IN THE SUPREME COURT OF ZAMBIA SCZ Appeal No. 56 of 1993

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

THE ATTORNEY GENERAL	Appellant
VS.	
AKASHAMBATWA MBIKUSITA LEWANIKA	1st Respondent
FABIAN KASONDE	2nd Respondent
JOHN MUBANGA MULWILA	3rd Respondent
CHILUFYA CHILESHE KAPWEPWE	4th Respondent
KATONGO MULENGA MAINE	5th Respondent

Coram: Bweupe., D.C.J., Sakala and Chaila, JJS
On 23rd September, 1993

For the Attorney-General: Mr. A.C. Kinariwala, Principal State Advocate

For the 1st Respondent: Mr. Sunday Nkonde of Central Chambers

For the 2nd, 3rd and 5th Respondent: Mr. C. Hakansenke of Shamwana and Co.

For the 4th Respondent: Mr. R. N. Ngenda of Richard Ngenda & Associates

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J U D G M E N T

Bweupe, D.C.J., delivered Judgment of the Court

Cases referred to:

(1) MWAMBA AND MBUZI VS ATTORNEY GENERAL SCZ Judgment No. 10 of 1993.

This is an appeal against that part of the decision of the High Court ordering that all By-elections and preparations for By-elections in the Constituency numbers 023, 083, 091, 092, 101, 110, 117, 127, 134, 143 and 146 being the Mufulira, Chinsali, Lukashya,

2/...Malole,

Malole, Lunte, Solwezi Central, Pemba, Bweengwa, Kalabo, Mongu and Senanga constituencies be stayed pending final determination of the five petitions now before Court and that no actions prejudicial to the outcome of five petitions should be taken by any party.

The simple facts which give rise to this appeal are these:-

Some time this year 11 Members of Parliament all of whom stood on the ticket for Movement for the Multi-Party Democracy resigned from that Party and declared their intentions to form a Political Party to be called National Party. Following their resignations from the Movement for Multi-Party Democracy the Speaker of the National Assembly declared those seats vacant. The Government then made preparations for elections to be conducted on October 12, 1993. Meantime, five Members of Parliament petitioned to the High Court to hear and determine whether or not their seats were vacant. On the 14th of September, 1993, the applicant now the appellant applied to the High Court for the consolidation of the five petitions. Following that application by the applicant the court, inter alia, ruled that all elections and preparations for By elections in all eleven constituencies be stayed pending the final determination of the five petitions now before Court.

The learned Counsel for the appellant, Mr. Kinariwala has argued three ground of appeal. The first ground was that the trial Judge erred in law in ordering all By Elections and preparations for By elections in all 11 constituencies to be stayed pending the final determination of the five petitions when the Members of Parliament who had resigned from Movement for Multi-Party Democracy and whose seats were declared vacant in six Constituencies numbers 092, 110, 117, 127 143 and 146 had not petitioned to the High Court against the declaration of their seats having become vacant. He said the respondent did not oppose the application and that the court properly exercised its jurisdiction in granting the order for stay of by elections and preparations of the elections in the said five Constituencies. He argued however, that there was no purpose behind counsel for the petitioners making an application for stay of By elections and preparations for by elections in the remaining six Constituencies as well because Members of Parliament who had resigned from Movement for Multi-Party Democracy and whose seats were declared

3/...vacant

vacant in the said six constituencies had not petitoned to the High Court against the declaration of their seats having become vacant and if the by elections were allowed to be held in the said six constituencies no prejudice was going to be caused to the Petitioners. He said that the Court improperly exercised its jurisdiction in granting the order for stay for by elections and preparations for elections in the said six Constituencies. In doing so he argued the Court acted without jurisdiction or alternatively exceeded its jurisdiction.

In the second ground Mr. Kinariwala argued that the Court erred in law in ordering that no actions prejudicial to the outcome of the petition should be taken by any party because the said order was too general and too vague in scope and could not have the effect of binding persons who are not parties to the proceedings herein.

In the third ground he said that in the absance of any written application and evidence in support thereof the Judge erred in law in granting the order referred to in ground 1.

In their brief reply, Mr. Ngenda addressed the court on behalf o the others on all the three grounds. He contended that the court below acted within its jurisdiction and did not exceed it for the following reasons: Firstly that the court was in order in making such order so as to affect other Members of Parliament who had not petitioned because according to him all the eleven Members of Parliament were directly affected by one executive action, that is to say the purported declaration by the Honourable Speaker that the seats in the eleven Constituencies were vacant. Mr. Ngenda argued that all the eleven Members of Parliament in the Constituencies concerned suffered the declaration of the rights and privileges they enjoyed before the said declaration. He submitted that the six who had not petitioned should not be deprived of the benefit of the order merely because they did not come to Court. Mr. Ngenda pointed out that the case of MWAMBA AND MBUZI VS ATTORNEY GENERAL(1) was distinguishable from the facts of the present case because in that case there were no identifiable parties.

4/... Mr. Nkonde

Mr. Nkonde advancing an alternative submission conceded that the order of the learned trial Judge should only affect the five petitions now before the court but should not deny or deprive the petitioners' rights, privileges and immunities by any party until the determination of the five petitions now before court.

We have carefully considered the arguments and submissions made on behalf of the appellants and the respondents. One thing that exhibits itself is that while five Members of Parliament petitioned the High Court to hear and determine whether or not their seats had become vacant by reason that they resigned from the Party on whose ticket they won their parliamentary seats the other six who were included in the stay order did not petition the High Court. It is also clear that the learned Advocates for the petitioners did not make written applications and adduce evidence in support of their applications. The six members of Parliament did not contend that although they were not party to the proceedings the outcome of the proceedings would be prejudicial to them and did not apply to court to make them parties to the proceedings and adduce evidence.

We entirely agree with the appellant that the order in the first place should not have been extended to other six constituencies whose Members of Parliament had not petitioned. In the second place we agree that the Order was too general in scope and application in that it covered persons who were not before court.

For the foregoing reasons this appeal is allowed. We squash that portion of the order in so far as it affects the six constituencies where petitions have not been filed.

On costs each member of the Court will deliver his own opinion.

Bweupe, D.CJ.

My opinion on costs is that the normal practice is that the successful party should have the costs. I see no compelling reasons why there should be a departure from such normal practice. I would order that the costs should follow the event.

Sakala, JS.

This is further ruling on costs. I agree with the judgment

5/....read by

read by the Honourable Deputy Chief Justice except on the question of costs on which I respectively disagree with him. On the question of costs, I take note that this was an interloctory appeal in which the main action is still pending before the High Court for determination I also take note that this appeal could perhaps have been avoided if the State had proceeded under Order 39 of the High Court Rules by way of review. I also note that the respondents through Mr. Nkonde for the 1st Respondent partially conceded that the order of stay continues in respect of the five petitions now before the High Court although this concession has come too late. Above all, this matter raises a constitutional issue of national importance of Parliamentary representation, we should, therefore, not frighten genuine litigants from coming before this court on account of costs. Consequently, this, in my view, is a proper case where costs should be in the cause and I so order.

Chaila, JS

This is a further ruling on the question of costs. I have listened to the views expressed by my two learned brothers on the question of costs. The judgment delivered by the learned Deputy Chief Justice is an agreed one and I fully agree and concur with whatever has been expressed there. On the question of costs, it is a trite law that a successful party gets its costs. This practice however, has been departed from in some cases particularly where the State is involved in respect of Constitutional matters where the courts have been ordering that each party pays his own costs where the State has been successful. The State in this matter appealed to the Supreme Court on the ruling which affected people or parties who were not parties to the petitions. The Advocates for the petitioners or respondents fought vigorously to uphold the ruling of the learned trial judge which ruling has been found to be faulty. The respondents have argued that the Attorney-General or the State should have used the process under Order 39. The State gave reasons why they chose not to proceed under that Order. This court at the beginning of the appeal inquired from respondents' Advocates how an order covered in general terms could cover people other than their clients. The learned advocates have not advanced any cogent reasons why a general order was sought in the first place. I find, therefore, that they have not shown or given any reason why a

6/...a general

general rule should be departed from. I find that this is a case we should not deprive the State of its costs. I order, therefore, that the successful party in the matter be given costs, and I order, that the costs be given to the State.

ORDER

The order of the court, therefore, is that costs should follow the event, that is to say, the costs are awarded to the State against the respondents.

B. K. Bweupe
DEPUTY CHIEF JUSTICE

E. L. Sakala
SUPREME COURT JUDGE

M. S. Chaila
SUPREME COURT JUDGE