IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL No.119 OF 1995

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

MUNDIA FRED SIKATANA — APPELLANT

AND

BRIDAGIER-GENERAL GODFREY MIYANDA (Sued as National Secretary of the Movement for Multi-Party Democracy) — RESPONDENT

Coram: Sakala, Chaila and Muzyamba, JJS

22nd December 1995 and 29th January 1996

For the Appellant: In person

For the Respondent: E. Silwamba, Malambo Silwamba & Co.

J U D G M E N T

Muzyamba, J.S. delivered the judgment of the court.

CASES REFERRED TO:

1. FRANCIS XAVIER NKHOMA v GODFREY MIYANDA - National Secretary of the Movement for Multi-Party Democracy (sued on his own behalf and on the Movement for Multi-Party Democracy) SCZ Judgment No.10 of 1995

2. SHELL AND B.P. ZAMBIA LTD v CONIDARIS AND OTHER 1975 ZR 174

This is an appeal against a High Court refusal to grant an interim order of injunction. On 22nd December 1995 when we heard the appeal we dismissed the appeal and said we would give our reasons later. We now give those reasons for our decision.

Briefly, the facts of the matter are that the appellant is a founder and paid up member of the Movement for Multi-Party Democracy. The Party held an Extra Ordinary National Convention that opened in Lusaka on 19th December, 1995. Before then, it is alleged that the National Executive Committee of the Party (NEC) passed a resolution barring non delegates from standing for elections as members of NEC. The appellant, who was not a delegate had intended to stand for elections at the Convention as Chairman of the Legal Affairs Sub-Committee of NEC but could not because of the resolution which was verbally communicated to him by Mr. Dipak Patel, Chairman of the Party Campaign Committee and President Chiluba. He felt aggrieved and issued a writ of summons on 19th December 1995 for inter alia, an interim injunction

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to restrain the respondent and/or NEC from conducting elections for a new NEC at the Convention pending a declaration that the said resolution was null and void on the ground that it was ultra vires the constitution. On the same day he filed an application for an ex parte order of injunction. The learned Judge assigned to hear the application did not hear him. He just indorsed his refusal on the affidavit in terms of Practice Direction Number 11 of 1968. The appellant then lodged an appeal to a single Judge of the Court. As no appeal lies to a single Judge of the Court we treated the appeal as an appeal to the full court.

At the hearing of the appeal the appellant applied to amend the writ in paragraph A wherein he appears to have brought the action on behalf of other non delegates to remove the element of representative capacity. Mr. Silwamba did not seriously object the application. He said if the court perceived that it had jurisdiction at this stage to amend the writ then he would leave it to the court to decide. After carefully considering the application we came to the conclusion that it was not competent for the court to amend the writ or indeed any pleading at this stage as doing so would create a bad precedent. However, the appeal proceeded on the basis that the appellant had brought the matter entirely on his own behalf and not on behalf of other non delegates as well.

Arguing the appeal, the appellant submitted that the resolution had infringed his party constitutional right to stand for elections and therefore that the learned Judge erred in saying in refusing the application that he, the appellant should bring an election petition. That an injunction was a proper remedy at this stage for letting the elections to proceed and then petition afterwards would be an academic exercise. That the fact that his rights had been infringed was beyond doubt and he referred the court to this court's decision in the case of Nkhoma (1). He further submitted that the learned Judge should have, on a balance of convenience granted him the ex parte order and then proceed to hear the main action during the period scheduled for the Convention in which event if he succeeded he would then take part in the elections. That this would be less costly than letting the elections go ahead and then recall all the delegates in the event again that the main action succeeded.

In response, Mr. Silwamba submitted that the appellant had not placed any evidence before the court to show that NEC had acted outside the Constitution and that his rights had been infringed. That there was no evidence that he had attempted to file his nomination before the Electoral Commission. Therefore that his right to relief was not very clear and as such an injunction would not issue. He cited the case of Shell and BP (2) in support of his argument.

We have considered the submissions on both sides and the authorities cited. The facts in Nkhoma case (1) are nowhere nearer to the facts of this case because in that case Francis Nkhoma stood for elections as Provincial Chairman of the Party. He was elected and by virtue of the Party Constitution he automatically became a member of NEC and in the course of attending a NEC meeting he was ejected on the ground that he was improperly elected. The argument being that Article 9 (d) of the Party Constitution had been amended to bar non residents from contesting elections as Provincial Chairmen. It turned out that the alleged amendment was made by an inferior body of the party and the circular letter informing party members in the various provinces to enforce the purported amendment was subsequently cancelled by the author, Mr. Sikota Wina in his capacity as Chairman of Elections Sub-Committee of NEC. In the case of Shell and BP (2) at page 181 we said that "the court will not grant an interlocutory injunction unless the right to relief is clear and unless the injunction is necessary to protect the plaintiff from irreparable injury." In the case presently before us the lower court was without the party constitution and the alleged resolution. A copy of the constitution was however made available to us but not the resolution. Without the resolution and evidence that the appellant tried to file his nomination and/or stand for election we are not able to say that his right to relief is clear. The injunction would not therefore issue.

On the question of balance of convenience we were mesmerized by the appellant's argument that if an injunction was granted the main action would have been tried within the time scheduled for the convention and that if he succeeded he would then participate in the elections at less or no inconvenience to the party. This argument escapes the fact that an action commenced by writ is followed by pleadings and that in case of summary hearing there must be an order to that effect made either by the trial Judge or Deputy Registrar on application by the parties. No such order was obtained. We do not therefore conceive that the main action could have been disposed of in the few days of the convention. The injunction if granted, would have therefore entailed postponement and re-scheduling of the convention to another date much to the inconvenience of and at greater cost to the respondent or Party.

For the foregoing reasons we would refuse the appeal with costs to the respondent to be taxed in default of agreement.

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E.L. SAKALA
SUPREME COURT JUDGE

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M.S. CHAILA
SUPREME COURT JUDGE

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W.M. MUZYAMBA
SUPREME COURT JUDGE