

MICHAEL CHILUFYA SATA Vs RUIPAH BWEDZANI BANDA, ELECTORAL COMMISSION OF ZAMBIA,
ATTORNEY-GENERAL OF ZAMBIA

SUPREME COURT

MAMBILIMA, DCJ, CHIRWA, CHITENGI, SILOMBA AND MWANAMWAMBWA, JJS

27th and 28th April 2009

SCZ/8/EP/01/2009

Flynote

Presidential election petition, when costs can be awarded.

Headnote

The petitioner challenged the Respondent's election as Republican President, citing irregularities allegedly committed during the presidential elections. The Petitioner withdraw the petition midstream, and respondent applied for costs.

Held:

Parties should not be inhibited to challenge the election of a President by unwarranted condemnation in costs, unless the petition is frivolous.

11. application granted.

RULING

CHIRWA, J.S. delivered the Ruling of the Court.

When this matter last came before us on 11th March, 2009, it was adjourned to 27th April 2009 for hearing. On 27th April 2009, before we commenced the hearing, State Counsel MUTALE informed the Court that since the last sitting, he had received instructions from the Petitioner to withdraw the petition, as the Petitioner had decided to commit all his energy and resources to the forthcoming Presidential and General Elections in 2011. State Counsel then formally applied to withdraw the Petition. There was no objection from all the Respondents and the petition was thus accordingly formally withdrawn. The question that remained was one of costs.

State Counsel MUTALE submitted that this was a proper case where the Court should order that each party bears its own costs as the petition was not frivolous. He told the Court that this petition was bona fide as it was brought because of the manner in which the 2nd Respondent conducted and managed the last Presidential Election, especially in the manner the results were posted. In his view, the petition, therefore, raised some Constitutional issues and the Petitioner should thus not be condemned in costs. He argued that since we were in a democracy and this Court had previously stated that people must be encouraged to litigate on important Constitutional issues, the Petitioner should be commended for bringing this Petition. He quoted what we said in *LEWANIKA & OTHERS V CHILUBA* (1998) Z.R. 79 at 228 that:

"However, it is clearly in the proper functioning of our democracy that challenges to the election of the President which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each parties should bear their own costs."

He also quoted what we said in *MAZOKA AND OTHERS V MWANAWASA* (2005) Z.R. 139 at 184 that:

"As we have always said on costs in matters of this nature, it is in the interest of the proper functioning of our democracy that challenges to the election of the President which are permitted by the constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs. In the event, it is only fair that each of the parties should bear their own costs."

In view of this State Counsel MUTALE submitted that the present petition was not frivolous and that we should uphold what we have said before on costs in previous Presidential election petition and order that each party should bear its own costs.

Prof. MVUNGA, SC, on behalf of the 1st Respondent, submitted that the present petition was distinguishable from the previous Presidential election petitions as those were heard and completed and not abandoned like this one. He said that it was only at the end of the hearing that the Court was able to assess whether the petition was frivolous. Prof. MVUNGA SC submitted that as the Petitioner has abandoned the petition, he should bear the costs. It was Prof. MVUNGA's further submission that the very act of abandoning the petition shows that it was frivolous. It was further argued that the Petitioner cannot say that the issues brought in this petition had never been decided upon before. He further stated that from the precious decisions of this Court, the Petitioner could have been guided. In the alternative, Prof. MVUNGA argued that the Court has not had the opportunity to determine whether the petition was frivolous or not as the petition has been abandoned. He submitted that the Court should therefore adopt the usual practice of the costs following the event.

In supplementing Prof. MVUNGA's submissions, Mr. SHONGA, another Counsel for the 1st Respondent, submitted that it was not proper in this case for the Court to order that each party should bear its own costs as there was a requirement under Section 99(4) of the Electoral Act, No. 12 of 2006 for the Court to make any such order as to costs as it may consider just. He argued that it would be unjust for the parties to bear their own costs and let the Petitioner walk away without footing the costs for this litigation. He stated that the 1st Respondent has already incurred costs in this petition and the Petitioner must pay them.

Mrs. KOMBE for the 2nd and 3rd Respondents initially adopted the arguments advanced by both Prof. MVUNGA and Mr. SHONGA but after prodding from the court as to whether as a keeper of public interest, the Attorney-General would insist on costs. Mrs. KOMBE fairly and properly conceded that the Attorney-General would not insist on costs.

We have considered the submissions by Counsel. We agree that the Petitioner properly brought this petition as allowed by the Constitution under our young democracy, and we are also alive to our previous decisions on costs in previous Presidential election petitions. In those decisions we ordered that each party should bear its own costs because we found that the petitions were not frivolous and parties should not be inhibited to challenge the election of a President by unwarranted condemnation in costs. In this case, we are not in a position to say whether the petition was frivolous or not as it was not

heard. Suffice to say that the allegations are targeted at the conduct of the elections by the 2nd Respondent. No wrongdoing has been alleged against the 1st Respondent. He was brought in because he was declared the winner. As was correctly submitted by Mr. SHONGA, the 1st Respondent has incurred costs in this petition. In the circumstances of this case, we see no reason why the 1st Respondent should be denied costs. We therefore, order that as between the Petitioner and the 1st Respondent, the Petitioner shall bear the costs of the 1st Respondent. As between the Petitioner and 2nd and 3rd Respondents, each party will bear its own costs. Costs as between the Petitioner and 1st Respondent to be agreed upon, in default, to be taxed.

I.C. Mambilima

DEPUTY CHIEF JUSTICE

D.K. Chirwa

SUPREME COURT JUDGE

P. Chitengi

SUPREME COURT JUDGE

S.S. Silomba

SUPREME COURT JUDGE

M.S. Mwanamwambwa

SUPREME COURT JUDGE