

IN THE CONSTITUTIONAL COURT

2022/CCZ/0023

HOLDEN AT NDOLA

(CONSTITUTIONAL JURISDICTION)

**IN THE MATTER OF: ARTICLE 2(a)(b) AS READ TOGETHER WITH
ARTICLE 128(1)(a)(b) and 128(3)(b)(c) OF THE
CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: ARTICLE 1, 3, 8, 9(1)(a)(b), 45(2)(a)(c)(e) AND
267(1) OF THE CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 52(6) AS
READ TOGETHER WITH ARTICLE 57(1) OF THE
CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF: OMISSION BY THE ELECTORAL COMMISSION OF
ZAMBIA TO CANCEL BY-ELECTIONS UPON RECEIPT
AND ACCEPTANCE OF RESIGNATIONS OF
CANDIDATES IN KWACHA AND KABUSHI
PARLIAMENTARY CONSTITUENCIES BY THE
COMMISSION**

**IN THE MATTER OF: OMISSION BY THE ELECTORAL COMMISSION OF
ZAMBIA TO HOLD FRESH NOMINATIONS UPON
RECEIPT AND ACCEPTANCE OF RESIGNATIONS BY
THE COMMISSION OF CANDIDATES IN KWACHA
AND KABUSHI PARLIAMENTARY CONSTITUENCIES
IN CONTRAVENTION OF ARTICLE 52(6) AS READ
TOGETHER WITH ARTICLE 57(1) OF THE
CONSTITUTION.**



BETWEEN:

PETER CHAZYA SINKAMBA

1ST PETITIONER

ISAAC MWANZA

2ND PETITIONER

AND

ELECTORAL COMMISSION OF ZAMBIA

RESPONDENT

ATTORNEY GENERAL

INTERVENOR

CORAM: Sitali, Mulenga and Mulongoti, JJC on 13th and on 14th October,

2022

For the 1st Petitioner:

In person

For the 2nd Petitioner:

In person

For the Respondent:

Ms. T. Phiri and Mr M. Bwalya, In House Counsel

For the Intervenor:

**Mr. M. Muchende SC, Solicitor General
Mr. J. Simachela, Chief State Advocate
Mr.C.Mulonda, Principal State Advocate
Mr. N. Mwiya, Assistant Senior State Advocate
Mr. O. Lubumbe, State Advocate
Mr. C. Mulumbwa, State Advocate**

RULING

Mulenga, JC delivered the Ruling of the Court

Cases referred to:

- 1. Martin Chitondo and Others v Attorney General 2019/CCZ/002**
- 2. Isaac Mwanza v Electoral Commission of Zambia and Attorney General 2020/CCZ/0008**

Legislation referred to:

- 1. The Constitution of Zambia Chapter 1 of the Laws of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016**

Introduction

[1] This Ruling is on the Intervenor's application for joinder as custodian of public interest and for arrest of Judgment in this cause that was due to be delivered on 10th October, 2022. The application was made by summons filed on 9th October, 2022 and is supported by an affidavit sworn

by Mr. Josiah Simachela, the Chief State Advocate. The application is based on the contention that following the rescinding of resignations by the two candidates, namely Alfred Yombwe and Lawrence Kasonde for Kabushi and Kwacha Constituencies by-elections on 6th October, 2022, there remains no factual basis to support the reliefs sought by the Petitioners in their Petition because it was based on the resignations of the two which have since been rescinded. Hence, that this Court risks delivering an academic Judgment.

[2] Upon hearing the Intervenor *ex parte* on 10th October, 2022, we granted the *ex parte* application and issued orders for directions for the Intervenor to file an affidavit and serve on the Petitioners and the Respondent to avail them opportunity to respond and that all the parties would be heard on 13th October, 2022. Only the Petitioners filed an affidavit and skeleton arguments on 11th October, 2022 in response to the affidavit and skeleton arguments filed by the Intervenor on 10th October, 2022.

Intervenor's case

[3] The gist of the Intervenor's affidavit, which was termed as an affidavit in opposition, is that the Petition filed on 26th September, 2022 seeking reliefs anchored on the withdrawal or resignation of the independent

candidates for Kabushi and Kwacha constituencies, namely Alfred Yombwe and Lawrence Kasonde no longer had material facts in controversy because the two candidates had since rescinded their resignations on 6th October, 2022.

[4] The two letters rescinding the resignations were exhibited and showed that they were received by the Respondent on 6th and 7th October, 2022 respectively.

[5] In the skeleton arguments in support of the application to arrest Judgment, the Intervenor submitted that following the rescission of the resignations, the resignations are no longer in effect and therefore, the reliefs sought by the Petitioners were rendered otiose warranting the dismissal of the Petition. The case of **Martin Chitondo and Others v Attorney General**¹ was cited in support of the position that this Court had declined to pronounce itself on a matter which had been overtaken by events.

[6] Therefore, that in light of the new development, it had become unnecessary for this Court to proceed to address the cancellation of the Kwacha and Kabushi by-elections on account of the resignations of the two candidates.

[7] At the hearing of the Intervenor's application, the learned Solicitor General, Mr. M. Muchende SC, augmented the skeleton arguments and reiterated that the rescission of the two candidates' resignations that took place on 6th October, 2022 was important for this Court to take into account as doing otherwise would amount to the Court rendering a misinformed judgment and the ultimate outcome will not reflect the facts on the ground. It was the Solicitor General's view that the Petitioners need to amend their Petition to reflect the fact that the two independent candidates had rescinded their respective resignations.

[8] Referring to our decision in **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**² Mr. Muchende, SC, pointed out that that case interrogated the resignation of a sitting councillor premised on Article 157 of the Constitution which bars a Councillor who resigns from re-contesting elections during the life of the Council from which he or she resigned.

[9] He argued that that case is distinguishable from the current matter that is based on Article 52(6) of the Constitution which is couched differently from Article 157. He added that Article 52(6) has no express bar against rescission. Further, that a reading of Article 52(6) together with Article 45(1)(a) of the Constitution, reveals that a parliamentary

candidate has a political right to rescind their resignation and that the issue of rescission of resignation has never been interrogated by this Court.

[10] In conclusion, the Solicitor General prayed that we arrest the delivery of Judgment and order that the Petition be amended so that it can reflect the fundamental facts that have been brought to our attention.

Petitioners' Response

[11] In opposing the application, the Petitioners in their affidavit stated that the purported rescission of resignation by the two independent candidates expanded the core issues to be determined by this Court.

[12] In their skeleton arguments, the Petitioners submitted that the facts leading to the Petition remain the same because the Constitution does not provide for retraction or rescission of constitutionally recognised resignations.

[13] In support, the case of **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**² was cited wherein we held that where the Constitution does not provide for a rescission of a resignation, the resignation cannot be rescinded. Therefore, that the purported rescissions highlighted by the Intervenor have no effect and are null and

void because there is no constitutional provision on rescission. That to allow a candidate to rescind their resignation would create anarchy in the entire electoral process as one could resign and then later claim the right to be added back to the ballot after printing.

[14] The Petitioners' other submissions were based on the 90 day period provided in Article 57(1) for holding a by-election. They argued that a reading of Articles 52(5), (6) and 57(1) reveals that any resignation, death or disqualification of a candidate that takes place within 30 days of the expiry of the 90-day period has no effect.

[15] It was the Petitioners' further contention that the remedy sought by the Intervenor that the Petition be dismissed based on the purported rescission of the resignations by the independent candidates is not available to the Intervenor who is not a party to the proceedings. That such a relief could only be sought by a Respondent or party to the action. They reiterated that the Petition alleges a contravention of the Constitution. They urged us to dismiss the Intervenor's application.

[16] In augmenting their skeleton arguments at the hearing, the 1st Petitioner reiterated that the purported rescissions of the resignations by the independent candidates have no effect on the substantive issues which were the subject of the Petition.

[17] Citing the case of **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**², the 1st Petitioner argued that our decision in that case addressed the issue of resignation and rescission of resignation. In his view, so long as Article 52(6) has not provided for rescission of a resignation by a candidate, this Court cannot take on board the alleged rescissions brought to its attention by the State.

[18] The 1st Petitioner further submitted that the timeframes set for holding elections in the Constitution are intended to make the electoral system certain and predictable. Therefore, that entertaining a rescission of a resignation by a candidate would make the electoral system unpredictable. He urged us to maintain our decision in **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**² and dismiss the Intervenor's application.

[19] The 2nd Petitioner's submissions mainly reiterated the position the Petitioners have taken in the main matter on the alleged contravention of the Constitution by the Respondent in failing to cancel the election based on Articles 52(6) of the Constitution. He added that the Petition was far removed from the rescinded resignations which on account of this Court's decision in **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**² had no impact on the Petition.

[20] Further, that contrary to the Solicitor General's submissions, there is no provision for rescission of a resignation by a candidate in the Constitution.

[21] He added that the Respondent had argued that it could not cancel the election following the resignations because of the Court Order but had announced the date of the by-election in spite of the Court Order.

[22] The 2nd Petitioner argued that the Petition has to do with contravention of the Constitution based on the factual situation that there was resignation by the two independent candidates but the Respondent had failed to perform its functions as required by Article 52(6). Further, that what the Intervenor was telling this Court is that a contravention can be atoned by another act but that this is not the case.

[23] The 2nd Petitioner urged us to proceed to render Judgment and contended that the Electoral Commission of Zambia had already set a new date for elections, a fact he invited us to take judicial notice of.

Intervenor's Reply

[24] In reply, the learned Solicitor General reiterated that the rescissions were fundamental facts which had a bearing on the Petition before us. In his view, taking the said rescissions into account would assist the Court

to render a meaningful and all-encompassing Judgment so as to aid the proper administration of justice.

[25] The Solicitor General pressed the point that there was need to take the rescissions into account, hence the State's intervention in the matter.

Determination

[26] We have considered the Intervenor's application, the affidavits and arguments by the Intervenor and the Petitioners.

[27] The factual basis is not in dispute. It is that the Petition alleges that the Respondent contravened Article 52(6) of the Constitution by its failure or omission to cancel the election and call for fresh nominations following the resignation of the independent candidates for Kabushi and Kwacha Constituencies on 12th and 13th September, 2022, respectively. The Petition was heard by the Court on 5th October, 2022 and Judgment was scheduled to be delivered on 10th October, 2022 when the Intervenor made the applications for joinder and arrest of Judgment based on the fact that new developments had arisen which would render the Judgment academic. The development was that the two independent candidates that had resigned on 12th and 13th September, 2022, respectively had rescinded their resignations on 6th October, 2022.

[28] It is the Intervenor's position that following the rescission of the resignations there were no longer any resignations upon which the Petition could be anchored or determined. That this is premised on our decision in the case of **Martin Chitondo and Others v Attorney General**¹. Further, that Article 52(6) as read with Article 45(1)(a) allows a candidate to rescind his resignation. That this case is therefore distinguishable from the case of **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**² which was premised on Article 157 involving sitting councillors. Hence, that the Petition needs to be amended to reflect the fundamental facts that have arisen based on the rescissions.

[29] The Petitioners on the other hand, argue that the case of **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**² also addressed the issue of resignation and rescissions and that so long as Article 52(6) does not provide for a rescission of a resignation by a candidate, the purported rescissions in this case have no effect on the substantive issues raised in the Petition.

[30] The Petition alleges contravention of Article 52(6) by the Respondent as a result of the failure or omission to cancel the election and call for

fresh nominations following the resignation of two independent candidates.

[31] The main issue for our determination in this application is whether the Judgment in this matter should be arrested and an order made directing the Petitioners to amend the Petition to take into account the factual situation that there has been a rescission of the resignations by the two independent candidates. Put differently, whether the Petition can be determined in its current state without incorporating the issue of the rescission of the resignations.

[32] We note that the intervenor in his arguments in support of his application to arrest delivery of judgment went on to submit that the Constitution permits a candidate who resigns to rescind that candidate's resignation and that there is no bar to such a candidate rescinding their decision as it is their democratic right to do so in accordance with Article 52(6) read with Article 45(1)(a) of the Constitution. Our view is that this argument cannot be advanced before us at this stage as the intention of the Intervenor in making the application for arrest of judgment is that the issue of the independent candidates' rescission of their resignation should be brought before us as it is not part of the issues for our determination in the petition. We are fortified in this observation by his further

application that the Petitioners be ordered to amend their petition to onboard the facts arising from the rescission of the resignation, to borrow his phrase.

[33] In response to the learned Solicitor's arguments, the Petitioners equally made submissions on whether or not the Constitution provides for a candidate to rescind his or her decision to resign. They relied on the case of **Isaac Mwanza v Electoral Commission of Zambia and Attorney General**² that rescinding a resignation is not tenable.

[34] The arguments advanced by the learned Solicitor General would in essence require us to proffer an interpretation of Article 52 (6) of the Constitution with related provisions of the Constitution relating to the subject. We refuse to do so. We say so because both the Constitution and the Rules of the Court clearly state how matters for our interpretation should be brought before this Court.

[35] Having made that important observation, our view is that the Intervenor ought to have provided sufficient authorities to support his application for us to arrest the Judgment in a petition which alleges a contravention of the Constitution by the Respondent based on the facts set out in the Petition. In our view, the Intervenor has not done so. In sum, the Intervenor seeks an order that we should compel the Petitioners

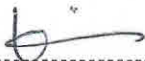
to alter their action to suit the Intervenor's perspective. As the Petitioners rightly observed, the Intervenor seeks to introduce new issues into the petition, which he cannot legitimately do as he is not a Respondent in this matter.

[36] In the circumstances, the application to arrest the Judgment and to order the Petitioners to amend their petition is without merit and is dismissed. Consequently, the *ex parte* orders for joinder of the Intervenor and to arrest the judgment issued on 10th October, 2022 are accordingly set aside.

[37] Judgment in this matter will be delivered on Monday 17th October, 2022 at 12:00 hours in Lusaka.



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A. M. Sitali
CONSTITUTIONAL COURT JUDGE



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M. S. Mulenga
CONSTITUTIONAL COURT JUDGE



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J. Z. Mulongoti
CONSTITUTIONAL COURT JUDGE