IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

PETITION NO.A/047
2016/HP/EP/0025

IN THE MATTER OF: THE PARLIAMENTARY ELECTION FOR ZAMBEZI WEST CONSTITUENCY NO. 119 SITUATED IN THE ZAMBEZI DISTRICT NO. 009 IN THE NORTH-WESTERN PROVINCE OF THE REPUBLIC OF ZAMBIA HELD ON THE 11TH OF AUGUST 2016

AND
IN THE MATTER OF: ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 AS READ TOGETHER WITH PART IX THE ELECTORAL PROCESS ACT NO. 35 OF 2016

AND
IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 45 (2a), (c) and (d), 47(2) and 68(1) and (2a)

BETWEEN:
CHRISTABEL NGIMBU — APPELLANT
AND
PRISCA CHISENGO KUCHEKA — 1ST RESPONDENT
ELECTORAL COMMISSION OF ZAMBIA — 2ND RESPONDENT

RULING

Munalula JC:

Cases referred to:
1. D. E. Nkhuwa v Lusaka Tyre Services Ltd (1977) Z.R. 43
2. Finnegan v Parkside Health Authority [1998] 1 All E.R. 595
3. Nahar Investment Ltd v Grindlays Bank International (Zambia) Ltd (1984) Z.R. 81

4. Twampane Mining Cooperative Society Ltd v E & M Storti Mining Ltd (2011) 3 Z.R. 67
5. Rosemary Bwalya and Others v Mwanamuto Investments Limited (2012) 1 Z.R. 473

Legislation referred to:
Constitution of Zambia (Amendment) Act No. 2 of 2016
Constitutional Court Rules S.I. 37 of 2016

Work referred to:
Rules of the Supreme Court (White Book) 1999

The Appellant herein simultaneously filed two applications, one seeking extension of time in which to file the record of appeal and skeleton arguments and the other seeking leave to amend the memorandum of appeal. For convenience, the applications will be dealt with together in one ruling following the order in which they were argued.

The brief facts and time line preceding the filing of the two applications are as follows. On 25th November 2016 the High Court delivered judgment in a Parliamentary election petition filed by the appellant relating to the Zambezi West Constituency. In the judgment the High Court found that the election of 11th August 2016 in Zambezi West Parliamentary Constituency was conducted substantially in accordance with the provisions of the Electoral Process Act and declared the first Respondent the duly elected Member of Parliament for Zambezi West Constituency.

On 27th December 2016, the Appellant filed a notice of appeal and memorandum of appeal. On 16th January 2017, the 2nd Respondent filed their notice of address for service. On 26th January 2017, the two applications now before me were filed. They were given a return date of 1st February 2017. On 31st January 2017, the 2nd Respondent filed their affidavit in opposition to summons for leave to amend the memorandum of appeal. On the return date, only the Respondents were represented as the Appellant's advocates were unwell. The matter was adjourned to 21st February 2017. On 16th February 2017, the 2nd Respondent filed two affidavits in opposition, one opposing the summons to extend time in which to file record of appeal and the heads of argument; the second for leave to amend the memorandum of appeal. The two applications were heard on 21st February 2017 when I reserved ruling to 17th March 2017. I now do so.

The Appellant's first application is for extension of time in which to file the record of appeal and skeleton arguments. It is brought pursuant to Order XV rule 7 of the Constitutional Court Rules S.I. 37 of 2016. The Applicant filed an affidavit in support of the summons for leave to extend time in which it was argued that the extension of time was required in order to facilitate the hearing of an application for an amendment to the

memorandum of appeal which was cardinal to the preparation of the grounds of appeal and heads of argument. That whilst the Appellant was still desirous of prosecuting the appeal it would be inappropriate and absurd to file the record of appeal and heads of argument before the application for amendment of the memorandum of appeal had been heard.

The 1st Respondent in their affidavit of 16th February 2017 opposed the application for extension of time. It was argued that as the application for extension of time was made on the very last day on which to file the record of appeal and heads of argument, it was a thinly veiled and unjustifiable attempt to gain the Appellant more time in which to file the said documents. That the delay in processing the appeal would prejudice the Respondents and therefore the application should be dismissed.

At the hearing both sides relied on their written submissions and enhanced them with oral arguments. Mr Mumba on behalf of the Appellant stated that the extension of time was justified by the importance of making the proposed amendment to the memorandum of appeal, which had some erroneous content which if not corrected would render the proceedings misleading and unattainable. He stated that the application for amendment had already been filed with the Court and prayed that the application for extension of time be granted, more so as it was not opposed

by the 2nd Respondent. In response to the 1st Respondent's affidavit in opposition he stated that the application for amendment was not an afterthought, it was made only after the error was discovered. Further that the application for extension was made within time. He stated that no prejudice would be occasioned by the extension of time as an appeal was not included in the 90 days provided for the hearing of petitions found in Article 73 (2) of The Constitution (Amendment) Act No. 2 of 2016. Further the appeal would not impact the Appellant who under Article 73 (4) would continue to hold their seat pending the determination of the election petition.

Mr Mweemba for the 1st Respondent relied on the affidavit in opposition to summons for leave to amend the memorandum of appeal filed on 16th February 2017 in which the relevant portion reads:

> **"...the amendment sought by the appellant is an afterthought and merely meant to mask the failure by the appellant to lodge appeal by filing record of appeal together with heads of argument and an electronic copy of the Record of Appeal on time as stipulated by the law".**

He further stated that the prejudice likely to be suffered lay in the preparation of the defence. That the proposed amendment is not tenable as it attempts to raise issues which were not canvassed in the court below.

In supporting Mr Mweemba, Mr Phiri also for the 1st Respondent, stated that the application was untenable and should be dismissed as the proposed amendment giving rise to the application for extension of time cannot bear fruit. That the Court would be engaging in an academic exercise as it cannot resolve the issues being canvassed. He concluded that the amendment would also be highly prejudicial to the 1st Respondent.

When called upon Ms Mulenga for the 2nd Respondent expressed concern that the application for extension of time was premised on an assumption that leave to amend had already been granted as granting leave to extend time could only be an academic exercise if leave to amend is not subsequently granted.

In reply, Mr Mumba, stated that the application for leave to amend had to be preceded by leave to extend time in which the application to amend could then be considered. That the leave was required in order to file the record of proceedings and the skeleton arguments in any case. He denied that the proposed amendment would be prejudicial to the Respondents. He also denied that the issue he was canvassing in the proposed amendment relating to purported admissions made by the two returning officers was not considered by the lower court and therefore could

not form part of the intended appeal. He concluded that the extension of time would not be an academic exercise.

I am grateful to counsel for the spirited arguments on both sides. The issue raised is whether the Appellant should be granted an extension of time in which to file the skeleton arguments and record of appeal. I have perused Order XI rule 5 in relation to Order XV rule 7 and in my view the provisions are generally in line with case law on the subject. The law gives the Court a discretion to enlarge time where the circumstances so demand and where the application for such enlargement is not inordinately tardy. Order IX rule 5 reads as follows:

> **5. Subject to Rule 4 and any extension of time, the appellant shall, within thirty days after filing a notice of appeal, lodge the appeal by filing in the Registry twenty hard copies of the record of appeal together with heads of argument and an electronic copy of the record of appeal.**(emphasis mine)

Rule 5 recognizes inadvertently the possibility of extending time in which to file the record of appeal and heads of argument. Indeed Order XV rule 7 explicitly allows this Court to extend time by providing as follows:

> **7. The Court may extend time limited by these rules, or by a decision of the Court, except where time is specifically limited by the Constitution.**

The Constitutional Court Rules are in good company. The case law in this area is fairly well settled. **D. E. Nkhuwa v Lusaka Tyre Services**

Limited[1]**, Finnegan v Parkside Health Authority**[2] and **Nahar Investment Limited v Grindlays Bank International (Zambia) Limited**[3] all point to the discretion enjoyed by the court to extend time provided the application is in good time and the discretion is exercised judiciously. Indeed in the case of **Twampane Mining Cooperative Society Limited v E & M Storti Mining Ltd**[4] the Supreme Court held at page 74 that the delay in the case was unreasonable and the excuse offered unacceptable; that the Appellant had sat on their rights by *inter alia* not filing the application for extension of time promptly. Based on the foregoing authorities, I am of the considered view that judicious exercise of discretion takes into account the need for litigants to observe the rules of court, the need for them to seek leave expeditiously and the need to avoid prejudice to the other party. The Court must be satisfied with the reasons given for a delay that leads to an application for extension of time. The length of the delay in the cases cited points to refusal to grant leave being more likely in cases of substantial tardiness to seek leave on the part of the applicant.

Since the Applicant filed the application to extend time before the time allowed expired and also filed an application to amend the memorandum of appeal that needed to be heard before the record of appeal and heads of argument can be filed I am inclined to award the

extension of time. More so as Order IX rule 7 states that **"An appeal shall not operate as a stay of execution or of proceedings under the judgment appealed against"** and Article 73(4) further states that **"A Member of Parliament whose election is petitioned shall hold the seat in the National Assembly pending the determination of the election petition."** Accordingly, I find that there is no prejudice to the Respondents in this case which cannot be remedied by an order for costs.

The application succeeds and the Appellant is given an extension of 30 days from the date hereof in which to file the heads of argument and the record of appeal.

I now turn to the second application. It is for leave to amend the memorandum of appeal and is made pursuant to Order IX rules 19 and 20 (1) of the Constitutional Court Rules. The Applicant relied on the supporting affidavit particularly paragraphs 3, 4, 5 and 6 which were enhanced by oral submissions. The gist of the submissions is to justify the proposed amendment as evidenced by the exhibit marked "ADMM1". The relevant portion of the affidavit in support of the application for leave to amend reads:

3. That on the 27th day of December 2016 the said Notice of Appeal and the accompanying Memorandum of Appeal consisting of three grounds only were duly filed into Court

4. That however upon further perusal of the 3rd Ground of Appeal I discovered that a portion of information relating to the 2nd Respondent herein was inadvertently omitted, while on the other it referred to the lower Court as having admitted the occurrence of the grave irregularities in the election management instead of accepted.

5. That the Applicant Party wishes to amend her 3rd Ground of Appeal by amending the said portion of information. Now shown to me marked "ADMM1" is a true copy of the Draft Amendment of the Memorandum of Appeal.

6. That the amendment being sought from this Court will not prejudice the Respondents in any way but merely clarify the facts thereof.

7. That in the premises I crave the indulgence of this Court for leave to amend the memorandum of Appeal so as to state correctly the information which she seeks to present to this Court on her Appeal.

The relevant portion of the exhibited memorandum of appeal reads:

3. The Court below erred and misdirected itself in law and fact when it failed to order a verification and recount of the ballot of the 11th August, 2016 Zambezi West Constituency parliamentary Election as prayed by the Appellant in her viva voce evidence

considering the grave irregularities observed and admitted by the Court.

The relevant portion of the exhibited amended memorandum of appeal marked "ADMM 1" reads:

3. The Court below erred and misdirected itself in law and fact when it failed to order a verification and recount of the ballot of the 11th August, 2016 Zambezi West Constituency parliamentary Election as prayed by the Appellant in her viva voce evidence considering the grave irregularities observed and admitted by the 2nd Respondent's two Assistant Returning Officers and accepted by the trial Court.

In oral submissions, Mr Mumba stated that the impugned wording in the memorandum of appeal was problematic. His exact words as transcribed in the Court record are:

"... the Court did not admit. It was not a participant in the election process. It can only accept the facts once accused before it. My lady the applicant has exhibited and amended the memorandum of appeal marked ADMM1 and highlighted the last part of paragraph 3 that seeks to amend. My lady that part cannot in any way prejudice both the first and second Respondent." (sic)

Both Respondents opposed the application. Mr Mweemba relied on the affidavit filed on 16th February 2017 in opposition to application for leave to amend the memorandum of appeal. He sought dismissal of the application. Relevant portions of the affidavit in opposition read:

> **"6...the 2nd Respondents two Assistant Returning officers never testified in the Court below and as such the assertions the Appellant is purveying were never subjected to cross examination and as such the proposed amendments ought to be disallowed".**
>
> **7...it is trite law that matters of fact which have not been canvassed before a trial Court can never be introduced on appeal in a court such as this one."**

Mr Mweemba averred that whilst it is in the discretion of the Court to allow an amendment, the determining factor is for the Court to consider the prejudice that the opposing parties would suffer if the amendments are allowed. The discretion must be exercised judiciously. In supplementing Mr Mweemba's arguments Mr Phiri stated that the proposed amendment would in fact obfuscate rather than clarify the facts as the officers referred to, did not testify in the Court below nor were they referred to in the judgment passed by the trial court. I take note that the judgment in issue has not been exhibited.

Ms Mulenga for the 2nd Respondent relied on the affidavit filed on 31st January 2017 in opposition to the application to amend the memorandum of appeal, particularly paragraphs 3 and 4. They read:

> **3. That the 2nd Respondent opposes the intended amendment of Ground 3 of the memorandum of Appeal which adds the words by the 2nd Respondent's two Assistant Returning Officers and accepted by the trial Court, as this will be prejudicial to the 2nd Respondent.**
>
> **4. That the court records will indicate that the 2nd Respondent's Assistant Returning Officers were not called as witness in the lower court.** (sic)

She argued that the net effect of allowing the application would be to introduce fresh evidence through the back door and thereby correct a defect in the evidence already adduced before the court.

In his reply, Mr Mumba denied that any new issues were being raised. He insisted that if the amendment was not allowed the impugned ground would carry "untenable information as the Court can only accept facts and not admit them". When pressed to explain the distinction he was drawing between "admit" and "accept" he stated (as per record) that:

> **What I meant my lady is that in the petition, there was this allegation where the two Assistant Returning Officers were said to have admitted the irregularities in the electoral process during the election itself. And so the facts are that not admitting**

in Court but admitting the irregularities took place and then accepted by the court when it was addressed before it...It is not the court that admitted that the irregularities took place, that is what the Applicant is trying to clarify."

I have anxiously considered the application and the submissions made both for and against the grant of leave to amend. The issue before me is whether I should exercise my discretion to allow the Appellant to amend the memorandum of appeal as pleaded. The law on amendment of process is clear. It is permissible with leave of the Court provided the Court's discretion is exercised judiciously. In **Rosemary Bwalya and Others v Mwanamuto Investments Limited**[5] the Supreme Court stated at page 482 that "[i]t is trite law that pleadings may be amended at any stage of the proceedings before judgment is passed..."

Furthermore Order IX rule 19 of the Constitutional Court Rules states that: **"A party that wishes to amend the process or any document may do so with the leave of the Court before the conclusion of the hearing."** Leave to amend may therefore be sought at any time as prescribed. Other rules provide more clarity. Order XI rule 9 (2) says "**the memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the**

judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided...” When this is immediately followed by and read with rule 9 (3) that **“The appellant shall not thereafter without the leave of the Court put forward any grounds of objection other than those set out in the memorandum of appeal...”** the ability to amend with leave of the Court is further confirmed.

Finally Note 20/8/6 of the White Book sets out the general principles for grant of leave to amend as follows: First, the amendment ought to be made for the purpose of determining the question before the parties or to correct a defect or error. Second, the object of the court is to decide the rights of the parties and not to punish them for mistakes that are not made mala fide. Third, the amendment should not prejudice the other side to an extent that cannot be compensated by costs. Fourth, the amendment should clarify the issues in dispute and not lead to a defence or claim to be raised for the first time. And finally the court is entitled to have regard to the merits of the case if the merits rare readily available as it considers the application to amend.

In the application before me leave is sought to amend the memorandum of appeal in order to ensure that what counsel for the applicant called ‘tenable information’ is brought before the Court. It also

appears that the application had to be made before the heads of argument and record of appeal were filed. I am not convinced on the affidavit evidence before me and the arguments of counsel, spirited as they were, that the necessity for the proposed amendment has been demonstrated. Nor am I convinced that the proposed amendment if allowed will not prejudice the Respondents. For the foregoing reasons the application for leave to amend the memorandum of appeal as proposed has not been granted.

As the application for extension of time in which to file the record of appeal and heads of argument has been successful whilst the application for leave to amend the memorandum of appeal has failed, costs shall be in the cause.

Justice Prof M Munalula

Constitutional Court Judge