

SELECTED JUDGMENT NO.31/2018

P.1102

IN THE SUPREME COURT OF ZAMBIA

SCZ/8/08/2017

HOLDEN AT KABWE

(Civil Jurisdiction)

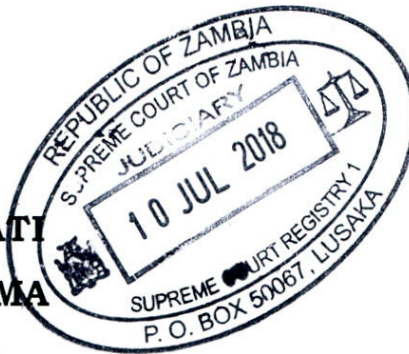
BETWEEN:

FELIX CHIPOTA MUTATI

MWANSA MBULAKULIMA

RAPHAEL NAKACINDA

GEORGE KANGWA



1st APPELLANT

2ND APPELLANT

3RD APPELLANT

4TH APPELLANT

AND

WINNIE ZALOUMIS (suing in her capacity as
acting National Secretary for the Movement
for Multiparty Democracy)

RESPONDENT

CORAM: Hamaundu, Malila and Kabuka, JJS,
On the 10th of April, 2018 and 10th July, 2018.

FOR THE APPELLANTS: Mr. E. S. Silwamba, SC, Mr. J. Jalasi,
Messrs Eric Silwamba, Jalasi and
Linyama.

FOR THE RESPONDENT: Mr. J. Madaika, Messrs J & M
Advocates.

JUDGMENT

Kabuka, JS, delivered the Judgment of the Court.

Case referred to:

1. Lt. General Wilford Joseph Funjika v Attorney General (2005) ZR 97 (SC).
2. New Plast Industries v The Commissioner of Lands and The Attorney-General (2001) ZR 51 (SC)

Legislation Referred to:

1. The Court of Appeal Act, 2016 S. (4) (2).
2. The Constitutional Court Act No. 8 of the 2016, Article 128 (2), S.8(2).
3. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016, O. IV r 1 (1).
4. The Supreme Court Practice (White book) 1999 Edition, Sweet& Maxwell, London.

The appellants had appealed a ruling of the Court of Appeal dated 13th June, 2017 which held that, it had no jurisdiction to entertain any appeal relating to a constitutional issue which is first raised in the High Court, as such appeal by law, lies direct to the Constitutional Court.

When we heard the appeal on 10th April, 2018, we dismissed it with costs to the respondent, both in this Court and in the Court below. We further said we would give our reasons in a judgment to be delivered later. This we now do.

The relevant background facts to the matter are that the appellants were all members of a political party known as the Movement for Multi-Party Democracy (MMD), which in this appeal, is represented by the respondent. The constitution of the MMD party requires that a regular convention, from where party leaders are also elected, be held every five years.

In that regard, the record of appeal shows, a regular convention of the party was last held in April, 2011 when the former Republican President Mr. Rupiah Banda, was elected as the MMD party president. He proceeded to stand as the MMD party Presidential candidate in the National General Elections which were held later the same year, in September, 2011, but lost to the late Mr. Michael Sata who was retained as the Republican President. Following his said defeat, Mr. Rupiah Banda resigned his position of MMD president in December, 2011.

Four months thereafter, in April, 2012, a *special* MMD convention was held where Dr. Nevers Mumba was elected as the new MMD party president.

The record further shows, a few months before April, 2016 there were calls from some MMD members to have a change of the party leadership. In particular, the 1st appellant, and others, openly registered their interest in contesting the MMD party presidency and other leadership positions, respectively. It appears this conduct did not sit well with the Dr. Nevers Mumba led Executive and on 30th January, 2016 the MMD National Executive Committee (NEC) called for a meeting at which it was resolved not to call for a regular national party convention in 2016. Its holding was instead postponed to the following year, 2017.

The party justified its said decision by explaining that, the five year term of the party president takes effect from the date the particular individual assumes that office and as such, it is not *co-terminus* with the holding of a regular convention of the party. That,

since Dr. Nevers Mumba was elected president of the party in April, 2012, his five year term would only come to an end in April, 2017.

As a result of that NEC decision, the appellants and other members agitating for holding of the regular convention were charged with disciplinary offences, following which they were either expelled or suspended from the party. In particular, the 1st appellant was by letter dated 22nd February, 2016 expelled from the MMD, while the 2nd, 3rd and 4th appellants were also suspended between 22nd February, 2016 and 3rd March, 2016. The appellants were then replaced by other party members, such as the respondent, who were appointed in acting capacities.

Despite their expulsion or suspension from the MMD, the appellants who were aggrieved with the postponement of the regular party convention, still went ahead and called for its holding. A notice indicating that the same would be held at the Mulungushi Rock of Authority from the 20th to 22nd May, 2016 was accordingly issued.

In reaction to that notice, the respondent rushed to commence an action in the High Court seeking to have the appellants restrained from making preparations or doing any acts of a preparatory nature, in relation to the holding of a regular convention for the MMD. An *ex-parte* interim injunction order was obtained in those terms and it further restrained any member of the MMD from attending or convening at the Mulungushi Rock of Authority for purposes of holding the proposed regular convention.

Undeterred by the apparent temporary setback, the appellants sought a discharge of the injunction order, *ex-parte* which was granted to them, and they proceeded to hold the convention as scheduled. Elections were held, from which the 1st appellant emerged as MMD president, while the 2nd, 3rd and 4th appellants were elected to positions of party National Trustee, National Secretary and Provincial Chairperson, respectively.

In order to address the changed circumstances, the respondent amended its initial statement of claim seeking to prevent the holding

of the convention. The respondent now challenged the legality of the convention that had been held, together with the election of the appellants, as purported new leaders of the MMD.

Several other claims by the respondent were made in the amended statement of claim including one seeking a declaration that the appellants having been expelled or suspended had no rights, powers or authority to convene any meetings or carry out any responsibilities of the MMD. That their purported action was in effect, a direct contravention of the decision of the MMD, NEC of 30th January, 2016 which postponed holding of the convention to 2017. Consequently, the respondent contended that the convention which was held, together with the election of the appellants as new party leaders, were illegal or unlawful and of no effect.

In answer to the allegations, the appellants denied that their convention and elections were illegal and a sham. They also raised a counter-claim in which they contended that, the failure by the respondent to call for a regular convention of the party to elect new

leaders denied them the opportunity of contesting the various positions in which they were interested. In particular, the 1st appellant claimed he was unable to stand as MMD party presidential candidate with a view that if he won, he could then, stand a chance of being fielded by the MMD, as their Presidential candidate in the National General Elections that were due to take place that same year in August, 2016.

The appellants further counter- claimed that, the conduct of the MMD faction led by Dr. Nevers Mumba to postpone holding of a regular party convention, was contrary to **Article 60 (2) (d) of the Constitution of Zambia** which seeks the promotion of democracy and to that end, mandates political parties to hold free and fair, regular intra-party elections. That in this respect, their counter-claim had raised a constitutional issue which could only be determined by the Constitutional Court, as the only court empowered to hear constitutional matters as provided for in **Article 128 (2) (c) of the Constitution**. That the judge of the High Court had no jurisdiction to hear the constitutional issue they had raised, as the High Court's

jurisdiction to hear constitutional matters is restricted to hearing violations relating to the Bill of Rights under Part III of the Constitution.

In dealing with the appellant's application to refer the issue raised as a constitutional issue to the Constitutional Court, the learned High Court judge, after hearing submissions from counsel, delivered a ruling dated 10th February, 2017. In that ruling, the judge considered paragraph 13 of the respondent's amended statement of claim where the respondent had admitted that the MMD, NEC did not sanction the holding of a convention in 2016. The learned judge found the admission was only intended to strengthen their argument, that the appellants did not have authority to hold a convention under the MMD party constitution and could not be taken as having raised any constitutional issue, at all.

The judge reasoned that, the substantive issue that was taken before him by the respondent for determination, was want of authority on the part of the appellants to hold the MMD regular

convention and to conduct elections. That this issue was independent of the appellants' claims that the respondent contravened **Article 60 2 (d)** and **128 (2)** of the Constitution of Zambia. The learned judge also observed to the effect that, the convention in issue was provided for under the MMD party constitution over which the High Court has jurisdiction and not the Constitution of Zambia. In the premises, that **Article 60 2 (d)** of the Constitution of Zambia could not be imposed on the respondent's claim by the appellants, so as to turn it into a constitutional issue, which the matter was in fact not.

The conclusion of the judge was based on a decision of this Court in **Lt. General Wilford Joseph Funjika v The Attorney General**.¹ We there held that, a counter-claim cannot be raised for the sole purpose of ousting the court's jurisdiction to hear and determine the main claim, which it otherwise, has authority to hear and determine. It is on that basis that the learned judge dismissed the appellants' application to refer the matter to the Constitutional Court.

Aggrieved by the outcome, the appellants immediately applied for leave to appeal the ruling to the Court of Appeal. They also applied for stay of the High Court proceedings pending the determination of the appeal. The High Court judge granted the appellants leave to appeal, but declined to stay hearing of the High Court matter on whether the appellants had authority to call for an MMD party convention and hold elections.

The appeal to the Court of Appeal relating to the refusal to stay the High Court proceedings first came up for hearing before a single judge of that court, who dismissed it. The appellants then took out a motion before a full bench of the Court.

When the matter came up for hearing of the motion for stay of proceedings before the full bench, the Court of Appeal considered whether it in fact had jurisdiction to entertain the said application. The court referred to the relevant law being **section 23 of the Constitutional Court Act** as read with **section 4 of the Court of Appeal Act** and found that, it had no jurisdiction to entertain the

application, at all. The grounds for the finding were that, the Constitution of Zambia mandates the Constitutional Court, only, as the court that can hear such appeals from the High Court.

The Court of Appeal further noted that, the **Court of Appeal Act in section 4 (2)** is only allowed to refer to the Constitutional Court a constitutional question which arises in the process of hearing appeals that are properly brought before it and not constitutional questions that first arose in the High Court. The renewed motion for stay of High Court proceedings pending appeal, was accordingly dismissed on grounds that, the Court of appeal had no jurisdiction to hear the matter. As a result of the dismissal of the interlocutory application relating to stay of the High Court matter, the substantive appeal by the appellants under **Article 60 2 (d)** questioning the High Court refusal to refer the constitutional issue to the Constitutional Court, was equally not heard. This is what prompted the appellants to bring their grievance to this Court, on four grounds of appeal,

which are couched in the following terms:

- 1. The Court of Appeal erred in law and fact when it held that an appeal from the decision of the High Court of Judicature for Zambia refusing to refer a matter to the Constitutional Court lies with the Constitutional Court of Zambia and not the Court of Appeal of Zambia.**
- 2. The Court of Appeal of Zambia erred in law when it held that the decision of the High Court of Judicature for Zambia refusing to refer the matter to the Constitutional Court of Zambia is within the definition of constitutional matters as defined by Section 23 of the Constitutional Court Act, No, 8 of 2016.**
- 3. The Court of Appeal of Zambia erred in law when it dismissed the entire appeal during the hearing of an interlocutory application, namely a Notice of Motion for Stay of Proceedings pending the determination of the Appeal thereby preventing the appellant to be heard on the merits with respect to the main appeal.**
- 4. That the Court of Appeal of Zambia erred in law to determine that it had no jurisdiction when it made a determination on whether or not the matter fell within the jurisdiction of the Constitutional Court of Zambia instead of referring the question to the Constitutional Court of Zambia.**

The parties filed detailed submissions and authorities in support and in opposition to the appeal. On the view of the appeal that we take, we do not find it necessary to recount them here.

In our view, the matters raised in grounds one and two of the appeal clearly go beyond the ruling of the Court of Appeal, subject of this appeal which is now before us. The issue in ground three also rests on the outcome of the determination in ground four.

This leaves the substance of this appeal to be the issue in ground four. This is whether the Court of Appeal had jurisdiction to hear the appeal from the High Court or any other application touching on or connected to it. That issue can only be properly resolved by considering the background from which the appeal arose brought out in the facts of the case as given earlier in this judgment. The real questions as we see them, are thus:

- (1) Whether the constitutional issue was properly raised before the High Court by the appellants and having been so raised, whether the High Court properly dealt with the said issue;**
- (2) Whether a counter-claim can be raised for the sole purpose of ousting the jurisdiction of the court that otherwise has jurisdiction to hear a matter properly commenced before it.**

Although both sides have advanced voluminous lists of authorities and arguments in support of their respective positions on

the matter, it is clear to us, that the above stated questions are purely procedural in nature.

In determining the first issue as identified, it is important to highlight the prior actions or steps taken by the appellants, which have culminated in this appeal. The record shows that, on 12th February, 2016 the appellants filed a petition in **Cause No. 2016/CC/C002** before the Constitutional Court, raising various constitutional issues on which they sought the pronouncement of that court. One of those issues was **Article 60 (2) (a) (d) and (e)** as set out in paragraph 12 of the affidavit in support of the petition, appearing at pages 579 and 580 of the record of appeal, volume 2. On 18th May, 2016 the appellants filed a notice of discontinuance, which effectively ended the matter before the Constitutional Court. One of the reasons advanced for that approach as set out in an affidavit deposed to by the 1st appellant, was that the rules of the Constitutional Court were then, not yet in place.

Later, the respondent commenced its own independent action, being **Cause No. 2016/HP/743** before the High Court to determine whether the appellants, had under the MMD Constitution, the requisite authority to call for a national convention; and, if the persons elected therefrom legitimately held office. It is from this action that the appellants raised a counter-claim effectively resurrecting the action they had earlier, before the Constitutional Court, abandoned. The counter-claim called for interpretation of **Article 60 2 (d)** of the Constitution of Zambia which is clearly a constitutional issue and unrelated to the main matter, brought by the respondent. Pursuant to the counter-claim, the appellants then made an application requesting the High Court judge to refer the matter to the Constitutional Court, on grounds that, he had no jurisdiction to hear the constitutional issue they had raised. The appellants relied on **Article 128 (2)** of the Constitution of Zambia which requires other courts to refer constitutional issues arising in proceedings before them to the Constitutional Court.

It was that background which formed the basis for the decision of the High Court judge by way of ruling dated 10th February, 2017 that a counter-claim cannot be raised by a defendant to an action for the sole purpose of ousting a court's jurisdiction, where it in fact has jurisdiction to hear and determine the main claim properly brought before it by the plaintiff.

In line with the trial judge's position, it is important to note that, the constitutional issue raised in the matter subject of the present appeal did not arise from the respondent's claim, who was the plaintiff before the High Court. It was introduced by counsel for the appellants, who were the defendants, as a counter-claim. They, thereafter, then sought to argue before the High Court, that it had no jurisdiction to hear the respondent's claim and to determine all the issues, as one of the issues was the constitutionality of the NEC's decision of 30th January, 2016 to postpone the holding of a regular convention, raised by themselves in the counter-claim.

Considering the actions of the appellants of having first taken the constitutional issue in question to the Constitutional Court, we are satisfied that they were well aware, the issue was a constitutional issue. That being the case, the issue is one which should properly have been brought by way of petition before the Constitutional Court, as the correct forum for the hearing and determination of such matters. That the matter was discontinued before the right court which had jurisdiction to hear it and resurrected as a counter-claim in a wrong court with no jurisdiction to hear it, in our view, seems to be a classic example of bringing a counter-claim whose effect, if not sole purpose, short of forum shopping, is to oust the jurisdiction of the trial court to hear the main claim that is otherwise properly before it and over which it has jurisdiction to hear and determine.

It appears to us, that the appellants' proposition of want of jurisdiction ignores the fact that, the issue that was brought by the respondent for determination by the High Court was simply, whether the MMD regular convention held by the appellants, was valid and the elections that were conducted, legal, within the provisions of the

MMD party constitution. At the hearing of the appeal, learned Counsel for the appellants in answer to a question from the court, acknowledged that the High Court has jurisdiction to deal with such issues. Counsel also conceded that, the issue of intra-party democracy introduced as a counter-claim by themselves, is provided for under **Article 60 (2)(d) of the Constitution Act, 2016**, and as such, is a constitutional issue, which according to **Article 128(2) of the Constitution of Zambia Act, 2016** can only be determined by the Constitutional Court.

On the basis of the answers given by counsel for the appellants and on the particular facts of this case, we cannot fault the learned High Court judge when he declined to refer to the Constitutional Court, the constitutional issue raised by the appellants. The claim was undoubtedly taken to a wrong forum, with no jurisdiction to hear it or to grant the order sought. In the case of **New Plast Industries v The Commissioner of Lands and The Attorney-General**², we did say that, the mode of commencement of any action does not depend

on the reliefs sought but is generally, as provided by the relevant statute.

Against that backdrop and in answer to the first issue as identified, the Constitution of Zambia in **Article 128 1 (a)** provides that, matters relating to interpretation of constitutional provisions must be commenced in the Constitutional Court. The counter-claim raised by the appellants related to interpretation of **Article 60 (2) (d) of the Constitution** and should have properly been commenced by way of petition before the right forum, which is the Constitutional Court. As the learned High Court judge correctly pointed out, the issue before him questioned the validity of the convention which ushered into office the 1st appellant as president of the MMD and had no bearing on interpretation of **Article 60 (2) (d)**.

In the premises, the appellants cannot be heard to argue, as identified in the second issue, that the only way they could have the constitutional issue determined was by raising it as a counter-claim to the respondent's action; and, that by his refusal to refer the matter

to the Constitutional Court as requested by themselves, the High Court judge was encouraging multiplicity of actions. **Order 15 rule 2 of the White book** which deals with the subject, is unambiguous and states that a counter-claim is an action of the defendant, independent from the claim made by the plaintiff, in the following words:

"A counter-claim is substantially a cross-action, not merely a defence to the plaintiff's claim. It must be of such a nature that the Court would have jurisdiction to entertain it as a separate action (Bow McLachlan & Co. Ltd v. Ship Camosun [1909] A.C. 597; Williams v. Agius [1914] A.C. 522). **"A counter-claim is to be treated, for all purposes for which justice requires it to be so treated, as an independent action."** (underlining ours)

The above quote indeed, makes it very clear that a counter-claim being a separate claim, is independent of the main action. The two are treated as entirely separate claims which are adjudicated separately with different outcomes. The Order is also very clear, that the court before which a counter-claim is raised, must have jurisdiction to hear it. The High Court did not have jurisdiction to

hear the counter-claim raised by the appellants in the matter subject of the present appeal, now before us.

It is for the reasons given that, we find the counter-claim was taken before a forum that was legally incompetent to entertain it for want of jurisdiction. The appellants had no option but to take it directly to the Constitutional Court which is the competent court mandated with *original* jurisdiction to hear matters relating to interpretation of constitutional provisions. As the record shows, the appellants were clearly aware of this fact as they had previously commenced the matter in that court.

On those facts, we cannot fault the trial judge for finding this was not a proper matter to refer to the Constitutional Court as the matter was not properly brought before the High Court. It was a matter bound to fail on its own inanition for having been taken to a wrong court. The appeal to the Court of Appeal against the said refusal of the High Court judge together with the dismissed application for stay of the High Court proceedings pending

determination of the appeal, were in the circumstances, equally incompetent.

We say so, since the High Court lacked jurisdiction to entertain the matter, no competent appeal could emanate from its said refusal. The mandate of the High Court is limited to referring constitutional issues on matters that are properly commenced in that court and over which it substantially has jurisdiction to hear and determine. The constitutional issue must arise from the plaintiff's claim, in the process of hearing the matter and not be introduced by a defendant, through a counter-claim over which the court has no jurisdiction to hear and determine. These are the reasons we dismissed the appeal when we heard it on 10th April, 2018.

In concluding, we direct that the hearing and determination of the main matter now pending before the High Court, on whether the appellants had authority to call for an MMD regular convention and to hold elections from which they can claim to have

been legally elected as president of MMD and other leadership positions, should proceed.

Appeal dismissed.



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E. M. HAMAUNDU
SUPREME COURT JUDGE



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M. MALILA
SUPREME COURT JUDGE



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J. K. KABUKA
SUPREME COURT JUDGE