

GODFREY KENNETH MIYANDA, ANDERSON KAMBELA MAZOKA, CHRISTON TEMBO, NEVERS MUMBA, TILYENJI KAUNDA, BEN MWILA AND THE ATTORNEY-GENERAL, THE ELECTORAL COMMISSION AND THE RETURNING OFFICER FOR PRESIDENTIAL ELECTIONS.

THE HIGH COURT
HONOURABLE MR. JUSTICE PETER CHITENGI
2ND JANUARY, 2002
(SCZ No. 2001/HP/1174)

Flynote:

Presidential Petition – Judicial Review – Elections

Headnote:

The applications all sought to be elected as Presidents of the Republic of Zambia. At the time of this application, the presidential elections were still going on in some constituencies. The applicants among other things claimed a recount under Regulation 44 of the Electoral (General) Regulations, verification of some electoral results in some constituents and delays in voting in the Luapula and Northern Provinces. And most importantly an order that the returning officer refrains from announcing the Presidential election results and declaring a winner until after verification and recount.

Held:

- (i) The Supreme Court has jurisdiction to hear Presidential election petition and not the High Court.
- (ii) For Judicial Review to lie there must be a decision in the first place.
- (iii) The Constitution is the most Supreme Law of the Land and cannot be over thrown by Acts of Parliament, Bye-Laws, rules of court etc.
- (iv) Held further that the election of the President cannot be arrested by way of Judicial Review.

Matter being a constitutional issue application dismissed.

For the Appellants: Mundia Messers C L Mundia & Company, Mutti, Messers Lukona Chambers, Matibini, Nchito, Messers MNS Legal Practitioners, Chisanga, Mwiimbu, Messers Mwiimbu & Company

For the Respondents: B.C. Mutale, Attorney-General and Jalasi State Advocate

Judgment

This application was made Ex Parte but because of the nature of the subject matter of the substantive action I formed the firm opinion that the application be heard Inter Parte so that it can be argued whether Leave for Judicial Review should actually be granted.

The applicants, who individually seek the Presidency of the Republic of Zambia, have various complaints and concerns about the current Presidential elections which I am told are still going on in some constituencies. From the Statement and Verifying Affidavit, the applicants who belong to different political parties but whose affinity now appears to be the failure by all of them to win the Presidency, have mainly complained that the Returning Officer has and continue to ignore to order a recount and verification of the Presidential polls when under Regulation 44 of the electoral (General) Regulations the Applicants are entitled to a recount as long as the request is not unreasonable and by Regulation 46 of the Regulations aforesaid the Returning Officer is obliged to appoint time for verification. Further, the have complained of some alleged deliberate misposting of election results in Constituencies called Moomba, Matero and Livingstone, a situation which the Applicants say requires verification. Further more, the applicants have expressed concerns about identical results in the Roan and Luanshya constituencies which they say raise suspicions and requires verification. The applicants have also complained about delays in voting in the Luapula and Northern Provinces which because of lack of monitors who had ran out of allowances the Applicants say require verification.

The applicants seek verification and recount in the Copperbelt, Northern, Lusaka and Luapula Provinces and an order that the Returning Officer refrains from announcing the Presidential election results and declaring a winner until after verification and recount.

The Attorney-General put in the forefront of his submissions the argument that this Court being the High Court lacks jurisdiction in this matter because this matter relates to election of the President. As authority for this proposition the Attorney-General relied on Article 41 of the Constitution and Section 9 (3) of the Electoral Act as repealed by Act No. 23 of 1996.

The Attorney-General's second argument was that the Applicants seek remedy under Order 53 RSC. All matters relating to Presidential election must be brought before the full bench of the Supreme Court. The court of first instance in Judicial Review is the High Court. It was the Attorney-General's submissions that Order 53 RSC is therefore not applicable.

Thirdly, the Attorney-General submitted and argued that the purpose of Judicial is to question and challenge the decision of a public officer. As authority for this proposition the Attorney-General cited Order 53/1-14 RSC. The Statement filed by the Applicants does not disclose the decision made. It was the Attorney-General's submission that it was common knowledge that the Returning Officer has not announced the results and that the Returning Officer has not received the results from the second Respondent. In the circumstances, the Attorney-General then referred to the position of the MMD Presidential candidate which in my view is not crucial to the determination of this application.

Mr. Matibini for the Applicants submitted that Section 9(3) of the Electoral Act No. 23 of 1996 does not apply here because it refers to challenge of nomination or election of the President. It was Mr. Matibini's submission that the challenge of the nomination and election of the President was not the issue in this case. The issue before the court relates to initial request for verification which was superseded by a request for a recount. The Returning Officer has communicated the decision on both. In respect of verification see Exhibit GKM2. The decision on recount has been communicated after this action was commenced. It was Mr. Matibini's submissions that the Returning Officer's discretion in so far as recount is concerned is a matter which the Court can determine. There is, Mr. Matibini argued, a distinction between the jurisdiction of the Supreme Court as a trier of election petition and the exercise of discretion by a Returning Officer under the Electoral Regulations.

Under my prodding Mr. Matibini submitted that under our law it is possible for the Returning Officer to stop the Presidential election process while it is in motion because the Returning

Officer is a Public Officer who enjoys administrative discretion which is amenable to Judicial Review if it is not exercised properly.

Mrs. Mutti, also for the Applicants, submitted that Article 41 of the Constitution only deals with the election of the President and whether a person has been validly elected as President. In the present case, no President has been elected yet. It was Mrs Mutti's submission that the Supreme Court will have no jurisdiction to hear an application before the election is considered and a winner declared.

Mrs. Mutti then submitted that under Regulation 44 of the Electoral (General) Regulations a candidate has the right to demand a count unless the request is unreasonable. Regulation 47 provides for verification. The purpose of verification is to ensure that the results are ascertained before they are declared. This is the purpose for this application. The decision relates to the functions of the Returning Officer and not the election of the President. Mrs Mutti then referred to the MMD Presidential candidate, an issue which I have said is not critical to the determination of this application. Finally Mrs Mutti submitted that this application will not prejudice the Respondents and that if there is any one to suffer prejudice it will be the applicants by failure to allow recount. In the event, Mrs. Mutti submitted that the preliminary issues raised by the Attorney-General are misconceived and should not be entertained.

The Attorney-General's reply to all this is that Section 41 of the Constitution should not be narrowly interpreted so as to include matters at election and after election. It was the Attorney-General's submission that the interpretation should include all matters from nomination to election. The interpretation should include errors and irregularities during the whole electoral process. The counting, verifications are issues which are covered by Article 41 of the Constitution. These are the issues which fall under the embrace "Any question". It was the Attorney-General's submission that the Constitution is the Grund Norm. Rules in the White Book cannot override what the Constitution specifically provides for. The third Respondent has no discretion on the issue of swearing and declaring a Presidential candidate. As authority for this proposition the Attorney-General cited Article 34 of Sub Article 9 of the Constitution. The Returning Officer has a constitutional obligation to declare and swear in a winning candidate. It was the attorney-General's submissions that Judicial Review is about restraint of discretionary powers. Such discretionary powers are not deposited in the Returning officer.

I have given my anxious consideration to this matter and I am alive to the fact that this is a very grave matter which has raised the passions of many people to fever pitch. If what I saw and what happened to me is anything to go by then there is a lot of excitement going out there. It took me a long time going round the High Court for me to gain entry to my Chambers in the High Court. I finally appreciate the heavy responsibility that now lies on my shoulders. In that regard, I make a passionate appeal to all those concerned to exercise maximum restraint.

Having said I must also state that in a democracy the Rule of Law must always prevail. Our personal passions, whatever their source, should not be allowed to evade the Rule of Law. The law lays down what should be done.

For avoidance of doubt, I must say at the outset that this ruling does not decide that the Applicants have no valid case in their complaints against the elections and/or that the elections were fairly and properly conducted. These are not issues for this forum but for the Supreme Court when it sits to hear any Presidential Election Petition. The Supreme Court is the Court with jurisdiction in these matters.

As I see it the critical issue in this case is whether the Presidential election results can be announced and the winning candidate sworn in before the determination of this application and

whether the orders sought by the applicants can issue against the Returning Officer.

The Statement indicates that the Plaintiffs seek verification and recount which are normally done in the constituencies. In my judgment the issues of verification and recount are peripheral. When I read the statement and the verifying affidavits and the papers exhibited it is very clear to me that Applicants' complaints are about alleged irregularities. Therefore, the issues of counting and verification of ballots are part of the important issue of alleged irregularities in the presidential electoral process. It is most unlikely that the Applicants would have come to Court if they were substantially happy with the general presidential electoral process. What makes the Applicants feel damnified are the alleged irregularities. If the complaint is about the Presidential electoral process, can the process be stayed while in progress?

I listened to the learned submissions by Counsel on both sides and considered the authorities they have cited. I commend them for their resourcefulness. I accept the submissions and the authorities cited by the Attorney-General that matters relating to the election of Zambian Republican President principally lie in the provisions in Section 9(3) of the Electoral Act as repealed by Act No. 23 of 1996 and particularly Article 41 of the Constitution. But these submissions fly in the teeth of pleadings themselves which allege failure to comply with certain provisions of the Electoral (General) Regulations. The theme of the Applicants' complaint as revealed by the papers on file is clearly that they have been cheated and adumbrate that there has been massive rigging of the elections. Hence the applicants talk about suspicion. All these matters touch on the validity of the election in so far as it relates to the MMD presidential candidate who is not a party to these proceedings but in respect of whom the applicants seek an order against the Returning Officer that the Returning Officer refrains from announcing the Presidential elections and declaring him a winner before verification and recount of the votes. It can, therefore, not be seriously argued that the application before the Court has nothing to do with nomination or election of a President as Mrs. Mutti argued. The application has something to do with the Presidential electoral process. In the event Article 41 of the Constitution would apply.

The Attorney-General raised issues of jurisdiction and whether Judicial Review can lie in these proceedings. Mr. Matibini and Mrs. Mutti urged that this Court has jurisdiction in this matter while the Attorney-General submitted and argued that this Court has in terms of Article 41 of the Constitution has no jurisdiction. In the view I take of this matter I would not rest my judgment on this point. Clearly, the High Court has no jurisdiction to deal with the Presidential petitions.

What appears to me to be the critical issue is whether Judicial Review can in fact be available in a case like this one. All Counsel who submitted before me, through they took opposing positions, agree that for there to be Judicial Review there must be exercise of discretion by a public officer. The controversy between the parties is only as to whether there is or there is no discretion. The Attorney-General also argued that the Applicants have pleaded no decision which should be reviewed. I agree there is no such decision pleaded in the Statement. But I proceed on the premises that the letter Exhibit GKM 3 and another received after the commencement of these proceedings are the decisions as Mr. Matibini submitted and argued.

The question arises, can the Court in the circumstances of this case grant the orders sought by the Applicants against the Returning Officer requiring him not to announce election results and declare the winner the President because the Returning Officer refused to order recount and verification of the Presidential polls in the constituencies.

The answer to this question lies in the Constitution. As the Attorney-General rightly submitted, the returning Officer has no discretion in these matters. Once the result of the Presidential poll

is communicated to him the Returning Officer has under the Constitution no choice but to declare the winner and swear him in as the President. See Article 34 sub Articles (8) and (9). The Constitution is the Supreme law from which all other laws trace their validity and no Acts of Parliament, Bye-Laws, Rules of Court etc. will be given interpretation which will conflict with the Constitution itself. In the even the High Court cannot make any order which will stop the Returning Officer to do what he or she is required by the Constitution to do. We cannot overthrow the Constitution. We have to abide by the Constitutional provisions.

In fact, after reading the relevant provisions in the Electoral Act and the Constitution I am certain in my mind that it has never been the intention of Parliament and the framers of the Constitution that presidential election process can be arrested before the President is sworn in. In my view the repeal and replacement of Section 9(3) of the Electoral Act by the Electoral (Amendment Act) Act No. 23 of 1996 appears to have been aimed at forestalling litigation before the electoral process of a President is completed. It is clear to me that litigation in these matters can only start after the event. That is after the President whose election is impugned has taken office.

The Applicants have spoken too soon and their action is premature. They can challenge the Presidential election within the fourteen days period which is stipulated in the law. Under the law as it stands I cannot certainly order arrest of the Presidential election process by way of Judicial Review.

In the result, I refuse the application for leave to apply for Judicial Review. My refusal of leave for Judicial Review should not even be considered by the Applicants as a set back because under the law their right to remedy is still intact. If, for argument's sake, the incoming President is sworn in today the Applicants can file their action tomorrow.

Having regard to the nature of this action which is basically a constitutional matter I order that each party bears his own costs. Leave to appeal to Supreme Court is granted.

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