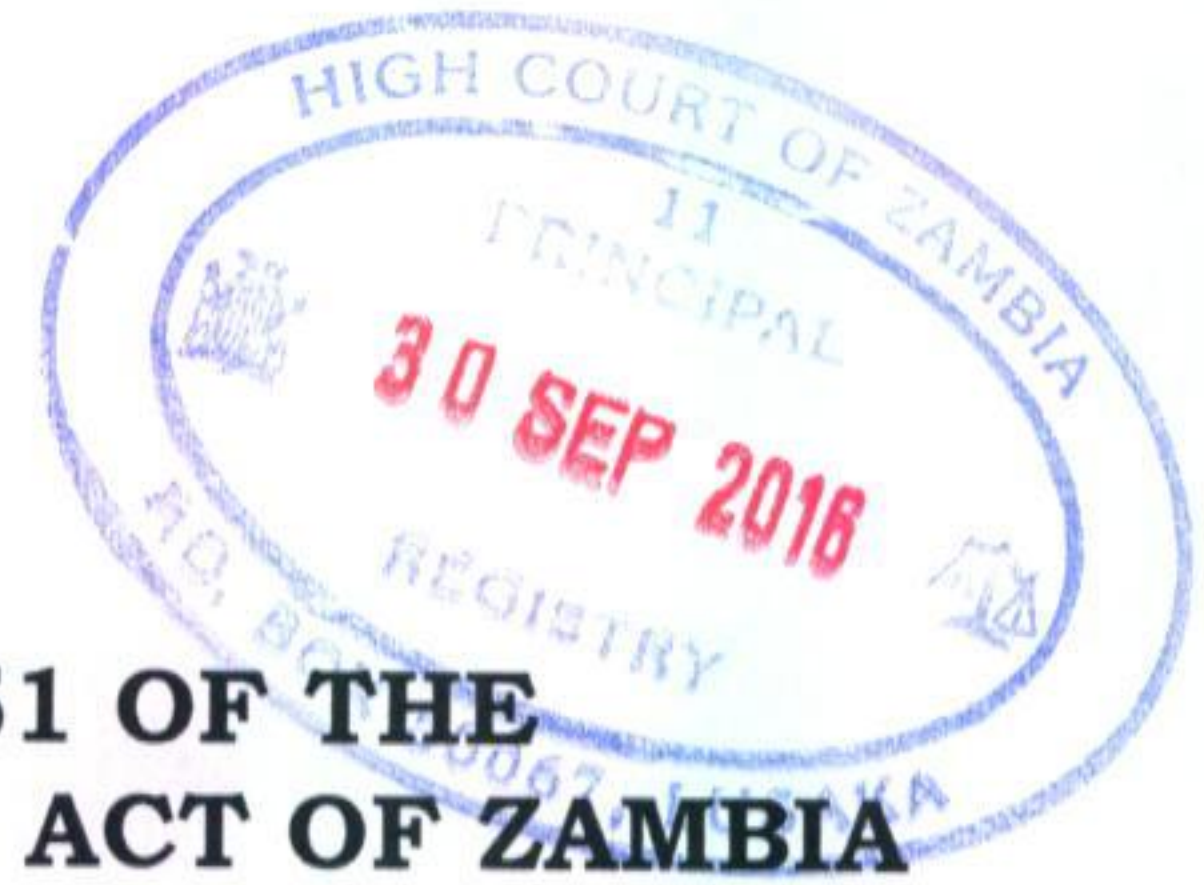


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

*(Constitutional Jurisdiction)*

**2016/HP/EP046**



**IN THE MATTER OF: ARTICLES 47(2), 51 OF THE  
CONSTITUTIONAL ACT OF ZAMBIA**

**AND**

**IN THE MATTER OF: SECTION 81, 89, 97(1), 98(C), 99-100  
(2) (a) OF THE ELECTORAL ACT NO. 35  
OF 2016**

**AND**

**IN THE MATTER OF: ELECTORAL CODE OF CONDUCT  
RULES 12, 15 (A), (H), (K)**

**AND**

**IN THE MATTER OF: VUBWI CONSTITUENCY ELECTIONS**

**BETWEEN:**

**PHIRI ALPHONSO KACHIZE**

**PETITIONER**

**AND**

**MARGARET MITI**

**1<sup>st</sup> RESPONDENT**

**ELECTORAL COMMISSION OF ZAMBIA**

**2<sup>nd</sup> RESPONDENT**

**CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC**

*For the Petitioner:* Dr. H.B. Mbusiof Messrs H.B. M. Advocates

*For the Respondents:* Mr. T. Ngulube; Ms. M. Kasongola Messrs F. B. Nangzyambo and Associates

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## **RULING**

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### **Cases referred to:**

1. *Hakainde Hichilema and another v Edgar Chagwa Lungu and others* 2016/CC/0031
2. *Matilda Mutale v Emmanuel Munaile* (2007) ZR 120
3. *Macfoy v. United Africa Company* (1961) 3 All ER 1969

### **Legislation referred to:**

1. *The Constitution Amendment Act No. 2 2016*
2. *The Electoral Act No. 35 of 2016*

This was the 1<sup>st</sup> Respondent's application to dismiss the action for irregularity on the basis that the Petition was lodged out of time. The 1<sup>st</sup> Respondent relied on an affidavit in support of the application filed into Court on 14<sup>th</sup> September, 2016.

The said affidavit was deposed to by one Margaret Miti who swore that the Election Petition which sought to challenge her election as a Member of Parliament for Vubwi Constituency was irregularly

before this Court as it was filed 14 days outside the stipulated period provided by the Electoral Process Act.

She averred that she was declared winner on the 12<sup>th</sup> of August, 2016 by the Returning officer while the Petition was lodged on 29<sup>th</sup> August, 2016 which was 17days after the declaration. She stated that there was no leave sought to lodge the Petition outside the Statutory period thereby making the Petition Statute Barred. She stated that the Court had therefore no jurisdiction to hear and determine this matter.

The Petitioner filed an affidavit in opposition dated 23<sup>rd</sup> September, 2016 deposed to by one Alfonso KazichePhiriwho swore that it is not true that the results on the 12<sup>th</sup> of August 2016 as alleged by the 1<sup>st</sup> Respondent. He averred that even if the Court was to believe that the results were announced on the 12<sup>th</sup> of August, 2016 there was no way he could have filed his petition on the 13<sup>th</sup> and 14<sup>th</sup> of August, 2016 as they were not working days. This necessitated the counting starting from Monday from 15<sup>th</sup> August, 2016 and 14days from that date was the 28<sup>th</sup> which was a Sunday and as such the Petitioncould only be filed on 29<sup>th</sup> August 2016.

When the matter came up for hearing, the gist of the by Counsel for the 1<sup>st</sup> Respondent was that argument was that the Petition was filed outside the statutory period. He submitted that the Petition was statute barred pursuant to section 100(3) of the Electoral Process Act No. 35 of 2016.The section requires that the Petitioner had to submit his Petition no later than 14 days of the elections results. The Respondent exhibited the declaration of the Vubwi

Parliamentary election results marked “MM1” which results were declared on the 12<sup>th</sup> of August, 2016.

The Petitioner however lodged this Petition on the 29<sup>th</sup> day of August, 2016 which was more than the 14 days envisaged by Act No. 35 of 2016. This Act is very clear as to when the 14 days should start counting and it was Counsel’s submission that the High Court Rules were not applicable regarding computation of time. He referred to the case of ***Matilda Mutale v Emmanuel Munaile (2007) ZR 120*** where the Supreme Court stated that a Petition is not a pleading. It is a rare form of bringing proceedings and is used in cases where it is required by statute.

He also cited the case of ***Hakainde Hichilema and another v Edgar Chagwa Lungu and others -2016/CC/0031*** where the Constitutional Court pronounced the meaning of 14 days.

Perusal of the Petition before this Court shows that it was commenced under Act No. 35 of 2016 and not the High Court Rules. It is also commenced under Article 47(2) of the Constitution of Zambia Act. It was Counsel’s submissions that reference by the Petitioner to the High Court rules in the skeleton arguments was erroneous.

Further, it was noted that in the Petition there was reference to the Electoral Code of Conduct rules 12 and 15 of 2006. These rules were however repealed and revoked and the Electoral Process Act 2016 prescribed its own code of conduct. He stated that Section

126 repeals the Electoral Process Act of 2006 which Act embodied the Electoral Code of Conduct rules cited in this Petition.

He further submitted that the schedule attached to the Electoral Code of Conduct Act states that the 2006 code of conduct regulation are revoked. It was his submission that repealed legislation is another ground upon which he asked this Court to dismiss this Petition. He referred the Court to the provisions of the Interpretations and General Provisions Act Chapter 2 of the Laws of Zambia and cited the provisions of section 14(3) which provides as follows:

- (3) *Where a written law repeals in whole or in part any other written law, the repeal shall not-*
  - (a) *Revive anything not in force or existing at the time at which the repeal takes effect; or*
  - (e) *affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.*

It was his submission that a repealed legislation shall not have effect on legal proceedings under the repealed law. He submitted that this Petition was not only irregular but statute barred as well.

He stated that there was a contradiction as regards the response by the Petitioner in their affidavit in opposition to this Application. In the said affidavit they claim that the elections results were not declared on the 12<sup>th</sup> of August, whereas in their skeleton arguments they state that they excluded Saturday and Sunday and started counting on Monday the 15<sup>th</sup> of August, 2016 and as such was more than the time allowed. He submitted that the computation was erroneous there was a clear admission in their Petition in paragraph 5(7) where they indicate clearly that they lodged their Petition on the 29<sup>th</sup> of August, 2016.

He referred the Court to section 97(1) of the Electoral Process Act which clearly shows that the legal regime governing the election rules are prescribed under the Electoral Process Act And not under any written law. He prayed that this petition be dismissed with costs.

In Response Counsel for the Petitioner submitted that the Application by the 1<sup>st</sup> Respondent was purely based on the question of time within which the Petition was meant to be filed. The requirement of law that issues should be given to the other party in civil matters and should be pleaded is meant not to ambush the other party. It puts the Court in an awkward position.

In the affidavit by the 1<sup>st</sup> Respondent, the issue of the code of conduct was not stated and it was strange that the respondent had at this last minutedecided to amend their summons and affidavit. He urged the Court to ignore and dismiss this part of the submission.

It was his further submission that the Petition was commenced under the Electoral Process Act of 2016, particularly under section 97(1). This did not mean that this Court should not entertain any other laws which would help the Electoral Process Act. The issue of time is of the essence and this application was brought based on time. This was the reason why Order 2(1) of the High Court rules and Order 3(2)(1) and Order 3(4) of the Supreme Court Rules of England, which all talk about the issue of computation of time, were cited.

He stated that it was not in dispute that the elections in Vubwi were declared on the 12<sup>th</sup> of August 2016 which was a Friday. The following day was a Saturday and Sunday and in that regard no action was undertaken and the only date available was Monday the 15<sup>th</sup> of August 2016. The days were counted up to the 28<sup>th</sup> of August from the 15<sup>th</sup> as being 14 days and since the 28<sup>th</sup> was a Sunday and the only date that was taken into computation was Monday the 29<sup>th</sup> of August 2016.

It was his submission that the Petition was filed within the same 14 days. He referred to Order 3(1) and Order 3(4) of the rules of the Supreme Court have clearly stipulated that the only date in which counting should start is the day when the normal activities were going to be established. He stated that counting of days including Saturday and Sunday was only in instances when the period exceeds 7 days.

He submitted that the petitioner filed within time and that it was a fallacy that the rules of the High Court should not be taken into

account when the filing of the Petition is filed in the High Court Registry and the Judge is sitting as a High Court Judge. He stated that the Munaile case cited by the Respondent is irrelevant and the case of Hakainde Hichilema and another V Edgar Chagwa Lungu and others should not be referred to as did not furnished the parties with this case before time.

It was argued that the argument by the Respondent that there was no provision for the Code of Conduct was incorrect as the Respondent did not have the full text of the Electoral Process Act. It was his submissions that the petitioner fulfilled the requirements of filing the petition within 14 days. He urged the Court to dismiss the application with costs.

In Reply Counsel submitted with regard to the case of Hakainde Hichilema and Another V Edgar Chagwa Lungu and others 2016/CC/31 that the Court could refer to any cases referred to or those not referred to within its knowledge or wisdom. The issue of computation of time was conclusively dealt with in this case and the Court was bound by the said case. With regard to ignoring of the High Court Rules, he stated that while the High Court and Supreme Court Rules were good law in line with the enabling Act No. 35 of 2016 all procedures relating to the electoral process must be in line with this Act

Order 2 rule 1 of the High Court rules and Order 3 of the Supreme Court Rules relate to any other civil proceedings and not election petitions.



He stated that the Electoral Code of Conduct that Counsel for the Petitioner referred to was revoked by Act No. 35 of 2016 and was replaced by the code of conduct thereunder. With respect to when the 14 days lapsed, the provisions of section 100(3) does not state 14 working days. It was his argument that Counsel had also conceded that the declaration was on the 12<sup>th</sup> day of August. He cited Article 269 of the Constitution as regards to computation of time. He stated that an excluded day is defined to mean Saturday and Sunday and any public holiday. He submitted that since the period and was more than 6 days, Saturdays and Sundays have to be excluded.

I have considered the affidavits, skeleton arguments and submissions by both parties. I have perused the Petition before this and it is not in dispute that the said Petition was filed into Court on the 29<sup>th</sup> of August, 2016. The 1<sup>st</sup> Respondent in her affidavit has stated that the election results were declared on 12<sup>th</sup> August 2016. However, the Petitioner has disputed this and stated that the results were not declared on the 12<sup>th</sup> of August as there was no one to sign the GEN 12 form.

The 1<sup>st</sup> Respondent has exhibited the GEN 12 form and it is dated 12<sup>th</sup> August, 2016 and is signed. In the Petitioner's oral submissions he has conceded that the results were in fact declared on the 12<sup>th</sup> of August 2016 but insists that the Petition was within the 14 day period as he could not count the 13<sup>th</sup> and 14<sup>th</sup> of August, 2016 which were Saturday and Sunday and only started counting the 14 days from the 15<sup>th</sup> of August, 2016. This according to the

Petitioner came to the 28<sup>th</sup> of August, 2016 which was a Sunday and this meant the Petition could only be filed on the 29<sup>th</sup> of August 2016. Counsel cited the High Court and Supreme Court of England Rules on the computation.

I agree with the holding in the case of **Matildah Mutale V Emmanuel Munaile**<sup>2</sup> which stated that an election petition is not a pleading but a form of bringing proceedings to the Court and is used where it is required by statute. The Electoral Process Act provides for bringing election petitions in instances where an election of a party is being challenged. Section 97(1) of the Electoral Process Act provides as follows:

*“97. (1) An election of a candidate as a Member of Parliament, mayor, council chairperson or councillor shall not be questioned except by an election petition presented under this Part.”*

Further section 100(3) of the same Act provides that:

*“An election petition shall be signed by the petitioner or by all the petitioners, if more than one, and shall be presented not later than fourteen days after the date on which the result of the election to which it relates is duly declared.”*

These provisions are very clear that election Petitions must be brought in accordance with the Electoral Process Act. Based on these provisions of law, I am satisfied that position of law is that matters relating to election petitions must be governed by the Electoral Process Act. Therefore, while the High Court Rules and the

Supreme Court Rules of England make provision for computation of time, the provisions thereunder do not apply to petitions as these are already provided for under the governing legislation.

The Constitutional Court in the case of Hakainde Hichilema and another V Edgar Chagwa Lungu and others cited Article 269(a) which provides as follows:

*For the purposes of this Constitution, in computing time, unless a contrary intention is expressed—*

*(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;*

*(b) if the last day of the period is a Saturday, Sunday or public holiday (“excluded day”), the period shall include the next day;*

*(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 the time.*

The Constitutional Court based on this provision held that any proceedings that would be heard outside the 14-day period provided for an election petition would be a nullity.

Having considered the provision of the law above, I am left without any doubt that an Election Petition must be brought within 14 days from the day of declaring the results. These 14 days, according to

the Constitution, is inclusive of Saturdays, Sundays and Public Holidays.

In the present case, the Petitioner had conceded that the election results were declared on 12<sup>th</sup> August, 2016 and the Petition was only filed on the 15<sup>th</sup> of August, 2016. I do not find the reasoning that the counting should have started on the 15<sup>th</sup> of August as the 13<sup>th</sup> and 14<sup>th</sup> were Saturday and Sunday in line with any written law. The law is clear that where the period exceeds 7 days, then Saturdays and Sundays are included. The 14 days in this case started running from the 13<sup>th</sup> of August, 2016 and lapsed on 26<sup>th</sup> August, 2016.

I therefore agree with the submission by Counsel for the 1<sup>st</sup> Respondent that this Petition is improperly before this Court as it was filed out of time. Put simply the purported petition filed out of the statutory mandatory period of 14 days is null and void.

Lord Denning had occasion to pronounce on void or null situations in the case of **Macfoy v. United Africa Company Limited**<sup>3</sup> he put it in this way:-

*“If an act is void, then it is a nullity, it is not only bad but it is incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient for the Court to declare it so and any proceeding which is founded on it is also incurably bad. You cannot put*

*something on nothing and expect it to stay there, it will collapse”*

With regard to the issue of the Code of Conduct of 2006 cited by the Petitioner, I agree that Act No. 35 of 2016 revoked and replaced the 2006 Code of Conduct and as such should not have been referred to in this Petition. Section 14(3) cited by the 1<sup>st</sup> Respondent is quite instructive on the issue of repealed laws.

Consequently, the Application by the 1<sup>st</sup> Respondent is successful and the Petition is hereby dismissed with costs to the 1<sup>st</sup> Respondent. The said costs to be taxed failing agreement.

Leave to appeal granted.

**Dated the *30th* day of *September* 2016.**



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**Mwila Chitabo, S.C.**  
**Judge**