the electoral process;
>
> (b) conduct elections and referenda;
>
> (c) register voters;

(d) settle minor electoral disputes, as prescribed;

(e) regulate the conduct of voters and candidates;

(f) accredit observers and election agents, as prescribed;

(g) delimit electoral boundaries; and

(h) perform such other functions as prescribed.

Further, the actualization of the Constitutional provision was provided for by the promulgation of the Electoral Commission of Zambia Act Number 25 of 2016 (with some amendments made in Act Number 5 of 2019). Section 4 of the Electoral Commission of Zambia Act provides for the functions of the Commission which among them include :

a) ensure that elections are free and fair;

(b) promote conditions conducive to free and fair elections;

(c) promote democratic electoral processes;

Further to the functions as contained in the Electoral Commission of Zambia Act, the Commission is guided by the provisions of the Electoral Process Act Number 35 of 2016 in the conduct of electoral processes. In section 4 the autonomy of the exercise of its functions under the Act is provided as follows:

(1) This Act shall be administered and enforced by the Commission and the Commission shall not be subject to the direction or control of any person or authority in the exercise of its functions under the Constitution and this Act.

Further Section 30 (3) of the Act provides that:

(2) A candidate delivering a nomination paper, referred to in subsection (1), to the Returning Officer shall be supported by one hundred supporters from each Province who are registered voters in that Province.

ANALYSIS

Upon careful consideration of the facts of the matter before the Court and due consideration of the law it is clear that the decision of the Electoral Commission of Zambia was made within the confines of the law as provided. The grievance of the Petitioner is that the decision of the Commission to require candidates to physically avail 100 supporters at 10 provincial centers is irrational and should be quashed by this Court. The Petitioner has then proceeded to make suggestions of how the process ought to be.

It must be mentioned here that the Court is fully aware that at this point it is not examining the merits of the case but has to consider, *prima facie*, whether the decision complained of warrants further investigation on the basis of irrationality. The definition of irrationality has been stated above and it is through those lenses that the Court conducts a prima facie analysis.

From the Petitioner's own affidavit it is apparent that the Commission in making its decision has taken into account the issues raised regarding the health concerns and has offered the relevant guidance. The Petitioner has also raised the issue of cost. This in my opinion is an issue of mere inconvenience on the part of the Petitioner as opposed to being a ground upon which the Court should be swayed to interfere with the operational autonomy of the Commission, as by law provided.

An examination of the documents provided and applying the standards as provided for in the authorities cited above I find that the Petitioner has failed to demonstrate that there exists an arguable case to warrant further investigation by this Court. It must be reminded that the role of the Court in Judicial Review proceedings is not to substitute the opinion of the Court with that of an authority which has legally exercised its powers or discretion.

Having found that there is nothing irrational or unreasonable about the decision of the Respondent, the application for leave is denied and is dismissed.

Delivered at Lusaka this 12th day of May, 2021.

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C. LOMBE PHIRI

JUDGE