

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

2016/CC/0031

05 SEP 2016

BETWEEN:

IN THE MATTER OF:

THE PRESIDENTIAL PETITION FOR THE
PRESIDENTIAL ELECTIONS 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:

ARTICLES 1, 2, 5, 8, 9, 45, 47, 48, 49, 50, 54,
60, 90, 91, 92, AND 93 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, 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:

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 THE
LAWS OF ZAMBIA

AND IN THE MATTER OF:

SECTIONS 110 OF ELECTORAL PROCESS
ACT (ELECTORAL CODE OF CONDUCT)
NO. 35 OF 2016 OF THE LAWS OF ZAMBIA

AND

AND IN THE MATTER OF:

SECTIONS 110 OF THE ELECTRONIC
COMMUNICATIONS AND TRANSACTIONS
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

Before Chibomba, PC, Sitali, Mulenga, Mulonda and Munalula, JJC in Open Court
on 5th September, 2016

For the Petitioners:

In Person

For the 1st and 2nd Respondent: Mr. B.C. Mutale, SC, of Ellis & Company

Mr. E.S. Silwamba, SC, Mr. J. Jalasi and Mr. L.
Linyama of Silwamba, Linyama and Jalasi Legal
Practitioners

Prof. P. Mvunga, SC, 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 Simwanza Legal
Practitioners

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

DISSENTING JUDGMENT

I hold a different view and will therefore read my own judgment.

This matter was scheduled for hearing on Friday 2nd September 2016 following direction given by a single judge of this Court on Thursday 1st September 2016. The direction was based on a literal interpretation of Article 101(5) of the Constitution. The Article provides as follows:

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

According to the literal interpretation the period in which to exchange pleadings and other pre-trial process, hear witnesses and if we follow the logic of this approach to its conclusion, deliver judgment, began on 20th August 2016, the day after the petition was filed and ended on Friday 2nd September 2016. Is this feasible? Familiarity with the trial process not only in generic terms but in the Zambian context will not support the position. As soon as the direction to hear witnesses and conclude the hearing on 2nd

September was given, the parties should have moved the full Court seeking an interpretation of Article 101(5). They did not do so.

On 2nd September 2016, the Court proceeded on the assumption that the parties would expedite the prosecution of the matter in order to fulfill the letter of the law. The Court began proceedings in that light. What followed was shocking. The Court was bombarded with motions from the petitioners' lawyers that took up most of the day. None of the motions however asked for an interpretation of Article 101(5). By early evening, it was clear that the petitioners' lawyers had no intention of presenting their witnesses and when instructed by the Court to begin calling their witnesses, they excused themselves from the proceedings abandoning the petitioners. The petitioners, representing themselves in person sought time to engage fresh counsel and the fulfillment of their cardinal right to be heard by the Court. Although the application was opposed by counsel for the respondents, the Court granted the application and set Monday 5th September to Thursday 8th September as the dates for continued trial. The decision of the Court needs explanation.

I wish to begin from the cardinal principle that the Constitution must be read as a whole. No one word or phrase in a provision, no one clause and certainly no one provision should be read in a manner that alienates it from the rest of the provisions or the rest of the Constitution. The common and ordinary meaning of words is the starting point to bringing life to a clause, provision and indeed Constitution as a whole. However an unrelieved focus on the words ***“within fourteen days of the filing of the petition”*** cannot give us the correct and sensible meaning of the Article in which the words are embedded. Literal and conservative interpretation of Article 101(5) is tenable in an abstraction that un-shackles the Court from the normal rigor of procedural justice. It also entails interpreting the said provision in isolation and without primary regard for the need to fulfill the purpose of the provision.

Under the general provisions of the Constitution, are two provisions that cannot be ignored. Firstly Article 271 sets out the implied powers of an office by stating that a power given to a person or an authority to do or enforce the doing of an act includes the necessary and ancillary powers to enable that person or authority to do or enforce the doing of an act. This Court enjoys implied powers to fulfill Article 101(5). Secondly Article 267

states that the Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles; in a manner that permits the development of the law and in a manner that contributes to good governance. Among the values set out in Article 8 are national unity and democracy. The application of the values and principles is by virtue of Article 9, mandatory. Article 118(1) further states that judicial authority derives from the people of Zambia and shall be exercised in a just manner and such exercise shall promote accountability. Article 118(2) states that in exercising judicial authority the courts shall be guided by principles which include:

"118 (e) Justice shall be administered without undue regard to procedural technicalities".

I am fully aware that the framers of the Constitution were faced with a history of endemic delays in the disposal of presidential election petitions that made a mockery of the process. They wanted a speedy resolution to any future petitions. They were fortified in taking this approach by the other provisions in the Constitution that limit the powers of the incumbent, even if he or she is the president-elect, and of anyone else acting as caretaker, until a presidential election petition is resolved. This period of uncertainty should be minimal.

However that need for speedy resolution must be tempered by a need to actually have a hearing. The primary purpose of Article 101(5) is to hear a petition and make one of the pronouncements set out in Article 101(6) based on a solid finding of both fact and law. If the process of hearing has not been concluded, the stated purpose has not been achieved and complying to a deadline without the intended event having taken place is an absurdity. This view is supported by a purposive interpretation of Article 101(5) and it is the position I would have supported.

In my view therefore the parties to this case working with this Court would have helped this country by allowing a hearing to take place rather than make a pronouncement based on a technicality. The Court's decision to take a route that would have this matter heard on the merits made on Friday was intended to allow an informed decision and reiterate our independence. The issue of a presidential election petition is too heavy for a mechanical response by the Court and a well reasoned decision would have helped to heal this nation.

At the same time I must acknowledge the difficulty that this Court has faced in handling this matter because neither party trusted us to do the right

thing. If we as a country want to develop constitutionalism in this country we need to begin to trust the institutions and the persons in those institutions. This concludes my dissenting opinion.



.....
Prof Justice Mulela Margaret Munalula