IN THE SUPREME COURT OF ZAMBIA SCA/EP/3&4 OF 1996

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 41(2) OF THE CONSTITUTION OF ZAMBIA.

IN THE MATTER OF THE PRESIDENTIAL ELECTION HELD IN ZAMBIA ON THE 18TH OF NOVEMBER, 1996.

B E T W E E N

AKASHAMBATWA MBIKUSITA LEWANIKA	1ST PETITIONER
AND	
EVARISTOR HICUUNGA KAMBALA	2ND PETITIONER
AND	
DEAN NAMULYA MUNG'OMBA	3RD PETITIONER
AND	
SEBASTIAN SAIZI ZULU	4TH PETITIONER
AND	
JENNIFER MWABA PHIRI	5TH PETITIONER
AND	
FREDERICK JACOB TITUS CHILUBA	1ST RESPONDENT

Coram: Ngulube C.J., Bweupe D.C.J., Sakala, Chirwa and Lewanika JJS.

16th May and 27th May, 1997.

For the Petitioners: Mr. M. Chona SC, Mahachi Chambers.
Mr. E.J. Shamwana SC, of Shamwana & Company.
Mr. D. Lisulo SC, of Lisulo & Company.
Professor M.P. Mvunga, of Mvunga Associates.
Mrs. N.B. Mutti, of Lukoma Chambers.

For the Petitioners: (continued)

Mr. E. Lungu, of A.S. Andrew Masiye & Co.
Mr. W. Kabimba.
Mrs. M. Zaloumis, of Mvunga Associates.
Mr. S. Sitwala, of Light House Chambers.

For the 1st Respondent: Mr. V. Malambo and E. Silwamba of Malambo, Silwamba & Company.

R U L I N G

Sakala JS delivered his Ruling.

On 16th May, 1997, in the course of the hearing of the Petition Advocates for the petitioners informed the Court that they had instructions from their clients to ask the court to review its earlier two rulings. The first of those rulings is dated 13th May, 1997. In that ruling the Court set aside the subpoena duces tecum issued to the Director of the Examination Council of Zambia ordering him to attend before this court to testify and produce documents relating to the respondent's "O" and "A" levels records and his Form Two qualification certificate.

The second ruling, dated 15th May, 1997 was necessitated by Mr. Silwamba's objection to PW83, Rodwell Kasonteka Sikazwe's evidence relating to the amendment of the ZUFIAW Constitution at the quadrennial Conference held in 1990 at which the Constitution of that Union was to be amended to allow one of the National Executive members of ZCTU to be a trustee in the ZUFIAW. After hearing arguments on the objection from learned Counsel, the court ruled, by majority, that the line of evidence being led concerning ZUFIAW Constitution Amendments was irrelevant. The objection was accordingly sustained. These are this court's two rulings for which the petitioners have applied for review by this court.

The court heard arguments and submissions in support and against the application for review. The first submissions in support of the application were advanced by Mr. Chona, State Counsel. In his submissions Mr. Chona informed the court that the instructions from their clients were to ask the court to review its ruling refusing the petitioners to lead evidence of manipulation of the ZUFIAW Constitution. Mr. Chona referred the court to the pleadings where the details of manipulation have been set out. Counsel further pointed out that among the issues raised in the instant case is one of the respondent's character in that when he swore the oath when he was filing his nomination papers he was not truthful.

Mr. Sitwala in his arguments pointed out that the evidence of PW83 was refused on the ground that it was not relevant. He contended that the evidence was intended to establish a pattern or propensity on the part of the respondent to manipulate a Constitution and to further show that the respondent and others manipulated the Constitution of ZUFIAW and managed to obtain a position of trustee in the Union. According to Mr. Sitwala the petitioners intended, by leading the evidence from PW83 to show that the same pattern was adopted with regard to the Republican Constitution. And therefore the evidence of character could not be said to be irrelevant. On the issue of relevance Mr. Sitwala referred the court to the 14th Edition of Phillipson on Evidence para 701 page 110. Counsel submitted that the petitioners having pleaded that the character and identity of the respondent are in issue then they must be investigated and determined.

In his submissions Mr. Shamwana informed the court that his understanding of the application was not only to review the ruling disallowing the evidence of PW83 but also for the court to review the decision disallowing the production of the respondent's certificates.

Mr. Shamwana observed that normally and clearly that evidence could be irrelevant but contended that the issue is not the examination Results or the manipulation of the ZUFIAW Constitution per se but because the evidence is relevant, petitioners in paragraphs 9 and 18 and several other paragraphs of the petition, are saying that the respondent in his nomination papers put forward certain facts which presume the identity of the respondent and the facts in paragraph 18 show the kind of conduct that the respondent is alleged to have done. Mr.Shamwana further pointed out that in other parts of the petition the petitioners are saying the Elections were rigged. Counsel submitted that implicity to rig or to allege to rig an election impugnes on the character of a person alleged to have rigged the Elections and this immediately places a duty on the petitioners to support those allegations by showing the character of a person against whom the allegations are made. Mr. Shamwana further submitted that it is therefore relevant to show that he manipulated the ZUFIAW Constitution and that he did not pass certain examinations. According to Mr. Shamwana if the respondent says his father is "X" and the petitioners say his father is "Y" the court must then have a yard stick to determine which story to believe. This according to Mr. Shamwana can only be done if peripheral evidence is there to assist the court. Mr. Shamwana also pointed out that public records are important and examination results are important and submitted that this was the basis for asking the court to review the two rulings.

In concluding his submissions Mr. Shamwana conceded that there is no provision in the Supreme Court Act for this court to review its own decisions but contended that this court has inherent powers to look to its past decisions. Accoding to Mr. Shamwana when the matter was first argued some of the issues were not brought to the attention of the court. He pointed out that this court is not sitting only in its original jurisdiction of a court of first instance but also sitting as a final court. According to Mr. Shamwana the first objection on the examination

results was not properly taken because evidence can only be objected to on ground of competency and state privilege.

On behalf of the respondent Mr. Silwamba submitted that the application for review of the court's two rulings must be refused and dismissed. Counsel pointed out that when he received the application he wondered whether this court had jurisdiction to review its own decisions. Under Order 39 of the High Court Rules, Counsel observed that only the High Court has jurisdiction to review its orders. Mr. Silwamba indicated that he was prepared to accept that this court sitting as a court of first instance must have jurisdiction to review its own decisions. Counsel however, contended that for a court to exercise jurisdiction similar to that given under Order 39, the application for review must show grounds to support the application contending that in the instant case what learned counsel have done is to argue the review proper without establishing grounds for asking for it. Mr. Silwamba submitted that on the decided authority of Roy Vs Chittakata (1980) ZR 198 grounds have not been shown and the court should not therefore entertain the application.

Mr. Silwamba further argued that both State counsel in their address endevoured to pursuade the court that the matters in issue have been pleaded in the petition and yet the manipulation pleaded is that of the Republican Constitution in the process of Elections and that nowhere in the petition have the petitioners pleaded the manipulation of any other Constitution. Mr. Silwamba adopted the authority of Phillipson on evidence as referred to by Mr. Sitwala as underscoring the issue of relevance.

Mr. Silwamba also argued that if PW83's evidence is intended to show the respondent's propensity of manipulation, the more the reason that it is irrelevant. Counsel referred the court to a number of passages in several authorities on the issue of relevance and submitted that even if

this court were to be magnanimous as to allow PW83 to testify and thereafter the court to be satisfied that the ZUFIAW Constitution was manipulated, this would still not assist the petitioners. Counsel submitted that he failed to see the nexus.

In conclusion Mr. Silwamba submitted that there is no good reason shown for the court to depart from its two rulings pointing out that if the law was good then it must be good today.

In reply Mr. Shamwana pointed out that the striking difference with the authorities relied upon by counsel was that the decisions were on appeal from a court below. While in the instant case this court is sitting as a court of first instance and therefore quite clear and right that Mr. Silwamba concedes that the court must have some powers as the High Court pursuant to Order 39.

On grounds for review Mr. Shamwana replied that the grounds have been set out in the course of the submissions by counsel for the petitioners although not put in writing. Mr. Shamwana also referred to a number of authorities in his reply contending that if it is in the interest of arriving at a just decision then the court must look at its early rulings as was done in the case of Phiri & Others Vs The People (1978) ZR 79 when this court clarified its earlier judgment in the case of Machobane Vs The People (1972) ZR 101.

I am greatly indebted to all the learned counsel for their very spirited arguments and the relevant authorities cited. I have taken them into consideration in arriving at my decision in this application. In my considered opinion, the first question that must be very quickly settled is whether this court has any jurisdiction under the Supreme Court Act and the Supreme Court Rules to review its own decisions. From the arguments, it appeared to

me that all the parties are agreed that this court, sitting as an appellate court, has no jurisdiction of review of its own decisions. It is common cause that the Supreme Court is not a court of unlimited jurisdiction. It is a creation of statute and enjoys only such jurisdiction as is conferred on it by the Constitution and the Statute.

The general rule as to the amendment and setting aside judgments or orders after a judgment or order has been drawn up is contained in Halsbury's Laws of England (4th Edition), Vol. 26 Page 279) This general rule which was followed with approval in the case of Mayo Transport Vs. United Dominions Limited (1962) R & N 22 reads as follows:

> "except by way of appeal, no court, judge or master has power to rehear, review, alter or vary any judgment or order after it has been entered either in an application made in the original action or matter or in a fresh action brought to review the judgment or order. The object of the rule is to bring litigation to finality, but it is subject to a number of exceptions."

This passage was confirmed by this court in the case of Trinity Engineering (PVT) Limited Vs Zambia National Commercial Bank Limited SCZ appeal No. 76 of 1995 when after citing the above passage the court had this to say:-

> "Quite clearly therefore, this court has no jurisdiction to review its judgment or set it aside and re-open the appeal. If it were not so then there would be no finality in dealing with appeals."

I am mindful that the above decision was on appeal from the High Court. But in the case of Kasote Vs The People (1977) ZR 75, this court under head note (iii) held:

"The Supreme Court being the final court in Zambia adopts the practice of the House of Lords in England concerning previous decisions of its own and will decide first, whether in its view the previous case was wrongly decided and, secondly, if so, whether there is a sufficiently strong reason to decline to follow it."

Thus the Emmanuel Phiri case referred to us by Mr. Shamwana did not infact overule or review the Machobane case, but simply clarified the terminologies of certain phrases used in that case. In my view the legal position seems to be that sitting as an appellate court the Supreme Court does not have any jurisdiction to review its judgment and to alter it in such a way as to give effect to what was not the intention of the court at the time when the judgment or order or ruling was given. To do so would in effect involve the Supreme Court sitting in appeal on its judgment. And to allow such applications for review would be to open doors to all and sundry to challenge the correctness of the decisions of the Supreme Court on the basis of arguments thought of long after the judgment or ruling was delivered. In those circumstances there would be no finality to litigation.

On the other hand, in matters of questioning the presidential Election by way of a petition the Constitution of Zambia itself has conferred original jurisdiction on the Supreme Court. Mr. Silwamba, fairly in my view, agreed and Mr. Shamwana concurred with him that in the special circumstances of a Presidential Petition, the Supreme Court having been conferred with original jurisdiction, and since it is not only sitting as a court of the first instance but also as a final court, then it must also have similar powers of review as those exercised by the High Court under Order 39 of the High Court Rules. Although the procedure and practice of the Supreme Court's original jurisdiction in these matters is not spelt out any where, I totally agree with both learned counsel

that when the Supreme Court is sitting as a court of first instance, then it must have those powers of review as exercised by a High Court Judge. It is on this basis that I propose to deal with the Petitioners' application but bearing in mind that this court is sitting in this Petition as a final court as well as a court of first instance.

Order 39(1) of the High Court Rules Cap 50 conferring power of review on the High Court reads:-

> "Any judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision."

A significant observation that must be made at this stage is that the rule acknowledges that an aggrieved party in the event of not exercising his right of review can still appeal. This is the same position spelt out in the passage in Halsbury Supra.

The petitioners in the present application are aggrieved by this court's rulings. This being a final court sitting as a court of first instance, the petitioners' only weapon of attacking the two rulings is certainly by applying for review. To this extent the application is well founded.

The decisions in the two rulings were based on the ground that the evidence of the respondent's certificates and the alleged manipulation of the ZUFIAW Constitution was irrelevant. The basis for the decision in the instant application therefore must be the construction of the

words: "upon such grounds as he shall consider sufficient" as they appear in Order 39.

Mr. Silwamba submitted that under Order 39, a review must be on grounds as the court "shall consider sufficient". I agree with Mr. Silwamba. Mr. Silwamba further submitted that in the instant case counsel for the petitioners have argued the review proper but advanced no grounds for asking for such review. In reply Mr. Shamwana contended that the grounds had beensubmitted in the course of the arguments. The question I must now resolve is whether sufficient grounds have been shown to enable this court to review its two rulings.

According to Mr. Chona, one of the grounds for asking for review is that the manipulation of the Constitution has been pleaded and the character of the respondent is in issue. According to Mr. Sitwala PW83's evidence on manipulation of ZUFIAW Constitution is relevant to show propensity on the part of the respondent and the respondent's character being in issue it must be investigated and determined.

According to Mr. Shamwana the evidence of certificates and ZUFIAW Constitution "could nomally and clearly be irrelevant" but that it is relevant in the instant case because the Petitioners have pleaded that the respondent in his nomination papers put forward certain facts which presume his identity and that the Petitioners have further pleaded that the elections were rigged thereby impugning on the character of the respondent.

In a High Court case of Roy, an application for review of a judge's own judgment on the ground that the judge could take into account fresh evidence was refused as being no good ground. In rejecting the application on the basis that there were no good grounds the court observed as follows:-

"As a matter of basic principle I have come to the conclusion that one can never take into account events which occur for the first time after delivery of judgment as grounds for review of a judgment. If it were otherwise there would never be an end to litigation."

In the case of Thynne Vs Thynne (1955) 3 All ER 129 Morris, L.J. summarised eight exceptions when a court, among other things, has power to review its own judgment as follows:-

(a) If there is some Clerical mistake in a judgment, order or ruling.
(b) If there is some error in a judgment, order or ruling arising from any accidental slip or ommision.
(c) If the meaning and intention of court is not expressed in its judgment, order or ruling.
(d) If the court has come to an erroneous decision either in regard to fact or law.
(e) If new evidence comes to light and can be called which no proper and reasonable diligence could earlier have secured.
(f) If a party is wrongly named or described in a judgment.
(g) If a party named in a judgment or ruling is non-existent.
(h) Where depending on circumstances the judgment or ruling was obtained by fraud.

The Thynne case was followed and approved in the Mayo Transport case. Although the exceptions are said not to be exhaustive I have still carefully looked and considered the grounds upon which the Petitioners are asking for the review in the instant case. I must however point out that when the two rulings were delivered the court took into account the matters as pleaded in the petition Those matters cannot now be said to be new grounds for asking the court to review its rulings on the issue of

relevance. In coming to this conclusion I have born in mind the eight exceptions to the general rule as set out in the judgment of Morris L.J.

The evidence relating to the respondent's "O" and "A" levels was rejected in our first ruling on the ground that it was irrelevant to the issues in a petition brought under article 41 (2) of the Constitution which requires this court to determine whether:-

> "(2)(a) Any provision of this Constitution or any law relating to election of a President has been complied with;
>
> (b) Any person has been validly elected President under article 34."

It was pointed out in that ruling that a candidate's education or academic achievements are not part of the qualifications necessary for a Presidential candidate. I have not been able to ascertain any good grounds for review of that ruling apart, perhaps, that the petitioners do not agree with it.

A short majority ruling in relation to the evidence of PW83 was that the evidence of PW83 concerning ZUFIAW Constitution amendments is irrelevant. Meaning no disrespect to learned counsel, I have serious difficulties in equating the amendments of a Union Constitution to that of the Republic. I have also found no good grounds for reviewing that short majority ruling. The application for review is therefore dismissed.

E.L. Sakala;
SUPREME COURT JUDGE.