IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2016/HP/1738

IN THE MATTER: **OF SECTIONS 1, 101, 103, 105 AND 267 OF THE CONTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016.**

IN THE MATTER OF: **THE HEARING OF THE PRESIDENTIAL ELECTION PETITION IN RELATION TO THE PRESIDENTIAL ELECTION HELD ON 11TH AUGUST 2016**

IN THE MATTER OF: **ARTICLE 28 OF THE CONSTITUTION**

AND

IN THE MATTER OF: **THE CONTRAVENTION OF ARTICLE 18 OF THE CONSTITUTION OF ZAMBIA**

BETWEEN:

HAKAINDE HICHILEMA **1st Petitioner**

GEOFREY BWALYA MWAMBA **2nd Petitioner**

AND

EDGAR CHANGWA LUNGU **1ST Respondent**
INONGE MUTUKWA WINA **2ND Respondent**
ELECTORAL COMMISSION OF ZAMBIA **3RD Respondent**
THE ATTORNEY GENERAL **4TH Respondent**
THE CHIEF JUSTICE OF ZAMBIA **5TH Respondent**
THE DEPUTY CHIEF JUSTICE OF ZAMBIA **6TH Respondent**
THE CONSTITUTIONAL COURT **7TH Respondent**

CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Petitioners: *N/A*

For the Respondent: *N/A*

R U L I N G

Cases referred to:

1. *Winnie Zaloumis (suing in her capacity as Acting National Secretary for MMD) v. Felix Mutati and 3 others selected Judgment No. 280 of 2016 SCZ/8/156/2016*
2. *Shamwana v. Mwanawasa (1993/1994) ZR 149 (unreported)*
3. *Zambia Seed Company Limited v. Dawson Lupunga 1994/HP/1990 (unreported)*

This is a petition by the petitioners seeking the following substantive reliefs:

(a) An order that sections 101 (2) and 103 (2) of the Constitution of Zambia (amendment) Act No. 2 of 2016, to the extent to which they have been construed by the Seventh Respondent to literally mean that the seventh Respondent "shall hear an election petition relating to the President – elect within fourteen (14) days of the filling of the petition' are ultra vires Articles (18) (9) of the Constitution hence null and void.

(b) An order that the decision of the Seventh Respondent to the effect that the Petitioners had until 24;00 hours on 2nd September, 2016 to prosecute their Petition before the Seventh Respondent under cause No. 2016/CC/31 is and was ultra vires Article 18 (9) of the Constitution of Zambia hence null and void.

(c) An order that the Ruling of the Seventh Respondent made on 5th September, 2016 dismissing the Petitioners Petition under cause No. 2016/CC/31 for want of prosecution is ultra vires Article 18 (9) of the Constitution of Zambia therefore null and void.

(d) An order directing the Seventh Respondent to hear and determine the Petitioners Petition independently, fairly and within a reasonable time in line with the provisions of Article 18 (9) of the Constitution

(e) An order that the Respondents herein bear the costs of and occasioned in the petition.

The Petitioners also seek the following interim reliefs namely;-

(a) That the Court be pleased to issue a conservatory order staying the decision of the Seventh Respondent delivered on 5th September, 2016 pending the hearing and determination of the petition.

(b) That the Court be pleased to issue conservatory order restraining the fifth and sixth Respondents or any person or authority whatsoever from swearing the First and Second Respondents into the offices of President and Vice President of Zambia respectively pursuant to Article 105 of the Constitution of Zambia until the determination of this petition.

The Petitioners filed in a certificate of urgency in support of the exparte application for interim relief. The exparte application is supported by an affidavit deposed to by the first Petitioner Hakainde Hichilema and a further affidavit deposed to by one Marshall Muchende. The application is further supported by skeleton arguments.

The Petitioners also filed in a prepared exparte order for interim relief pursuant to Article 28 of the Constitution of Zambia couched in the following terms:-

> *"Upon reading the said application for conservatory orders and upon reading the affidavit in support sworn by Messrs Hakainde Hichilema and Geoffrey Bwalya Mwamba on the 6th September, 2016, exparte and UPON hearing counsel for the Petitioner exparte, IT IS hereby ordered that pending the determination of the application on ..... day of ..... 2016 at ..... O'clock in the ..... noon, the conservatory orders do and are hereby issued;*

(a) Staying the decision of the Constitutional Court delivered on 5th September, 2016 and,

(b) Restraining the Fifth Respondent, the Sixth Respondent or any person or authority whatsoever from swearing the First and Second Respondents into the offices of President and Vice President of Zambia respectively pursuant to the provisions of Article 105 of the Constitution.

Without in any way attempting to deal with merits and demerits of the substantive exparte application for the interim reliefs, it is obvious from the remedy being sought under relief (a) is a request by the Petitioners for the High Court which in the hierarchy system is an inferior Court ad by the doctrine of stare decis the High Court is bound by the superior Court namely the Constitutional Court.

The issue therefore goes to jurisdiction which can only be navigated and interrogated by the Respondents' given an opportunity to be heard which is one of the fundamental rules of natural justice in our jurisprudence.

The relief sought under (b) invites the Court to restrain the 5th and 6th Respondents or authority whatsoever from swearing the First and Second Respondents respectively into offices of President and Vice President of Zambia.

In my view, the Petitioners have raised important constitutional issues which cannot be decided upon exparte with affording the

Respondents an opportunity to be heard. The factor of public interest should not be lost sight of too.

Faced with the exparte application before me, I visited the recent Supreme Court case of ***Winnie Zaloumis (suing in her capacity as the Acting National Secretary for MMD) v. Felix Mutati and 3 others selected Judgment No. 280 of 2016 SCZ/8/156/2016 (unreported)*** where their Lordships and Her Ladyship instructively and authoritatively pronounced themselves on the matter in the following terms at page J21

> *"In our considered view, when a Court is confronted as it was in this case with an exparte application it is encumbent upon it to firstly thoroughly study and understand the record. Thereafter, the court must ask itself the questions, firstly, is the application urgent? And secondly, if it does not hear it now and exparte, will it be rendered nugatory by the time I hear the matter inter-partes?*
>
> *..... the Judges should have directed that the exparte application for an injunction be heard inter parte in view of the fact that the event it sought to curtail was due to take place next day. In doing so, he would have heard and determined the matter once and for all and not encouraged a multiplicity of applications, whilst affording the Respondents' an opportunity to be heard as was their right.*

In our view, the fact that an application is couched as being exparte does not mean that a Judge should act in auto pilot and consider and grant it as such. T he test we have set is in line with holding by Ngulube CJ, (as he then was) sitting as a High Court Judge in the case of ***Shamwana v. Mwanawasa (1993/1994) ZR 149*** *as follows:-*

> *'It is an elementary requirement of fairness and justice that as a general rule both sides be afforded the opportunity to be heard and where it to depart from the norm, as in an exparte application for an injunction, strong grounds must be shown to justify the application being made exparte. The application must be made promptly as soon as the Plaintiff becomes aware of his or her cause of action and there is need either to preserve the status quo or to prevent irreparable or serious mischief and are for cases of real urgency'.*

Although the above passage addresses applications for injunctions it applies similarly to other exparte applications such as those relating to discharge of injunctions, stay of execution, etc. Indeed in his High Court Ruling in ***Zambia Seed Company Limited v. Dawson Lupunga 1994/HP/1990 (unreported)*** Ngulube CJ (as he then was) sitting as High Court Judge repeated the position in ***Shamwana v. Mwanawasa*** when he said

> *'A disturbing feature of the case is that exparte Orders seem to be readily available, contrary to practice direction No. 1 of 1993.*

As was suggested in ***Shamwana v. Mwanawasa****, exparte applications should generally never be entertained at all in actions between two or more opposing litigants, unless there is some real urgency and there has been an impossibility to serve notice on the other side, especially where there would be irreparable or serious mischief if a party were to proceed in an ordinary way..... The granting of exparte orders is the exercise of an inherently unjust and extra ordinary jurisdiction. The Courts should guard against making what is extraordinary the norm or the ordinary and usual to do. Deputy and District Registrars in particular should exercise circumspection when faced with these matters.*

At J4 *'We would respectfully adopt the above passage and say that the Respondents application to discharge the injunction as well ought not to have been heard exparte because there was no real urgency and neither would the application have been rendered nugatory if it was heard interparte"*

I am bound by the decisions of the Supreme Court; my hands are shackled.

In the case in casu, serious issues touching on this Courts' jurisdiction to make orders;

(i) *To stay proceedings of a superior Court of the Constitutional Court – a Court of final resort in constitutional matters.*

(ii) *Restraining the swearing in of the 1st and 2nd Respondents as President and Vice President respectively amongst other considerations cannot in my view granting an exparte order.*

The Respondents need to be given an opportunity to be heard on the weighty application before Court.

I am of the firm considered view that this is not a fit and proper case in which I was to invoke my inherent and discretionary remedy to grant the remedies being sought exparte.

I therefore hereby direct that the exparte application for the interim reliefs be heard interparte and returnable on 8th September, 2016 at 08:30 hours. This is to give allowance to the Respondents to seek instructions and file in their responses.

I make no order as to costs.

Delivered this 7/11 Day of September, 2016

Mwila Chitabo, SC
Judge