

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: AN APPLICATION UNDER ARTICLE 41 (2) OF THE
CONSTITUTION, and

IN THE MATTER OF: THE ELECTORAL ACT 1991 AND SUBSEQUENT AMENDMENTS
THEREOF and

IN THE MATTER OF: ARTICLE 34 (3) OF THE CONSTITUTION OF ZAMBIA

B E T W E E N:

AKASHAMBATHA MBIKUSITA LEWANIKA

HICUUNGA EVARISTO KAMBAILA

PETITIONERS

SEBASTIAN SAIZI ZULU (Suing as Secretary General
of UNIP)

JENNIPHER MWABA PHIRI (Suing as National Secretary
of Liberal Progressive Front)

AND

THE ATTORNEY-GENERAL

THE ELECTORAL COMMISSION

RESPONDENTS

FREDERICK TITUS JACOB CHILUBA

Coram: Ngulube, CJ, Bweupe DCJ, Sakala, Challa, Chirwa, Muzyamba
and Lewanika. JJS 14th November, 1996

FOR THE PETITIONERS: E.J. Shamwana, SC Shamwana & Co

M.M. Chona, SC Mahachi Chambers

Prof. P. Mvunga, Patrick Mvunga and Associates

O. Dzekedzeke, Dzekedzeke & Co

S. Sikota, Central Chambers

N.K. Mubonda, D.H. Kemp & Co.

Mrs. F. Zaloumis, Legal Counsel, UNIP

Mrs. Mutti, Lukona Chambers

E.C. Lungu, Andrea Masiye & Co.

FOR THE RESPONDENTS: S.L. Chisulo, Solicitor-General

E. Silwamba, Malambo Silwamba & Co.

R U L I N G

By Muzyamba, J.S.

This is a consolidated petition by Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kamballa, Sebastian Saizi Zulu and Jennipher Mwaba Phiri against the Attorney-General, the Electoral Commission and Frederick Titus Jacob Chiluba for the following declarations:

- (a) That the provisions of Article 34 (3) (a), (b) and (e) of the Constitution in respect of Frederick Titus Jacob Chiluba have not been satisfied and therefore that he was not qualified to be nominated as presidential candidate or to be elected as President of the Republic of Zambia.
- (b) That the said Frederick Titus Jacob Chiluba, in contravention of Section 9 of the Electoral Act 1991 as amended by Act No.23 of 1996 has sworn falsely as to his Citizenship and that of his parents.
- (c) That Section 9 (3) of the Electoral Act 1991 as amended by Act No.23 of 1996 is ultra vires Article 41 (2) of the Constitution.
- (d) That the said Frederick Titus Jacob Chiluba was not a Zambian.
- (e) For an Order that the 1996 Presidential Elections be stayed until the determination of the issues raised in the petition and such other relief as the court made deem appropriate to enforce Article 41.

Before the petition could be heard the court, on its own motion raised a preliminary issue namely whether or not a petition under Article 41 could be brought before the Presidential Elections are held and especially in view of the provisions of Section 9 subsection (3) of the Amendment to the Electoral Act, 1991.

Article 41 (2) (a) and (b) of the Constitution provide:

"2 Any question which may arise as to whether:

- (a) Any provision of the Constitution or any law relating to Election of a President has been complied with;
- (b) Any person has been validly elected as President under Article 34."

And Section 9 (3) of the Amended Electoral Act 1991 reads:

"Any question, by any person, which may arise as to whether any provision of the Constitution or any law relating to nomination or Election of President has been complied with shall be referred by the returning officer or by such person to the full bench of the Supreme Court within 14 days of the person elected as President being sworn in, in accordance with Clause 9 of Article 34 of the Constitution."

Leading Counsel for the petitioners Mr. Shamwana argued quite forcefully that Article 41 (2) was in two parts. That the first part in Subarticle (2) (a) relates to compliance with the provisions of the Constitution and any other law that deal with presidential nominations and Subarticle (2) (b) deals with the question of whether or not a person has been validly elected as a president.

That under Subarticle 2 (a) any person was at liberty to bring a petition to challenge the nomination of a presidential candidate before an Election is held.

That Section 9 (3) of the Amendment to the Electoral Act was ultra vires the Constitution in that it seeks to postpone the right of a person under Article 41 (2) (a) of the Constitution to bring a petition to a date after a winning candidate has been sworn in as President and not before the Election.

that the court had jurisdiction to declare such a section unconstitutional and to sever it from the rest of the Act. In support of his argument he cited the case of *The People v Thomas Mumba* 1984 Z.R. 36 by Chirwa J, as he then was.

For the purposes of this ruling I do not intend to dwell on the question of the cost of running the Elections. Nor on the question of subtle invention of a mischief allegedly created by Section 9 (3) of the amendment to the Electoral Act, 1991 referred to by Mr. Sikota in his arguments. For this reason I do not intend to repeat the arguments by Prof. Mvunga and Mr. Sikota.

For the other side, it was argued by Mr. Chisulo that the words of Article 41 were unambiguous and that they should import their natural meaning. That whereas non compliance may exist in terms of Article 41 (2) (a) of the Constitution during nomination nevertheless it was not open to anybody to bring a petition relating to that nomination before Elections. To fortify his argument he referred the court to Section 9 (3) cited above which, he again argued was unambiguous.

On the question of whether or not Section 9 (3) was ultra vires Article 41 he argued that the Section was procedural. That it did not take away the rights conferred by Article 41 (2) (a) and therefore that it was intra vires the Constitution.

And Mr. Silwamba, while conceding that Article 41 (2)^(a) was not restrictive he concurred with Mr. Chisulo that this subarticle was caught up by Section 9 (3) of the amendment to the Electoral Act which he said was intra vires the Constitution. He further submitted that assuming that it was ultra vires the Constitution this court had no jurisdiction to declare it unconstitutional. That only the High Court was competent to do so under Article 28.

In reply, Mr. Shamwana argued that this court had jurisdiction to declare the Section unconstitutional.

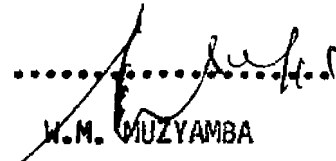
I have considered the arguments on both sides. It is my finding that Article 41 (2) is in two parts. Subarticle (2) (a) relates to nominations, that is qualifications and disqualifications for presidential candidates and subarticle (2)^(b) relates to the validity of the Election of a President, that is whether or not the Elected President conducted himself in accordance with the Electoral Regulations during the run up to the elections.

The pertinent question to ask at this stage is when can one bring a petition under subarticle (2) (a). Is it before or after an Election is held. The answer would appear to lie in Section 9 (3) and as to whether or not it is procedural or a matter of substantive law, that is does it take away anybody's rights under Article 41 (2) (a).

I have closely examined the Section and I am satisfied that it is procedural. It is not a matter of substantive law and does not in any way diminish anybody's rights under Article 41 (2) (a). It is therefore intra vires the Constitution. For this reason I hold that the petition is premature. It ought not to have been brought at this stage. I would dismiss it.

In view of what I have said above I find it unnecessary to decide whether or not this court has original jurisdiction to declare any law unconstitutional.

I award the costs to the respondents.


W.M. MUZYAMBA
SUPREME COURT JUDGE