

**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**

**1<sup>ST</sup> PETITIONER**

**ISAAC MWANZA**

**2<sup>ND</sup> PETITIONER**

**AND**

**ELECTORAL COMMISSION OF ZAMBIA**

**RESPONDENT**

**ATTORNEY GENERAL**

**INTERVENOR**

**CORAM: Sitali, Mulenga and Mulongoti, JJC on 13<sup>th</sup> and on 14<sup>th</sup> October,**

**2022**

<b>For the 1<sup>st</sup> Petitioner:</b>	<b>In person</b>
<b>For the 2<sup>nd</sup> Petitioner:</b>	<b>In person</b>
<b>For the Respondent:</b>	<b>Ms. T. Phiri and Mr M. Bwalya, In House Counsel</b>
<b>For the Intervenor:</b>	<b>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</b>

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## **RULING**

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***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 10<sup>th</sup> October, 2022. The application was made by summons filed on 9<sup>th</sup> 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 6<sup>th</sup> 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 10<sup>th</sup> 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 13<sup>th</sup> October, 2022. Only the Petitioners filed an affidavit and skeleton arguments on 11<sup>th</sup> October, 2022 in response to the affidavit and skeleton arguments filed by the Intervenor on 10<sup>th</sup> 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 26<sup>th</sup> 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 6<sup>th</sup> October, 2022.

[4] The two letters rescinding the resignations were exhibited and showed that they were received by the Respondent on 6<sup>th</sup> and 7<sup>th</sup> 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**<sup>1</sup> 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 6<sup>th</sup> 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**<sup>2</sup> 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

