IN THE CONSTITUTIONAL COURT **2016/CC/A018**

AT THE CONSTITUTINAL REGISTRY

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF:	**THE PARLIAMENTARY PETITION RELATING TO THE PARLIAMENTARY ELECTION 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, 48, 50, 54, 70, 71, 72, AND 73 OF THE CONSTITUTION OF ZAMBIA ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA**
AND	
IN THE MATTER OF:	**SECTION 29, 37, 38, 51, 52, 55, 58, 59, 60, 66, 68, 69, 70, 71, 72, 75, 76, 77, 81, 82, 83, 86, 87 AND 89 OF THE ELECTION PROCESS (ELECTORAL CODE OF CONDUCT) NO. 35 OF 2016 OF THE LAWS OF ZAMBIA**
AND	
IN THE MATTER OF:	**SECTION 96, 97 ,98, 99, 100, 106, 107 AND 108 OF THE ELECTORAL PROCESS (ELECTORAL CODE OF CONDUCT) NO. 35 OF 2016 OF THE LAWS OF ZAMBIA**
AND	

IN THE MATTER OF:	**THE ELECTORAL CODE OF CONDUCT 2016**
BETWEEN:	
MARGARET MWANAKATWE	**APPLICANT**
AND	
CHARLOTTE SCOTT	**1ST RESPONDENT**
ELECTORAL COMMISSION OF ZAMBIA	**2NDRESPONDENT**
ATTORNEY GENERAL	**3RDRESPONDENT**

Before Mr. Justice E. Mulembe in Chambers on 21st December, 2016.

For the Applicant:	**Mrs. S. C. Chazanga and Ms. N. Liswaniso of Messrs. KBF & Partners**
For the 1St Respondent:	**Mr. M. H. Haimbe of Messrs. Malambo and Company and Mr. K. Mweemba of Messrs. Keith Mweemba Advocates**
For the 2nd Respondent:	**No Appearance**
For the 3rd Respondent:	**Mrs. D. M. Shamabobo and Mrs. P. Mundia, Asssitant Senior State Advocates**

RULING

Cases referred to:

1. **Cropper v. Smith (1884) 26 Ch. D 700 (CA)**
2. **Bellamano v. Ligure Lombarda Limited (1976) ZR 267**
3. **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe, SCZ Judgment No. 21 of 2002**

Legislation referred to:

1. **Constitutional Court Rules, Statutory Instrument No.37 of 2016**
2. **Constitution of Zambia (Amendment) Act No. 2 of 2016**
3. **Constitutional Court Act No. 8 of 2016**

This is an application, initially made *ex parte* but heard *inter parte,* for an order for leave to amend Memorandum of Appeal, made pursuant to Order IX rule 19 and Order X rule 2(1) and (2) of the **Constitutional Court Rules**[1](also referred to herein as "the rules").

In the Affidavit in Support of the application to amend deposed by the Applicant, she averred that on 24th November, 2016, she filed into court a Notice of Appeal and Memorandum of Appeal arising from a decision of the High Court. She further averred that after a further perusal of the judgment and other proceedings on record in the court below, she wished to amend the grounds filed in the Memorandum of Appeal and craved the indulgence of this Court to grant her application.

In oral submissions, learned counsel for the Applicant, Mrs. Chazanga, relied on the affidavit in support. She submitted that the Orders cited give this Court the power to grant leave to amend process or any document before the conclusion of the hearing. Mrs. Chazanga acknowledged that discretion to grant leave to amend rested entirely with the Court, albeit to be exercised judiciously.She submitted that the provisions to amend were included so as not to punish applicants for mistakes or errors.Counsel referred to the case of **Cropper v. Smith**[1] in which Bowen, L.J had this to say at page 710:

> **"Now, I think it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other**

division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace....It seems to me that as soon as it appears that the way in which the party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

Mrs. Chazanga submitted that based on that authority and on the affidavit in support, a further perusal of the judgment revealed other grounds which the Applicant wishes the Court to consider or to take into account in the determination of the appeal. It was submitted that the amendments would not prejudice the 1st Respondent or cause any injustice and requested that the Applicant be granted leave to amend the Memorandum of Appeal so that justice can prevail.

Mrs. Chazanga submitted that it was not correct for the 1st Respondent to argue that there was no rule on which leave to amend was being sought. Making reference to the 1st Respondent's skeleton arguments filed into court, counsel contended that Order IX rule 19 was crafted in such a way that it provided for any document to be amended. She further argued, that contrary to the 1st Respondent's assertion, Order XI rule 9(3) only provided for supplementary grounds once the Record of Appeal had been filed. In this instant, the Applicant had not yet filed the Record of Appeal and, therefore, was in order to bring the application under Order IX rule 19 of the **Constitutional Court Rules**[1].

On the assertion by the 1st Respondent that the application herein lacked merit and was not tenable at law as there was an outstanding application for stay of execution of the judgment of the court below, Mrs. Chazanga countered that view by submitting that there was nothing that stops this Court from hearing any other interlocutory applications. She wound up her submissions by stressing that the appeal had not yet been heard and, therefore, the application for leave to amend had merit and should be granted.

Mr. Haimbe, learned counsel for the 1st Respondent, submitted that the application was opposed and relied on skeleton arguments filed to that effect.

In the skeleton arguments, the 1st Respondent submitted that the provisions of Order IX rule 19 relied upon by the Appellant to bring the application only applied to proceedings brought by way of originating process pursuant to the original jurisdiction of the Court and not to appeals such as the one in the instant case. It was submitted that the proper provision is Order XI dealing with appeals and cross-appeals; that Order XI rule 1 was clear, that the provisions contained in that Order are the only ones to apply to appeals.

It was further asserted that the procedural rules wherefrom this Court draws its jurisdiction to make any procedural order in an appeal are comprised in Order XI of the rules and not any other Order. It was submitted that the application was not competently before the Court as it had been brought under an entirely wrong

provision of the rules. In that regard, reference was made to the case of **Bellamano v. Ligure Lombarda Limited**[2], wherein it was stated that it was always necessary, on making of applications, for summons or notice of application to contain a reference to the order or rule number or authority under which the relief was sought. It is the 1st Respondent's contention that the summons, having been brought under totally inapplicable provisions, was defective and not properly before the Court.

It was further submitted that even Order XI of the rules did not cloth this Court with jurisdiction to grant the relief sought; even if it overlooked the irregularity of the application as earlier indicated. Thus, the application was misconceived and not completely before the Court and should not be entertained.

In the alternative, the 1st Respondent submitted that even if the Court found that the application was properly before it, it still lacked merit. The Court was reminded that the application for a stay of execution, whose material for consideration included the Memorandum of Appeal, was still outstanding. It was submitted that what the Appellant was seeking was to inextricably alter the record such that the Memorandum of Appeal under consideration by this Court in relation to the application for stay of execution would no longer be relevant to that application and the Court would, of necessity, have to instead consider the amended memorandum of appeal in arriving at its decision whether or not to grant the stay.

It was further asserted that not only would it be prejudicial to the 1st Respondent, but it would violate the principle that an application is not supposed to be used to circumvent or pre-empt the decision of a court. It was contended that the application for a stay needed to be disposed of first, especially that, as one of the issues at the centre of the application for stay, the Memorandum of Appeal contained grounds that were likely to succeed.Further, that allowing the Applicantto place on record an amended memorandum of appeal incorporating completely new grounds would circumvent the pending decision of the Court as the Court cannot ignore the amended memorandum of appeal.

Citing the case of **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe**[3], the 1st Respondent contended that amendments are not permissible when they prejudice existing rights of the opposite party. This, it was submitted, was not a proper case in which an amendment ought to be allowed.

Augmenting the written submissions, Mr. Haimbe reiterated the points advanced therein. He stressed that the Constitutional Court was vested with both original and appellate jurisdiction which, he argued, were separate and distinct. Procedure applied to one could not be commingled with the other; that it was clear in the rules. Mr. Haimbe argued that Orders IV to X of the **Constitutional Court Rules**[1] clearly were meant to deal with matters connected to the Court's original jurisdiction, including all ancillary procedural matters that have to do with originating process and not appeals, as

was clear from the wording of the Orders. Citing Order IX rule 19 of the rules, Mr. Haimbe opined that the rule clearly referred to matters concerned with original jurisdiction. Reference to "any document", he submitted, refers to documents commenced by originating process and does not generally apply to all documents before the Court. On the other hand, Mr. Haimbe argued, Order XI of the rules deals with the appeal process from beginning to end; that it was self-contained. Appeals, he stressed, must conform to that Order and that to do otherwise is irregular.

Jurisprudence, counsel argued, was clear that rules must be followed and a party that fails to adhere to them does so at their own peril. Mr. Haimbe argued that the Appellant had chosen to make the application under the wrong provision and, thus, the application was not competently before the Court.

In the alternative, Mr. Haimbe submitted that if the Court was of the view that the application was properly before it, it still lacked merit. He disagreed with counsel for the Applicant that the pending application for stay of execution was not a bar to this application, and that to suggest so was to take a narrow view of the objection put forward by the 1st Respondent. He contended that an application cannot be brought in a vacuum and that in applying its discretion, the Court must consider all relevant factors. Mr. Haimbe stressed that what the Applicant was asking the Court to do was to ignore the effect of the amendment once granted. He argued that the effect is that the amendment would alter the record;

the 1st Respondent would not have been given the opportunity to address the Court on the new memorandum of appeal, meaning that the Applicant would effectively pre-empt the decision of the Courtand brought fresh evidence on record post hearing of the application for stay.

Mr. Haimbe argued that due process demanded that any applications which may be interrelated, such as in the instant case, must not operate in such a way as to defeat the course of justice. He reiterated the point that the application for stay of execution needed to be disposed of first. The overriding condition, counsel added, is that the amendment must not cause prejudice upon the opposing party; that in the instant case, there was clear prejudice and the application is without merit and should be dismissed with costs.

Adding to submissions on behalf of the 1st Respondent, learned counsel Mr. Mweemba argued that if the amendment were allowed, there would be injustice occasioned to the 1st Respondent because, for the stay, she will be made to receive a decision without being heard on the merits of the matters arising; that the Court will not be able to ignore what is on record. He submitted that the application to amend the Memorandum of Appeal was not properly before this Court.

In reply, learned counsel for the Applicant, Ms. Liswaniso, argued that to view Order IX rule 19 as mainly dealing with originating process is a gross misdirection. She contended that that rule

speaks to amendment of court process and that the Notice of Appeal and the Memorandum of Appeal are a form of court process. Ms. Liswaniso added that a proper perusal of the said Order clearly shows that it is inclusive of service of court process that includes any application that applicants may make to this Court. Counsel invited the Court to note that Order IX rule 19 is the only order that speaks to amendment of court process or any other document.

Ms. Liswaniso submitted further that the Court was a court of justice and what it looks at is whether, in the end, justice will be done. She contended that the instant application had merit and was properly before this Court; that denying the Applicant the right to amend court process will defeat the purpose of justice. Counsel argued that there would be no prejudice occasioned to the 1st Respondent as she would have the chance to respond to the grounds of appeal in her heads of argument. She added that the Memorandum of Appeal alluded to the main matter and denying the Applicant an amendment would be to deny her justice.

At this stage, it is imperative to note that by way of Consent Order filed on 14th December, 2016, the 2nd Respondent is no longer a party to these proceedings. The 3rd Respondent did not oppose the application herein.

I am grateful to the parties for their submissions. From all that has been said, I find myself confronted with two key questions. The first is whether this application is competently before this Court.

only in respect to appeals relating to the election of Members of Parliament and councilors. It is trite that appeals before the Court are initiated by way of filing of a Notice of Appeal and Memorandum of Appeal. The question is, which provision of the Constitutional Court Rules does the appellant use in the event that they wish to amend the Memorandum of Appeal?

A perusal of the rules aforesaid suggests that the applicable rule is Order IX rule 19. I therefore find that the application is properly before this Court.

I now turn to the question whether or not the application herein has merit, when all the circumstances surrounding the application are considered. Counsel for the Applicant argued that the application for leave to amend had merit considering the fact that the Record of Appeal had not yet been filed and served. On the contrary, counsel for the 1st Respondent submitted that amendments to the Memorandum of Appeal cannot be allowed especially that there was still the outstanding decision on the application for stay of execution which had been anchored on the grounds in the Memorandum of Appeal having prospects of success. That to allow the amendment would be an alteration of the record and prejudicial to the 1st Respondent.

My considered view is that, having established that the application is properly before this Court, the Applicant wishes to frame her case, through amending the grounds of appeal, in a manner that would appear to address her concerns with the judgment of the

court below. The 1st Respondent's apprehension is that granting leave to amend will be prejudicial to her case. I do not believe so. I agree with the position of counsel for the Applicant that the 1st Respondent still has the right and opportunity to respond to the new or amended grounds of appeal for the consideration of the Court when it hears the main matter. As the right to respond is not taken away, I see no prejudice that would be occasioned through the granting of leave to amend. As to whether the pending decision of the application for stay of execution of the judgment of the court below is a bar or an impediment to this application, I find no merit in that argument. That application has been argued and to assume that the Court will now be influenced by any amendment to the memorandum of appeal is to be speculative. The interests of justice lie in both parties, the Appellant and the 1st Respondent, having the opportunity to present and argue their cases in the appeal before the full Court.

Leave to amend Memorandum of Appeal is granted. Each party shall bear their own costs.

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E. MULEMBE

JUDGE