IN THE CONSTITUTIONAL COURT OF ZAMBIA **2016/CC/A046**
HOLDEN AT LUSAKA **APPEAL NO. 10/2017**
(Constitutional Jurisdiction)

IN THE MATTER OF: **AN ELECTION PETITION FOR MKUSHI SOUTH CONSTITUENCY PARLIAMENTARY ELECTION**

AND

IN THE MATTER OF: **ARTICLE 73 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA AS AMENDED BY ACT NO. 2 OF 2016**

AND

IN THE MATTER OF: **SECTION 96 OF THE ELECTORAL PROCESS ACT NO. 36 OF 2016**

BETWEEN:

SYDNEY CHISANGA **APPELLANT**

AND

DAVIES CHISOPA **1ST RESPONDENT**
ELECTORAL COMMISSION OF ZAMBIA **2ND RESPONDENT**
ATTORNEY GENERAL **3RD RESPONDENT**

Before Justice P.Mulonda, in Chambers, on the 18th day of August, 2017

For the Appellant: Mr. M. Museba of Simeza, Sangwa &Associates

For the 1st Respondent: Mr. K. Kunda of Ellis & Co
For the 2nd Respondent: Mr. R. Mukuka from Robert & Partners

RULING

Authorities & Materials Referred to:

1. **Cropper v. Smith (1884) 26 QBD**
2. **Zambia Consolidated Copper Mines Limited v. Joseph**

David Chileshe SCZ Judgment No. 21 of 2002

3. **Stanbic Bank Zambia Limited v. Microquip Zambia Limited Appeal No. 214 of 2013.**
4. **Bank of Zambia (As Liquidator of Credit Africa Bank Limited in Liquidation) v. Al Shams Building Materials Company Limited, Appeal No. 214 of 2013**
5. **Clack v. Wood (1882) 9 Q.B.D. 276**
6. **Oxford Advanced Learner's Dictionary, 7th Edition**

Legislation referred to:

1. **The Constitution of Zambia, Act No. 2 of 2016**
2. **The Constitutional Court Rules, S. I. No. 37 of 2016**
3. **Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia**
4. **The Supreme Court Rules, Chapter 25 of the Laws of Zambia**
5. **The Supreme Court Practice, 1999 Edition (White Book)**

The appellant in this matter made an application for an Order to amend the Record of Appeal. The Summons was filed pursuant to the provisions of **Order I Rule 1** of the **Constitutional Court Rules** and **Rule 68 (1)** of the **Supreme Court Rules, Chapter 25 of the Laws of Zambia**.

In support of this Application, the learned counsel for the appellant, Mr. Museba, relied on the Affidavit in Support of the Application

and the Skeleton Arguments filed. The gist of the Affidavit in Support is that when the main appeal came up for hearing on 14th July, 2017, the appellant's counsel was informed on the same day by counsel for the 2nd Respondent that the Record of Appeal did not contain a copy of the Orders for Direction and a supplementary notice to produce that were filed in the lower court. The appellant's counsel was not aware of the omission due to the fact that the record was only made available upon their request for the same from the Kitwe High Court Registry. It was after the discovery of the said omission that counsel for the appellant applied for an adjournment to obtain the said documents. Having obtained the documents, the appellant now applies to have the Record of Appeal amended.

In the appellant's submissions, counsel gave a brief background of the case, after which he proceeded to address the applicable procedure for the amendment of the Record of Appeal. Counsel cited the provisions of **Order I Rule 1**of the **Constitutional Court Rules, S. I. No. 37 of 2016** which provides that:

"The jurisdiction vested in this Court shall, as regards practice and procedure, be exercised in the manner provided by the Act and these Rules, the Criminal Procedure Code or any other written law, or by such rules, orders or directions of the Court as may be under the Act, the Criminal Procedure Code or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) and the law and practice applicable in England in the Court of Appeal up to 31st December, 1999."

It was submitted that the Constitutional Court Rules had a lacuna in terms of amending a Record of Appeal, therefore where the Constitutional Court Rules did not provide for the practice and procedure for any particular aspect, recourse had to be made to any other written law as envisaged in **Order I Rule 1** of the **Constitutional Court Rules.** It was on this basis that counsel further relied on the provisions of **Rule 68 (1)** of the **Supreme Court Rules, Chapter 25 of the Laws of Zambia** which provided for amendment of part of the Record of Appeal. In support of his submission, counsel cited the case of **Bank of Zambia (As Liquidator of Credit Africa Bank Limited in Liquidation) v. Al**

Shams Building Materials Company Limited, Appeal No. 214 of 2013.

Counsel for the appellant further submitted that the prevailing practice in the Supreme Court dictated that where an Order is granted to rectify a Record of Appeal, the appellant is allowed to withdraw the Record of Appeal amounting to a withdrawal of the appeal. In support of this argument, reliance was placed on the case of **Stanbic Bank Zambia Limited v. Microquip Zambia Limited, Appeal No. 134 of 2012** where it was held that an application to withdraw a Record of Appeal in order to correct a defect was not synonymous with the withdrawal of the Appeal even though it contained a Notice of Appeal. It was then prayed that the appellant be granted leave to amend the Record of Appeal by withdrawing and filling a rectified Record of Appeal.

In objecting to the application, counsel for the 1st Respondent relied on that filed Skeleton Arguments. It was submitted that on the 14th of July, 2017, the full bench of this Court granted the appellant leave to file a Supplementary Record for documents omitted from the Record of Appeal, within 21 days, failing which the Appeal stood

dismissed. It was argued that the application by the appellant to amend the Record of Appeal was misconceived as it was not only filed out of time, but that it was in effect asking a single Judge to overrule the decision of the full bench.

Further, it was submitted that the Constitutional Court had its own rules therefore the appellant was not at liberty to rely on the Rules of the Supreme Courtas they only applied to that Court. It was also argued that reliance on **Order I Rule 1** of the **Constitutional Court Rules** was misconceived as there was no lacuna in the Court's Rules relating to the Record of Appeal. Counsel prayed for the application to be dismissed with costs.

The 2nd Respondent through its counsel equally relied on the filed Skeleton Arguments in opposition of the application to amend the Record of Appeal. The legal issue raised was whether the Court could entertain an application to amend the Record of Appeal when in fact the full bench of the Court granted leave for an application to file a Supplementary Record of Appeal. It was submitted that the appellant had not made any such application. Therefore, the appellant could not bring a different application to amend the

Record of Appeal. It was also submitted that on this basis, the appellant was in breach of the Order of the full bench.

Further, counsel argued that the appellant's reliance on **Order I Rule 1** of the **Constitutional Court Rules** and **Rule 68 (1)** of the **Supreme Court Rules** was misconceived as the **Constitutional Court Rules under Order XI** sufficiently provided for matters relating to appeals and Records of Appeal.

In response to the appellant's submission that there was no provision in the Constitutional Court Rules that provided for the appellant to file a Supplementary Record of Appeal, counsel for the 2nd Respondent submitted that this Court ought to dismiss the Appeal on account of an incomplete record that was before the Court. It was further submitted that **Order XI Rule 6** of the **Constitutional Court Rules** was very clear where an appeal was not lodged in accordance with the rules of the Court as to time. The rule allowed the respondent to apply for an order to dismiss the appeal for want of prosecution. Counsel therefore prayed that the Appeal be dismissed for want of prosecution in terms of **Order XI Rule 6** of the **Constitutional Court Rules**.

In reply, counsel for the appellant submitted orally and urged this Court to note that the position of the Affidavit in Support of the Summons to amend the Record of Appeal was undisputed as there was no Affidavit in Opposition that had been filed by the respondents. It was argued that the respondents were misleading the Court in their submission that the full bench ordered the appellant to file a Supplementary Record, as a perusal of the record reflected that the application made before the full bench was one for an adjournment to allow the appellant to make a formal application, which was granted with a condition to file the same within 21 days from the date thereof.

Counsel for the appellant further argued that the respondents were asking the appellant to make an application for which there was no legal basis, as the rules of the Constitutional Court did not have any provision that allowed for an appellant to file a Supplementary Record of Appeal. In any event, it was argued that the respondents themselves could have exercised the option to file a Supplementary Record of Appeal to avoid the application presently before Court.

Counsel reiterated their earlier submission and prayed that their application be granted and that costs be in the cause.

I have carefully considered the arguments by learned counsel for the parties and authorities brought to my attention. It is imperative to establish at this point, whether the appellant complied with the Order of the full bench of this Court on 14th July, 2017 in which an adjournment was granted. In the order we stated that the adjournment was to:

> ***"...allow the Appellant to file an <u>appropriate application</u> on condition that the said application shall be filed within 21 days from today. In default thereof the whole Appeal shall stand dismissed..." [Emphasis mine]***

Having regard to the Order of the full bench, I find that the appellant's application is in line with the Order given. The said Order having been a conditional Order, gave the appellant a particular time frame within which to comply. The law on the computation of time is trite. **Article 269** of the **Constitution of Zambia Act No. 2 of 2016** read together with **Section 35** of the

Interpretation and General Provision Act, Cap 2 of the Laws of Zambia which give clear guidance on computing time.

The provisions of **Article 269 (a), (c)** and **(d)** of the **Constitution** of Zambia (Amendment) Act No. 2 of 2016 are similar to **Section 35 (a), (c)** and **(d)** of the **Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia**. The only exception is that in paragraph (b) of **Article 269** of the Constitution, an excluded day includes a Saturday whilst in the **Interpretation and General Provisions Act**, it excludes a Saturday. The law is clear that where a period exceeds six (6) days, then Saturdays and Sundays are included in the computation of time.

Having the above in mind, I note from the record that the appellant did file an application to amend the Record of Appeal on the **3rd of August, 2017,** which was the 20th day from the date of the full bench's Order. I find that the appellant was within the stipulated timeframe within which to *"file an appropriate application"*. Therefore, this application is rightfully before this Court.

What then appears to be at the core of this application, is whether or not the Rules of the Supreme Court, Chapter 25 of the Laws of

Zambia and any other written law, apply to the practice and procedure of the Constitutional Court where there is a lacuna in the **Constitutional Court Rules, S. I. No. 37 of 2016**.

I have considered the argument of the 1st Respondent's counsel to the effect that the Supreme Court Rules only apply to the Supreme Court and not to this Court. I have also noted with careful concern, the submissions of the learned counsel for the appellant in which he states that where the Constitutional Court Rules do not provide for the practice and procedure for any particular aspect, **Order I Rule 1** of the **Constitutional Court Rules** allows this Court to exercise its jurisdiction pursuant to the practice and procedure prescribed in any other written law. The question therefore, is whether there is any rule in the Constitutional Court that provides for an appellant to amend a Record of Appeal? There is none.

I commiserate with the situation the appellant finds himself in, in attempting to find a provision to move this court for an amendment of the Record of Appeal. However, it has been our practice to make use of the **Supreme Court Practice, 1999 (White Book)** whenever

our own rules as a court prove inadequate. The said **Order I Rule 1** of the **Constitutional Court Rules** states:

> **"...in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) and the law and practice applicable in England in the Court of Appeal up to 31st December, 1999."**

The same Order goes on to state as follows:

> **"(2) Where the Act and these Rules do not make provision for any particular point of practice or procedure, the practice and procedure of the Court shall be as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal in England."**

The appropriate provision for an application of this nature is therefore under **Order 59 Rule 10 (1)** as read together with **Order 20/8/15** of the **Supreme Court Practice, 1999 (White Book)**. It bestows on the Court of Appeal in England an inherent power to order the Record of the trial to be amended so as comply with the facts proved, and the decisions given. This position is grounded in

the case of **Clack v Wood (1882) 9 Q.B.D. 276**. Having stated this position, it is vital to address the law on amendments.

The words of, Lord Bowen LJ in the case of **Cropper v. Smith (1884) 26 QBD** are instructions where he stated that:

> ***"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 the mistakes for which they make in the conduct of their cases...I know of no kind of error or mistake which, if not fraudulent...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 amendments as a matter of favor or grace...it seems to me that as soon as it appears that the way a party has framed his case will not lead to a decision of the real matter in controversy, it is as such a matter of right on its part to have it corrected, if it can be done without injustice."***

Further, the learned authors of "**Pleadings Principles and Practice**" in the authority cited above state that:-

"The wide and extensive powers of amendment vested in the Courts are designed to prevent the failure of justice due to procedural errors, mistakes and defects and they are exercised to further and serve the aims of Justice. The power of amendment are intended to make more effective the function of the power of the Courts to determine the true substantive merits of the case, to have more regard to substance than form, and this is to free the parties and the Court from the technicalities or formalities of procedure and to correct errors and defects in proceedings.

The Supreme Court in the case of **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe SCZ Judgment No. 21 of 2002** stated that amendments to pleadings should not be allowed if they cause prejudice to the rights of the opposite party as existing at the date of such amendment.

Much as I appreciate the absence in our own rules regarding amendment of the Record of Appeal by the appellant and regarding the fact that a Supplementary Record of Appeal can only be filed by the respondent, I find that the appellant had no choice but to seek refuge in the provisions of the Supreme Court Rules. In that regard,

the appellant connected **Order I Rule 1** of the **Constitutional Court Rules, S. I. No. 37 of 2016** which addresses the issue of resorting to any other written law. However, I have already stated the position taken by this Court and is to use the default source, the **Supreme Court Practice, 1999 White Book.**

In allowing an amendment of the Record of Appeal, it follows that the applicant be allowed to withdraw the Record of Appeal for purposes of rectifying it. I accordingly grant the appellant leave to amend the Record of Appeal by way of withdrawing and filling a rectified Record of Appeal within 14 days from the date hereof, pursuant to **Order 59 Rule 10 (1)** as read together with **20/8/15 of the White Book.**

Costs for this hearing shall be in the cause.

Dated the 29 day of August 2017

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P. MULONDA
CONSTITUTIONAL COURT JUDGE