

30/2014

SCZ NO.

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**IN THE SUPREME COURT OF ZAMBIA
123/2012**

APPEAL NO.

HOLDEN

AT

LUSAKA

**SCZ/8/70/12
(CIVIL JURISDICTION)**

IN THE MATTER OF : **Article 72 (1) (a) of the Constitution
of** **the Republic of Zambia**

AND

IN THE MATTER OF : **Sections 93(1) of the Electoral Act
No.12** **of 2006**

AND

IN THE MATTER OF : **Vubwi Constituency Election held in
Zambia on 20th September, 2011**

BETWEEN:

**VINCENT ISAIAH MWALE
APPLICANT**

AND

EUSTARKIO KAZONGA **1ST**
RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA **2ND**
RESPONDENT

Coram : **Mwanamwambwa, Chibomba, Phiri, Wanki,
Muyovwe,JJS,**

**Lengalenga and Hamaundu, AJJS
on the 17th December, 2013 and the 3rd July, 2014**

For the applicant : **Mr Bonaventure Mutale, SC., and Ms Mukuka,
Messrs**

Ellis & Co, Mr A.D. Mumba, Messrs A.D.

Mwansa

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Mumba & Associates

For 1st respondent: Major C. Lisita, Messrs Central Chambers

For 2nd respondent: Mrs Lungu, Legal Counsel

JUDGMENT

HAMAUNDU, AJS, delivered the Judgment of the Court

Cases referred to:

1. **Caltex Oil Zambia V Teresa Transport Limited [2002] ZR**
2. **Michael Mabenga V Sikota Vina & 2 others [2003] ZR 110**

Legislation referred to

1. **Electoral Act, No.12 of 2006**
2. **Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia**

This is a Motion brought by the applicant pursuant to **Rule 48(5)** of the **Supreme Court Rules, Chapter 25** of the **Laws of Zambia**.

By this Motion, the applicant requests the Supreme Court to determine the following questions.-

Whether, on a construction of **Sections 22** and **104** of the **Electoral Act, No. 12 of 2006**, as read with **Section 9** of the **Supreme Court Act, Chapter 25** of the **Laws of Zambia**, and in view of the finding by the Supreme Court that the 1st

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respondent is guilty of having committed corrupt practices in connection with the Parliamentary Election held on the 20th September, 2011 in respect of the Vubwi Constituency;

- (1) It is incumbent on the High Court to make a report to the 2nd respondent and the Director of Public Prosecutions on the finding that the 1st respondent committed corrupt Practices in connection with the Parliamentary election held in respect of the Vubwi Constituency on the 20th September, 2011
- (2) The 1st respondent may not contest any Parliamentary election in Zambia in the period of five (5) years from the submission to the 2nd respondent and the Director of Public prosecutions of a report prepared by the High Court; and
- (3) It is incumbent on the 2nd respondent or the National Prosecution Authority to prosecute the 1st respondent for corrupt practices under the *Electoral Act*.

A brief background to this Motion is as follows:

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The applicant and the 1st respondent contested the general elections held in September, 2011, as candidates for the Parliamentary seat in the Vubwi Constituency. The 1st respondent won the seat. The applicant contested the results in the High Court, alleging corrupt practices on the part of the 1st respondent. The High Court dismissed those allegations, as well as the petition. The applicant appealed to the Supreme Court which held that the finding by the High Court that the 1st respondent had given a sum of K20 each to about 20 village headmen amounted to a corrupt practice committed by the 1st respondent personally and that by the provisions of Section 93 (2) (c), that corrupt practice rendered his election void. The Supreme Court nullified the 1st respondent's election on that action. It is against that background that the applicant asks the above listed questions.

All the parties filed heads of arguments.

On behalf of the applicant, **Section 104, sub-section 6,7** and **8** of the **Electoral Act, No. 12 of 2006** was cited. It was submitted that, on the interpretation of those provisions and as read with **Section 9** of the **Supreme Court Act, Chapter 25** of

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the **Laws of Zambia**, it is incumbent upon the High Court to prepare a report on the 1st respondent's corrupt practices for onward transmission to the 2nd respondent and the Director of Public Prosecutions notwithstanding that the finding of corrupt practice was made by the Supreme Court and not the High Court.

It was also submitted on behalf of the applicant that, on the interpretation of those provisions, it was incumbent upon the Director of Public Prosecutions, upon receipt of the said report, to institute criminal proceedings against the 1st respondent for the commission of the said corrupt practices.

It was, finally, submitted on behalf of the applicant that on the interpretation of the provision of **Section 104** of the Electoral Act, No.12 of 2006 and as read with **Section 22(b)** of the same **Act**, a report submitted by the High Court to the 2nd respondent operated to bar the 1st respondent from contesting any parliamentary election in Zambia for a period of five (5) years.

With those submissions, the applicant implored this court to answer the questions in the affirmative.

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On behalf of the 1st respondent, emphasis was placed on the provisions of **Section 104, sub-section (6)** of the **Electoral Act**. It was submitted that on the interpretation of that sub-section, it was only the High Court, as a trial court, that was mandated to prepare the report. It was submitted, however, that before the High Court could prepare a report, the following conditions should have been fulfilled:-

- (i) It must have appeared to the High Court upon the trial that the 1st respondent had committed a corrupt practice in connection with the election;
- (ii) Having found that the 1st respondent had committed a corrupt practice, there was need for the High Court to afford the 1st respondent an opportunity to appear and be heard as to why he should not be cited in the report.

It was submitted that in this case, it did not appear to the trial court that the 1st respondent had committed a malpractice and, therefore, no report could be prepared.

In the same vein, it was submitted that the 1st respondent could not be barred from contesting any Parliamentary election

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for the next five years because the trial court did not find him guilty of any corrupt practice. It was, further, submitted that, even where the corrupt practice is found by the Supreme Court, there is need to comply with the provisions of **Section 104** retrospectively by holding a new trial specifically for the purpose of making a report to the 2nd respondent and the Director of Public Prosecutions. It was submitted that even assuming that the provisions of **Section 9** of the **Supreme Court Act** were to apply, the High Court would still have to adopt the procedure above.

It was, finally, submitted that, in the absence of a report having been submitted to the Director of Public Prosecutions, no prosecution of the 1st respondent can be undertaken and that invoking any of the questions sought by the applicant at this late hour is untenable and tantamount to persecution of the 1st respondent.

In its heads of argument, the 2nd respondent opted to offer no legal arguments.

In response to the 1st respondent's arguments, it was submitted on behalf of the applicant that **Section 2(3)** of the **Electoral Act** provides the ambit within which the Electoral Act should be interpreted. It was submitted that the provision requires the Act to be interpreted in a manner which not only gives effect to the guarantees and responsibilities contained in the Constitution of Zambia but also takes into account any appropriate code. It was submitted that pursuant to that provision, **Section 104** of the **Electoral Act** should be read with **Section 9** of the **Supreme Court Act** which provides that any judgment of the Supreme Court shall be executed and enforced in like manner as if it were a judgment of the High Court. It was submitted that the High Court is required to enforce the findings of the Supreme Court as if they were made by the High Court itself. The applicant relied on the case of **Caltex Oil Zambia v Teresa Transport Limited**⁽¹⁾ for the foregoing submission.

It was also submitted on behalf of the applicant that the *proviso* to **Section 104(6)** of the **Electoral Act** did not apply to the 1st respondent for the following reasons:-

- (i) That the 1st respondent was party to the proceedings from their inception in the High Court
- (ii) That the 1st respondent exercised his right and was availed of the opportunity to defend himself when he filed an Answer and adduced evidence in support of his case which was aimed at rebutting the allegations of corrupt practices; and
- (iii) That the 1st respondent's names and particulars were clearly recorded in the petition, the answer and during his own examination in-chief.

It was argued that the *proviso* to **Section 104(6)** applies only to persons who did not have the foregoing opportunity.

It was also submitted that the disqualification of a person from election as a Member of Parliament may result not only from conviction following criminal proceedings but also as a result of a finding made in the course of civil proceedings. It was argued that the remarks which this Court made in the case of **Michael Mabenga V Sikota Wina & 2 others**⁽²⁾ were obiter and have

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since been superseded by the enactment of the **Electoral Act No.12 of 2006.**

Those were the written submission by the parties.

At the hearing, learned State Counsel, Mr Mutale, informed the Court that the applicant would rely on his written submissions. Learned State Counsel added that the applicant was merely seeking that this Court provides guidance to the High Court since the court that ought to enforce the order is the High Court.

On behalf of the 1st respondent learned Counsel, Major Lisita, submitted that the provisions of **Section 104** of the **Electoral Act** demand that the person who is to be the subject of the report should be given an opportunity to appear before the court and show cause why he should not be cited in the report. Counsel submitted that the court could not proceed to make a report without following that procedure.

On behalf of the 2nd respondent, learned Counsel, Mrs Lungu, informed the Court that the 2nd respondent would rely on its written heads of argument which stated that the 2nd respondent would offer no legal arguments.

In response to Major Lisita's submission, State Counsel Mutale argued that the **proviso** to **Section 104** of the **Electoral Act** does not refer to a person who has been a party to the proceedings and has been found guilty of corrupt practices.

Those were the oral submissions on both sides.

We have considered the arguments on both sides. We wish to state from the outset that this motion is misconcieved. The reason for the misconception can be found in the case of **Caltex Oil Zambia Limited v Teresa Transport Limited**⁽¹⁾ which was cited by the applicant. In that case, we had ordered a respondent who had withdrawn money paid into court to pay it back in court within 30 days from the date of that order. For the full effect of our decision in that case to be appreciated, we will reproduce a portion of our judgment. The portion reads:-

“On 5th December 2001, when we heard the main appeal, counsel for the appellant drew our attention to the fact that the respondent had not complied with our order of 16th March 2001, and asked for directions as to what should be done about enforcing the order.

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We advised her that the court does not enforce its orders and advised her to make the necessary applications to the High Court. On 20th December, 2001, counsel for the appellant made applications to the High Court for sequestration and contempt. These applications were dealt with by two judges of the High Court one after the other and the latter judge refused to entertain the applications on the ground that it had no jurisdiction to do so.

We would like to draw the attention of the parties to section 9 of the Supreme Court of Zambia Act which provides as follows:-

Section 9:

'The process of the court shall run throughout Zambia and any judgment of the court shall be executed and enforced in like manner as if it were a judgment of the High Court'.

The effect of this section is that our judgment and orders are to be enforced in the High Court as there is

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no provision to conduct running litigation in this court.”

The circumstances in the **Caltex Oil⁽¹⁾** case are similar to those in this motion. We passed our judgment on the 10th December, 2013. In that judgment, we found a corrupt practice which rendered the election of the 1st respondent null and void. The applicant now wants to enforce that judgment by virtue of **Section 9** of the **Supreme Court Act**. As we held in the **Caltex Oil⁽¹⁾** case, the applicant ought to have pursued that enforcement in the High Court and not before this Court. It is for that reason that we have said that this motion is misconceived.

This motion stands dismissed. Either party will bear their own costs.

.....
M.S. MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

.....
H. CHIBOMBA

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SUPREME COURT JUDGE

.....
G.S PHIRI
SUPREME COURT JUDGE

.....
M.E. WANKI
SUPREME COURT JUDGE

.....
E.N.C. MUYOVWE
SUPREME COURT JUDGE

.....
F. LENGALINGA
ACTING SUPREME COURT JUDGE

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E.M. HAMAUNDU
ACTING SUPREME COURT JUDGE