

**IN THE CONSTITUTIONAL COURT**  
**HOLDEN AT LUSAKA**  
(Constitutional Jurisdiction)



**2022/CCZ/0026**

**IN THE MATTER OF:**

**ARTICLE 52(1), (2), (3), (4), (5) AND  
(6) OF THE CONSTITUTION OF  
ZAMBIA (AMENDMENT) ACT NO. 2  
OF 2016 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF:**

**ARTICLE 1(3) AND (5) OF THE  
CONSTITUTION OF ZAMBIA  
(AMENDMENT) ACT NO. 2 OF 2016  
OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF:**

**THE DECISION OF THE  
ELECTORAL COMMISSION OF  
ZAMBIA, DATED 11<sup>TH</sup> OCTOBER,  
2022**

**NICKSON CHILANGWA**

*(In his capacity as Secretary General for the Patriotic Front)*

**APPLICANT**

**AND**

**ATTORNEY GENERAL**

**1<sup>st</sup> RESPONDENT**

**ELECTORAL COMMISSION OF ZAMBIA**

**2<sup>nd</sup> RESPONDENT**

***CORAM: Munalula, DPC, Chisunka and Mulongoti, JJC on 16<sup>th</sup>  
February, 2023 and 9<sup>th</sup> March, 2023.***

**APPEARANCES:**

**For the Applicant:**

**No appearance**

**For the 1<sup>st</sup> Respondent:**

**Mrs. K.N. Mundia – Ag. Deputy  
Chief State Advocate, Attorney  
General’s Chambers.**



For the 2<sup>nd</sup> Respondent: Mr. M. Bwalya – In-house Counsel,  
ECZ.

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## R U L I N G

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Chisunka, JC, delivered the Ruling of the Court

Cases referred to:

1. Inonge Mubika v Mukelabai Pelekelo, CCZ Selected Judgment No. 32 of 2017
2. Finance Bank Zambia Limited v Dimitrios Monokandilos, Filandraia Kouri (2012) 1 Z.R. 484
3. Costellow v Somerset County (1993) W.L.R. 256
4. Twampane Mining Co-operative Society Limited v E and M Storti Limited (2011) 3 Z.R. 67
5. Bampi Aubrey Kapalasa and Joseph Busenga v Attorney General, 2021/CCZ/0011 and 0014
6. Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General, 2016/CC/0033, CCZ Selected Ruling No. 29 of 2018

Legislation referred to:

1. The Constitutional Court Act No. 8 of 2016
2. The Constitutional Court Rules, Statutory Instrument No. 37 of 2016

Works referred to:

1. The Rules of the Supreme Court of England, 1965 (1999 Edition)

Introduction

1. This Ruling decides an application by the Applicant for an Order to withdraw certain questions from the Originating Summons and for



leave to file the Applicant's final skeleton arguments out of time. The application was made by summons pursuant to Order 15 Rule 7 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 (the "**CCR**"), as read with Order 3 Rule 5 of the Rules of the Supreme Court of England, 1965 (1999 Edition) (the "**White Book**").

2. When the matter came up for hearing, Counsel for the Applicant was not before Court and did not advance any reason or excuse for non-attendance. The Court then ruled that it would proceed to render a Ruling on the basis of the documents that were before it as the Respondents did not wish to add anything by way of oral augmentation.

### **Background**

3. The background to this application is that on 12<sup>th</sup> October, 2022, the Applicant filed an Originating Summons pursuant to Order 4 Rule 2(2) of the CCR. The Originating Summons raised seven questions for our determination, as follows:

- 3.1 **Whether under Article 52 (6) of the Constitution of Zambia (Amendment) Act No.2 of 2016 after the withdrawal of two independent candidates from Kabushi and Kwacha Parliamentary by-elections the Electoral Commission of Zambia has discretion whether to conduct fresh nominations or not;**

- 3.2 Whether a candidate that withdraws from an election can rescind his decision and be allowed to contest the said election without any fresh nominations;**
  - 3.3 Whether in view of the decision of this Court under cause number 2022/CCZ/0018 in which this Court held that nullification is not a disqualification, Joseph Malanji and Bowman Lusambo should be allowed to contest the Kwacha and Kabushi parliamentary by-elections announced by the Electoral Commission of Zambia respectively;**
  - 3.4 Whether under Article 52(4) of the Constitution of Zambia (Amendment) Act No. 2 of 2016, the Electoral Commission of Zambia can proceed with the Kwacha and Kabushi Parliamentary by-elections before the final determination of the challenge of the nominations conducted by them by virtue of a stay of Court proceedings under 2022/HP/1327 and the pending appeal in the Court of Appeal which stayed the proceedings;**
  - 3.5 What is the meaning of resigning from an election and whether an independent who withdraws from the election can trigger the holding of fresh nominations;**
  - 3.6 Whether there can be an interlocutory appeal in proceedings relating to Article 52 of the Constitution of Zambia and whether such appeal lies to the Court of Appeal;**
  - 3.7 Whether the time frames provided for in the Constitution can stop running, be stayed or be extended by any Court.**
4. On 17<sup>th</sup> October, 2022, a single Judge of this Court ordered the Applicant to file his skeleton arguments in reply on or before 20<sup>th</sup> October, 2022, and attend a compliance conference on 21<sup>st</sup> October, 2022. The Applicant did not, however, file his skeleton arguments in reply on the stipulated date. Rather, the Applicant filed what he termed as “final skeleton arguments” on 25<sup>th</sup> October, 2022.



5. Following this, the 1<sup>st</sup> Respondent made an application for an Order to expunge the Applicant's final skeleton arguments. Through a Ruling delivered on 22<sup>nd</sup> November, 2022, the single Judge expunged the Applicant's final skeleton arguments on grounds that the arguments were filed without leave and against the orders of the Court.
6. On 24<sup>th</sup> November, 2022, the Applicant filed this application seeking an order to withdraw certain questions from the Originating Summons and for leave to file the Applicant's final skeleton arguments out of time.
7. This is the context under which the application now before us was made.

**The Applicant's Affidavit Evidence and Arguments in Support of the Application**

8. The application was accompanied by an affidavit in support, list of authorities and skeleton arguments. The affidavit in support was sworn by Shupa Felix Chipompela, the Applicant's Counsel. He deposed that:
  - 8.1. On 16<sup>th</sup> November, 2022, the 1<sup>st</sup> Respondent made an application for an Order to expunge the Applicant's final skeleton arguments.

- 8.2. The hearing of the 1<sup>st</sup> Respondent's application to expunge the Applicant's final skeleton arguments took place on 22<sup>nd</sup> November, 2022, at 10:00 hours. The 1<sup>st</sup> Respondent, however, only served the Applicant the summons for the said application two hours after the hearing had ended. Thus, the Applicant's final skeleton arguments were expunged in the Applicant's absence.
- 8.3. Although the 1<sup>st</sup> Respondent served the Applicant an affidavit dated 16<sup>th</sup> November, 2022, the affidavit aforesaid was not accompanied by a summons and it did not indicate the date of hearing the application. Despite this, the Applicant attempted to file an affidavit in opposition to the application to expunge his final skeleton arguments, but he was advised that the matter had already been heard.
- 8.4. The skeleton arguments intended to be filed are not pleadings and, therefore, cannot be prejudicial as they are meant to assist the Court to arrive at a just decision. The Applicant, however, will suffer great prejudice should the Court deny him leave to file final skeleton arguments out of time as there are serious triable issues that ought to be considered by the Court.



8.5. The Applicant intends to withdraw some of the questions in the Originating Summons because most of the questions had been answered in previous judgments delivered by this Court.

9. In the written skeleton arguments filed in support of the application, the Applicant submitted that:

9.1. Order 15 Rule 7 of the CCR and Order 3 Rule 5 of the White Book vests this Court with discretionary authority to extend time in which to file documents.

9.2. In the case of *Inonge Mubika v Mukelabai Pelekelo*<sup>1</sup>, this Court stated that discretion to extend time within which to file documents that are out of time applies both before and after the time within which the applicant is to act has run out.

9.3. As per the cases of *Finance Bank Zambia Limited v Dimitrios Monokandilos Filandraia Kouri*,<sup>2</sup> and *Costellow v Somerset County*<sup>3</sup>, the Applicant should not be denied the opportunity to remedy procedural defects or irregularities because no prejudice will be suffered by the Respondent if this application is granted.



9.4. In light of the foregoing authorities, the Court ought to exercise its discretion in favour of the Applicant and allow him to withdraw certain questions from the Originating Summons and to file his final skeleton arguments out of time.

**The Respondents Affidavit Evidence and Arguments in Opposition to the Application**

10. The 1<sup>st</sup> Respondent filed an affidavit in opposition, list of authorities and skeleton arguments on 12<sup>th</sup> January, 2023. The affidavit in opposition was sworn by the Attorney General and it disclosed that:

10.1. The Applicant seeks to appeal against the Ruling of the Court dated 22<sup>nd</sup> November, 2022, which expunged the Applicant's final skeleton arguments through this application for leave to file out of time.

10.2. Regarding the withdrawal of some questions from the Originating Summons, the Applicant was already put on notice that some of the questions he wanted to withdraw were already before this Court for determination.

11. In the 1<sup>st</sup> Respondent's written skeleton arguments opposing the application, it was submitted:

11.1. That the discretionary power conferred by Order 15 Rule 7 of the CCR must be exercised judiciously.



- 11.2. That this Court expunged the Applicant's final skeleton arguments through a Ruling dated 22<sup>nd</sup> November, 2022. In that Ruling, the single Judge, citing the case of ***Twampane Mining Cooperative Society Limited v E and M Storti Limited***<sup>4</sup>, emphasised that parties who choose to ignore rules of Court do so at their own peril.
- 11.3. That owing to the Applicant's conduct in ignoring the rules of Court and the Orders for Directions herein, the Court should decline to exercise its discretion in favour of the Applicant. The Court having expunged the Applicant's final skeleton arguments for want of leave, should not entertain this application as it is *functus officio*.
- 11.4. That the Applicant's affidavit in support of this application brings fresh evidence as to why he failed to appear before Court. In essence, the Applicant is trying to appeal against the Ruling of the Court that expunged his final skeleton arguments. This position is not tenable under section 6 of the Constitutional Court Act No. 8 of 2016.
- 11.5. That in respect of the withdrawal of some questions in the Originating Summons, the 1<sup>st</sup> Respondent had put the Applicant on notice that the questions he was raising were



already before this Court in other matters. The Applicant cannot, therefore, seek the withdrawal of the questions he had previously been notified of. This conduct by the Applicant amounts to abuse of process in terms of the case of *Bampi Aubrey Kapalasa and Joseph Busenga v Attorney General*<sup>5</sup>.

#### **Issue for Determination**

12. The main issue that falls for determination is whether or not, in the circumstances, this Court should grant the application for an Order to withdraw certain questions from the Originating Summons and for leave to file the Applicant's final skeleton arguments out of time.

#### **Evaluation and Decision**

13. In essence, the Applicant has made two applications before us as follows:
  - 13.1. The first application is for an Order to withdraw certain questions from the Originating Summons; and
  - 13.2. The second application is for leave to file the Applicant's final skeleton arguments out of time.
14. We shall determine the two applications in the following order.



**Application to withdraw certain questions from the Originating Summons**

15. In support of this application, the Applicant in his affidavit disclosed that he intends to withdraw some of the questions from the Originating Summons herein. In his skeleton arguments, he urged us to allow him to withdraw certain questions from the Originating Summons.
16. The 1<sup>st</sup> Respondent, on the other hand, argued that they had notified the Applicant that the questions he raised in his Originating Summons had been answered by this Court in different judgments. Thus, the Applicant could not seek to withdraw the same questions he had been put on notice of.
17. We have carefully examined the application to withdraw certain questions from the Originating Summons. It is clear that the Originating Summons contains seven questions that have been placed before us for determination. In his application, the Applicant did not, however, state the specific questions that he desired to have withdrawn from the Originating Summons. He only indicated that he intended to have “some questions” or “certain questions” withdrawn, without specifying the particular questions that he wished to withdraw.



18. We are unable to ascertain which of the seven questions in the Originating Summons that are intended to be withdrawn. The net effect is that there are presently no questions before us to be considered for withdrawal.
19. In view of the foregoing, the application is unsuccessful as the Applicant did not specify the questions to be withdrawn from the Originating Summons.

**Application for leave to file the Applicant's final skeleton arguments out of time**

20. In this application, the Applicant urged us to allow him file his final skeleton arguments out of time as doing so would not be prejudicial to the Respondents. In opposing the application, the 1<sup>st</sup> Respondent contended that the Applicant's final skeleton arguments were expunged by a Ruling of this Court, therefore, this application was an improper attempt to appeal against that Ruling.
21. It is apparent from the case record that the single Judge expunged the Applicant's final skeleton arguments dated 25<sup>th</sup> October, 2022, for the reason that they were filed without leave and went against the Orders of the Court. The Applicant was aggrieved by the Ruling of the single Judge and this prompted him to file this application to permit him file the expunged skeleton arguments. Thus, the present



application is effectively a challenge to the Ruling of the single Judge.

22. In the case of ***Hakainde Hichilema and Geoffrey Bwalya Mwamba v Edgar Chagwa Lungu and Attorney General***<sup>6</sup>, we considered the manner in which a party should challenge a decision of a single Judge. We guided that an appeal against a decision of the single Judge of this Court must be made as a renewed or fresh application before the full bench by summons and must, *inter alia*, contain an affidavit in support of the summons on appeal exhibiting the:

22.1. statements of fact relating to what transpired before the single judge;

22.2. ruling, decision or order of the single judge appealed against;

22.3. record of proceedings of the single judge appealed against; and

22.4. affidavit and skeleton arguments that were filed before the single judge.

23. Even though the Applicant was dissatisfied with the Ruling of the single Judge expunging his final skeleton arguments, he did not appeal that Ruling to the full bench. The Applicant instead, filed this



application seeking leave to file skeleton arguments that were expunged from the record by the single Judge.

24. We have analysed this application for leave to file final skeleton arguments and we find that it does not exhibit the single Judge's Ruling or the record of proceedings before the single Judge. This application is, therefore, neither an appeal of the Ruling of the single Judge nor a renewed or fresh application that was before the single Judge. The only reference this application makes to the proceedings before the single Judge is that the Applicant did not attend the said proceedings because he was not served with the summons before the single Judge.
25. The proceedings before the single Judge in the case record, however, reveal that the Applicant was served with the summons before the single Judge four days before the hearing. On this basis, the single Judge was satisfied that service was effected on the Applicant. He, therefore, heard the application and expunged the skeleton arguments. In light of this, we find that the Applicant's assertion that he was not aware of the proceedings before the single Judge is not supported by the case record.
26. Our considered view is that the Applicant should have appealed the Ruling of the single Judge before the full bench in the appropriate



manner. We, therefore, agree with the 1<sup>st</sup> Respondent that the Applicant is attempting to appeal the Ruling of the single Judge through this application which does not meet the criteria necessary to challenge the decision of a single judge. In essence, the Applicant has tried to circumvent the manner in which a party must challenge a decision of a single Judge. We frown upon this practice by the Applicant and we urge litigants to approach the Court in the appropriate manner.

27. The result is that this application is not the proper mode of challenging the Ruling of the single Judge that expunged the Applicant's final skeleton arguments. Consequently, we find that this is not an appropriate case in which we can exercise our discretion to grant the Applicant leave to file the expunged final skeleton arguments out of time. For the avoidance of doubt, the Applicant's final skeleton arguments filed on 25<sup>th</sup> October, 2022, remain expunged from the case record.

### **Conclusion**

28. Taking all of the above into account, our settled view is that the application to withdraw certain questions from the Originating Summons and for leave to file the Applicant's final skeleton



arguments out of time has no merit. The application, therefore, fails and is dismissed.

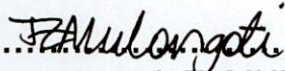
29. Each party to bear their own costs.



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**M. MUNALULA, JSD  
DEPUTY PRESIDENT  
CONSTITUTIONAL COURT**



.....  
**M. K. CHISUNKA  
CONSTITUTIONAL COURT JUDGE**



.....  
**J. Z. MULONGOTI  
CONSTITUTIONAL COURT JUDGE**