IN THE CONSTITUTIONAL COURT OF ZAMBIA
AT THE CONSTITUTIONAL REGISTRY
HOLDEN AT LUSAKA
(CONSTITUTIONAL JURISDICTION)

2016/CC/0031
RULING NO. 33 OF 2016

BETWEEN:

05 SEP 2016

IN THE MATTER OF: THE PRESIDENTIAL ELECTION PETITION FOR THE PRESIDENTIAL ELCTIONS HELD ON 11TH AUGUST, 2016

AND IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: ARTICLES 1, 2, 5, 8, 9, 45, 47, 48, 49, 50, 54, 60, 90, 91, 29 AND 93 OF CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: ARTICLES 101, 102, 103, 104, 118, 229 AND 267 OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF: ARTICLES 128(1) (C) OF THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

AND IN THE MATTER OF:	**SECTION 8 (1) (C) AND (D) OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**
AND IN THE MATTER OF:	**ORDER XIV OF THE CONSTITUTIONAL COURT RULES ACT NO. 8 OF 2016 OF 2016 OF THE LAWS OF ZAMBIA**
AND IN THE MATTER OF:	**SECTIONS 29, 37, 38, 51, 52, 58, 59, 60, 66, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 81, 82, 83, 84, 86, 87, 89 AND 91 OF ELECTORAL PROCESS ACT NO. 35 OF 2016 OF 2016 OF THE LAWS OF ZAMBIA**
AND IN THE MATTER OF:	**SECTIONS 110 OF ELECTORAL PROCESS ACT (ELECTORAL CODE OF CONDUCT NO. 35 OF 2016 OF 2016 OF THE LAWS OF ZAMBIA**
AND	
AND IN THE MATTER OF:	**SECTIONS 110 OF THE ELECTRONIC COMMUNICATIONS AND COMMUNICATIONS ACT NO. 21 OF 2009 OF THE LAWS OF ZAMBIA**

BETWEEN:

HAKAINDE HICHILEMA	**1ST PETITIONER**
GEOFFREY BWALYA MWAMBA	**2ND PETITIONER**

AND

EDGAR CHAGWA LUNGU	**1ST RESPONDENT**
INONGE WINA	**2ND RESPONDENT**
ELECTORAL COMMISSION OF ZAMBIA	**3RD RESPONDENT**
ATTORNEY-GENERAL	**4TH RESPONDENT**

CORAM: Chibomba, PC, Sitali, Mulenga, Mulonda and Munalula, JJC.
On 2nd September, 2016 and on 5th September, 2016

For the Petitioners:	**In Person**
For the 1st and 2nd Respondent:	**Mr. B.C. Mutale, SC of Ellis and Company**
	Mr. E.S. Silwamba, SC of Silwamba, Lisimba and Jalasi
	Prof. P. Mvunga of Mvunga Associates
	Mr. S. Sikota of Central Chambers
	Mr. N. Mubonda of D.H. Kemp and Company
	Mrs. Suba of Suba Tafeni and Associates
	Mr. N. Simwanza of Noel Legal Practitioners
	Mr. T. Ngulube of Nanguzyambo and Company
For the 3rd Respondent:	**Mr. A. Shonga, SC and Mr. S. Lungu of Shamwana and Company**
For the 4th Respondent:	**Mr. L. Kalaluka, SC Attorney-General**
	Mr. A. Mwansa, SC Solicitor-General

Mr. M. Lukwasa, Deputy Chief State Advocate

Mr. F. K. Mwale, Senior State Advocate

Ms M. Kalimamukwento, Assistant Senior State Advocate

R U L I N G

SITALI, JC, delivered the Ruling of the Court.

Case referred to:

1. **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others Petition No. 5 of 2013**

Legislation referred to:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia, Articles 101 (5), 103 (2), 104 and 269 (a) and (d).**

2. **The Constitutional Court Rules, Statutory Instrument No. 37 of 2016, Order XV rule 7.**

On Friday, 2nd September, 2016, the Court adjourned the proceedings herein to today 5th September, 2016, for hearing following the Petitioners' advocates' decision to withdraw from representing the Petitioners. The reason advanced by the Court for the adjournment was to give the Petitioners time to engage legal practitioners to represent them. However, prior to the

adjournment, the learned Attorney-General submitted that in terms of Article 101 (5) of the Constitution, the time limited for the hearing of the Petition was fourteen (14) days from the date of the filing of the Petition. He further submitted that once the fourteen (14) days had expired, this Court would not have jurisdiction to hear the Petition and that any further proceedings that would be entertained by this Court would be a nullity.

We did not address that submission prior to adjourning the matter to today for hearing. It is trite that whenever the jurisdiction of the Court, to hear a matter is raised, that issue must be addressed and determined before the hearing of that matter can proceed. This is because if a Court proceeds to hear a matter without jurisdiction, the resulting trial or hearing would be a nullity.

Thus, it is imperative, in the present case, for this Court to address the objection raised by the Attorney-General on behalf of the 4th Respondent and by State Counsel for the 1st, 2nd and 3rd Respondents in the course of the sitting on Friday, 2nd September, 2016. Mr. Shonga, SC, went as far as to state that when dealing with an election petition, the Court exercises a special jurisdiction, which is limited to the Constitutional provisions and any electoral laws and rules of Court relating to the petition. State Counsel at that point submitted that when exercising that special jurisdiction the Court is placed in a straight jacket. He stated that as the

proceedings relating to an election petition are *sui generis*, this Court does not have the discretion or the constitutional mandate to enlarge the time in which the petition must be heard. The Constitution in both Articles 101 (5) and 103 (2) provides that a petition under the said articles shall be heard within fourteen (14) days from the filing of the petition.

The question to be determined, therefore, is whether this Court has jurisdiction to hear the election Petition herein after the expiry of the fourteen days limited for the hearing of the Petition. In order to answer the question, we have considered the provisions of Article 101 (5) of the Constitution which states that:

> *"(5) The Constitutional Court shall hear an election petition filed in accordance with clause (4) within fourteen days of the filing of the petition."*

The provision set out above is clear and unambiguous. It is couched in mandatory terms thus giving the Court no discretion to enlarge the time for hearing the Petition. In interpreting the provisions of Article 101 (5) of the Constitution, the words used by the legislature should be given their ordinary meaning and only if the ordinary meaning results in an absurd meaning should the purposive interpretation be resorted to. In the present case, no absurdity results from the interpretation of the provision in its ordinary sense.

Having said that, Article 269 (a) and (d) of the Constitution, which relate to the computation of time, provide that:

> *"(a) a period of days from the happening of an event or the doing of an act shall be considered to be exclusive of the day on which the event happens or the act is done:*
>
> *(d) where an act or a proceeding is directed or allowed to be done or taken within a time not exceeding six days, an excluded day shall not be counted in the computation of time."*

In the present case, the presidential election petition was filed on 19th August, 2016, within the seven (7) days prescribed period. Article 269 (a), on the computation of time, provides that the time begins to run on the day following the doing of an action and in this case the 14 days began to run on 20th August, 2016. The fourteen days lapsed on 2nd September, 2016.

Article 1 (1) of the Constitution provides that the Constitution is the supreme law of the land and Article 1 (3) provides that the Constitution is binding on all persons in Zambia including State organs and institutions. Therefore, where the time for hearing the petition is limited by the Constitution, the Court is bound to enforce the time limit. This means that if this petition were to be heard outside the fourteen days' period, the proceedings will be a nullity.

There is, therefore, no benefit to any party in breaching the constitutional provision of fourteen days period for hearing the petition, apart from wastage of money and other resources.

The purposive approach to the interpretation of the Constitution does not assist in this case as the time frame for the hearing of the petition is stated in mandatory terms and Order XV rule 7 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 states that this Court has no jurisdiction to change the time frame specified in the Constitution. This Court's hands are, therefore, tied in terms of enlarging time. In view of the fact that the Court has no power to enlarge time, the order we gave to the parties, on 2nd September, 2016, that they would be given two days each to present their case outside the prescribed period is not tenable.

The parties, including the Petitioners, who were ably represented by advocates from as many as ten law firms, who included State Counsel, were well aware of this strict provision on the time frame. We say so because shortly after the filing of the Petition, the Petitioners' lawyers were called to appear before the single Judge of the Court who was allocated the matter to issue directions for trial, being myself. The Judge at that early stage, directed the Petitioners' advocates to immediately serve the Respondents and file an affidavit of service to that effect. The direction was given as according to the rules of the Court, the Respondents have five days

within which to file their answer after the date the petition is served on them. The Petitioners' advocates only served the petition on the 1st and 2nd Respondents on Tuesday, 23rd August, 2016, which was four days after they had filed the petition. The 3rd Respondent was served on 19th August, 2016, being the date on which the Petition was filed. The single Judge subsequently issued directions in the matter on 24th August, 2016, which directions are on record. The directions initially given to the parties were that the hearing of the petition would commence on 2nd September, 2016, and end on 8th September, 2016. After representations were made, the Judge informed the parties on 1st September, 2016, in the morning, that the status was that the hearing would commence and conclude on 2nd September, 2016, being the last day of hearing. In the meantime, the Petitioners filed a number of interlocutory applications.

This Court was ready to hear the petition within the prescribed fourteen (14) days but the Petitioners instead chose to concentrate on interlocutory applications at the expense of ensuring that the petition was heard within the prescribed time. This was their right to do and so they only have themselves to blame when time ran out on them. Even equity cannot assist the Petitioners because equity does not assist the indolent.

It was apparent that the Petitioners were not ready to prosecute their petition because even when this Court proposed to begin hearing them on 1st September, 2016, so as to increase the time of hearing the matter, their advocates, after getting instructions, refused to accept this direction citing the need to file bundles of documents. It is worth noting that the witness statements which were filed by the Petitioners together with the petition on 19th August, 2016, reveal that most of the witnesses whom the Petitioners intended to call are based in Lusaka and could be called at short notice. This is why the Court directed that the hearing of the matter could commence on Thursday, 1st September, 2016, at 14.00 hours.

When the matter came up for hearing on 2nd September, 2016, at 08.00 hours, the Court informed the parties that the hearing of the petition would conclude at 23.45 hours and that each side would be allocated six and half hours to present their cases. However, the Petitioners' advocates opted to make several preliminary applications, which consumed a lot of time, as the final application was only determined after 19.00 hours leaving only four (4) hours to the time stated for the conclusion of the hearing. Each side, therefore, had two hours left within which to present their cases.

At this point, all the Petitioners' lawyers all sought the Court's leave to withdraw from representing the Petitioners citing the fact that

the two hours they had remaining to present the case, were inadequate for them to ably represent the Petitioners, which leave was granted.

Thus, the Petitioners cannot now be heard to complain that they were only given two hours to present and prove their case when they deliberately chose to squander the many hours that were allocated to them. From the conduct of the Petitioners' advocates throughout the day, on 2nd September, 2016, in making the several preliminary applications in the presence of the Petitioners who were present in Court, it is evident that the Petitioners had no intention of putting any witness on the stand on that day. The only inference that can be drawn from that conduct is that the Petitioners' advocates intended to force the Court to extend the hearing of the petition beyond the time limited for the hearing of the petition by the Constitution. This conclusion is supported by the advocates' decision to withdraw from representing the Petitioners just a few hours before the time set by the Court for the conclusion of the hearing.

When the matter came up for hearing on 2nd September, 2016, the Court emphasized to the parties that the fourteen (14) day period was rigid and the hearing had to be concluded by 23.45 hours and the hours were shared equally between the Petitioners on one hand and the Respondents on the other hand. Upon being asked to

proceed with their case, the Petitioners' Counsel began to raise motion upon motion for determination. They raised a total of six (6) applications while the Respondents raised one. These applications were finally disposed off at around 19.30 hours.

We must state that the behavior of some of the Counsel for the Petitioners was unbecoming of the noble profession and some went to the extent of alleging bias on the part of the Court and the single Judge in particular, who was the face of the Court at the scheduling stage, as the reason for their applications being dismissed. We condemn this conduct in the strongest terms and in particular that of Ms Martha Mushipe and enjoin the Law Association of Zambia to take appropriate disciplinary action against her.

It was further unacceptable for learned lawyers representing the Petitioners to state that the single Judge of the Court made unilateral decisions with regard to the setting down of the matter for hearing and thereby misled the Petitioners into alleging bias against the single judge. The said advocates were fully aware that the single judge was mandated in accordance with Article 129 (2) of the Constitution which states that Constitutional Court shall be constituted by a single judge when hearing an interlocutory matter. Further, they are well aware that the scheduling of the matter for hearing is the responsibility of a single Judge of the Court. We, therefore, disapprove of their unprofessional conduct in that regard.

After that spectacle which their advocates put up dressing down the Court in the presence of a packed Court room, the Petitioners, when called upon to address the Court in person, lamented that the remaining time was insufficient to present their case and also alleged bias on the part of the Court as the reason for dismissing their applications and singled out the single Judge of the Court. We must state here that this Court places no blame on the Petitioners who are lay persons because they can only respond to what their advocates tell them. And as we have said, in this particular case, learned advocates of very senior standing at the Bar chose to mislead the Petitioners into thinking that any directions that were being issued by the single Judge of the Court were as a result of the Court's bias. It is common knowledge that the single Judge of the Court is merely the face of the Court and as can be understood, there was no way the single Judge was going to set down the matter for trial without other members of this bench being in agreement.

That said when the Petitioners requested the Court to give them about an hour to consult, that request was granted. The Petitioners later requested for time to engage Counsel. This application was granted at around 23.55 hours and the matter was then adjourned to today 5th September, 2016.

As we have said in this case, the period for hearing the petition is prescribed by the Constitution itself. The time frame is rigid and

thus this Court has not been given discretion to enlarge time. This is for good reason, that is, to avoid prolonged uncertainty concerning the office of President, which is the highest office in this Country through a prolonged delay in swearing in of the President-elect. Thus, the rigid timeframe for the hearing of presidential election petitions was deliberately enacted by the law makers because, from the provisions of Article 104, a President-elect cannot assume office once the validity of their election is challenged.

Thus, it was imperative for the Constitutional Court to determine the petition expeditiously so as to avert the anxiety and anticipation in the country as a prolonged hearing would not serve the public interest. The Court should quickly determine the petition so that depending on the outcome of the hearing, fresh elections can be held within thirty-seven (37) days of the initial election date in terms of Article 101 or within thirty (30) days of nullification of the election under Article 103. If the election of the President-elect or the presidential candidate is declared valid by the Court, the President-elect can then be sworn into office.

Similar views were expressed by the Supreme Court of Kenya in the case of *Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission and 3 Others Petition No. 5 of 2013*. The provisions of the Kenyan Constitution, regarding the period within which a presidential election petition may be heard, are similar to

the provisions of Article 101 (5) and 103 (2) although they are not in exact terms.

It is noted that in the past, there was no time limit set for the determination of presidential election petitions and this resulted in some petitions taking several years to be determined. This was, however, against the background that the Presidential candidate, who was declared winner, was immediately sworn in and was fully in office so that there was no gap in the executive arm, as Government began to function while the election petition was being heard and determined. This is the situation that the people of Zambia decided to change through the enactment of the current provisions in the Constitution requiring that the petition be disposed of before the swearing in of the President-elect. Hence, the need for the time frames to be strictly followed.

As Articles 101 (5) and 103 (2) of the Constitution limit the period within which a presidential election petition must be heard by this Court to fourteen days after the filing of the election petition, the Court cannot competently hear a petition outside this period.

The last issue to be considered is the status of the Petition after the time limited for its hearing expired on Friday 2nd September, 2016. It should be noted that the Petitioners needed to present evidence in support of their allegations against the Respondents which they

failed to do. In the absence of the evidence to support the allegations, the Court could not make any findings of fact or make a determination in accordance with Article 101 (6) of the Constitution. As rightly held by the single Judge in her Ruling of 1st September, 2016, election petitions proceedings are *sui generis* and have to be determined within the statutory prescribed period.

Our position, therefore, is that the Petition stood dismissed for want of prosecution when the time limited for its hearing lapsed and, therefore, failed by reason of that technicality. This is because the Petitioners failed to prosecution their case within fourteen days of its being filed. That being the case, there is no petition to be heard before this Court as at today.

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A.M. SITALI,
CONSTITUTIONAL COURT JUDGE

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M.S. MULENGA,
CONSTITUTIONAL COURT JUDGE

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P. MULONDA,
CONSTITUTIONAL COURT JUDGE