

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

2023/CCZ/0021

**IN THE MATTER OF: ARTICLE 2, 47 AND 105 (3) OF THE CONSTITUTION
OF ZAMBIA, (AMENDMENT) ACT NO. 2 OF 2016**

IN THE MATTER OF: SECTION 7 OF ACT NO. 1 OF 2016

IN THE MATTER OF: SECTION 2 OF ACT NO. 1 OF 2016

**IN THE MATTER OF: REPEALED ARTICLE 35 OF THE CONSTITUTION OF
ZAMBIA 1991 AS AMENDED**

**IN THE MATTER OF: THE EFFECT OF THE NOW REPEALED ARTICLE 35
OF THE CONSTITUTION OF ZAMBIA 1991 (AS
AMENDED) ON EDGAR LUNGU'S TERM AS
PRESIDENT**

BETWEEN:

MICHELO CHIZOMBE

AND

EDGAR CHAGWA LUNGU

ELECTORAL COMMISSION OF ZAMBIA

THE ATTORNEY GENERAL



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

**CORAM: Munalula, PC, Shilimi, DPC, Sitali, Mulonda, Mulenga, Musaluke,
Chisunka, Mulongoti, Mwandenga, Kawimbe and Mulife, JJC on
14th June, 2024 and 9th July, 2024**

**For the Petitioner : Mr. M. Moono and Ms. T. Kasanda of
Messrs. L. J. Michaels Legal Practitioners**

**For the 1st
Respondent : Mr. M. Zulu, Mr. J. Zimba and Mr. N. Botha of
Messrs. Makebi Zulu Advocates**

**For the 2nd
Respondent** : **Mrs. T. Phiri and Mr. M. Bwalya of
Electoral Commission of Zambia**

**For the 3rd
Respondent** : **Mr. M. Kabesha SC, Attorney General;
Mr. Muchende SC, Solicitor General;
Ms. C. Mulenga, Chief State Advocate;
Mr. C. Mulonda, Principal State Advocate;
Mr. N. Mwiya, Principal State Advocate;
Ms. M. Katolo, Assistant Senior State Advocate
and Mr. M. Mutwena, State Advocate
Attorney General's Chambers**

R U L I N G

Cases referred to:

1. Daniel Pule and Others v Attorney General and Others, Selected Judgment No. 60 of 2018
2. Bambi Aubrey Kapalasa and Another v The Attorney General (CCZ 11 of 2021; CCZ 14 of 2021)
3. Legal Resources Foundation Limited and 2 Others v Edgar Chagwa Lungu and Attorney General, Selected Judgment No. 27 of 2021

Legislation referred to:

1. The Constitutional Court Act No.8 of 2016
2. The Constitutional Court Rules, Statutory Instrument No.37 of 2016
3. The Rules of the Supreme Court 1999 Edition, Volume 1

[1.0] INTRODUCTION

[1.1] By Notice of Motion filed into Court on 30th November, 2023, the 1st

respondent seeks the determination of the following issues:

- 1) Firstly, whether the fresh action brought before this Court is *res judicata*, with this Honourable Court having previously pronounced itself three times on the same matter. Specifically, in the case of *Daniel Pule and Others v Attorney General and Others* ⁽¹⁾ under cause No. 2017/CCZ/004, Selected Judgment No. 60 of 2018, *Bambi Aubrey Kapalasa and Another v The Attorney General*⁽²⁾ (CCZ 11 of 2021; CCZ 14 of 2021) and *Legal Resources Foundation Limited and 2 Others v Edgar Chagwa Lungu and Attorney General*⁽³⁾, Selected Judgment No. 27 of 2021.
- 2) Secondly, whether this petition can be deemed an abuse of the court process considering that the arguments presented in the petition could have reasonably been raised at an earlier stage within the legal proceedings.
- 3) Thirdly, whether this Court lacks jurisdiction as it is *functus officio*, having already made a pronouncement on the matter in the cases mentioned above.
- 4) Lastly, whether the petition seeking to challenge the eligibility of the 1st respondent falls outside the parameters outlined in Article 101(4) (a) and (b), of the Constitution of Zambia (Amendment) Act

No. 2 of 2016 which delineates a specific process and timeline for challenging the validity of elections and candidacy, thereby raising the question of the court's jurisdiction to entertain the petition after the prescribed period has lapsed.

[1.2] The notice of motion was supported by an affidavit sworn by the 1st respondent, Edgar Chagwa Lungu. The 1st respondent essentially alleged that the petition filed in this matter was fraught with irregularities as set out in the notice of motion and that, as a result of those irregularities, this Court cannot entertain it for not being competently before this Court.

[2.0] BACKGROUND

[2.1] The background to the motion is that on 9th October, 2023, the petitioner, Michelo Chizombe, filed a petition against Edgar Chagwa Lungu, the Electoral Commission of Zambia and the Attorney General, as 1st, 2nd and 3rd respondents, respectively. The petitioner seeks to challenge the 1st respondent's participation as Patriotic Front Party presidential candidate in the elections that were held on 12th August, 2021 and his eligibility to participate in future presidential elections on the ground that he has served two terms of office. Firstly, as President first under the 1991 Constitution of Zambia and secondly under the Constitution of Zambia as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (the Constitution).

[2.2] The petitioner thus seeks the following declarations:

- (i) that the Electoral Commission of Zambia's inclusion of Edgar Chagwa Lungu on the 2021 ballot was unconstitutional;
- (ii) that Edgar Chagwa Lungu's participation in the August, 2021 election was unconstitutional;
- (iii) that Edgar Chagwa Lungu is not eligible to contest a presidential election under the current Constitution as read with the repealed 1991 Constitution as amended;
- (iv) that the entire Article 106 of the Constitution as amended by Act No. 2 of 2016 did not apply to Edgar Chagwa Lungu's presidential term between 25th January, 2015 to 13th September, 2016; and
- (v) that Edgar Chagwa Lungu is not eligible to seek presidential office for a third term.

[2.3] The petitioner further seeks a combined interpretation of sections 2 and 7 of Act No. 1 of 2016 and interpretation as to whether sections 7 and 2 of Act No. 1 of 2016 had the effect of saving Article 35 of the 1991 Constitution, as amended, in regard to Edgar Chagwa Lungu's presidential term between 25th January, 2015 and 13th September, 2016.

[2.4] In his affidavit verifying facts, the petitioner contended that the 1st respondent had been elected twice and held the office of President twice, thereby being ineligible to participate in the August 2021 presidential elections and any future elections to the office of President of Zambia. He faults the 2nd respondent for accepting the 1st respondent's nomination and permitting him to contest in the August, 2021 presidential elections, despite the alleged constitutional disqualification.

[2.5] In his answer to the petition, the 1st respondent asserted in the main, that this Court has pronounced itself on the issues raised by the petitioner, and will aver at trial that he has not served two terms as alleged by the Petitioner. He contended that the petitioner had an opportunity to raise the contents of his petition when the matter was before this Court under three different petitions but neglected to do so. That this Court should embrace the principle of finality in legal decisions considering the potential adverse consequences of setting aside a decision that was rightly made in his favour.

[2.6] The 1st respondent further asserted that this Court considered and pronounced itself on Article 35 of the Constitution of Zambia 1991 as amended in 1996, and which article was repealed by the Constitution of Zambia (Amendment) Act No. 2 of 2016. Lastly, he asserted that this Court

thoroughly reviewed all relevant legal provisions and that the majority decision was not made in ignorance of any applicable law.

[2.7] The 2nd respondent filed an answer to the petition in which it essentially asserted that it abided by all requisite laws for processing the nominations for the presidential candidates. It denied that it had breached the Constitution as alleged by the petitioner.

[2.8] The 3rd respondent filed his answer to the petition in which he stated that he would assert at trial that this Court should vacate its decision in the cases of *Legal Resources Foundation Limited, Dr. Sishuwa Sishuwa and Chapter One Foundation Limited v Edgar Chagwa Lungu and Attorney General*⁽³⁾ because Article 106 of the Constitution does not have retrospective effect.

3.0 1ST RESPONDENT'S ARGUMENTS IN SUPPORT OF NOTICE OF MOTION

[3.1] The gist of the 1st respondent's skeleton arguments is first, that the petition in this matter is *res judicata* and an abuse of court process as the interpretation of Article 106 (3) of the Constitution which he seeks was rendered by this Court in the cases of *Daniel Pule*⁽¹⁾, *Bampi Aubrey Kapalasa*⁽²⁾ and *Legal Resources Foundation Limited*⁽³⁾, all of which challenged the eligibility of the 1st respondent to stand as a presidential

candidate in 2021, having served less than three years in his first term. That the judgments in those cases were conclusive and final thus barring the issue from being relitigated.

[3.2] The 1st respondent further argued that the petitioner herein shares similar interest as the petitioners in the *Daniel Pule, Bampi Kapalasa and Legal Resources Foundation* cases regarding the disqualification or assessment of the 1st respondent to participate in presidential elections. He also contended that the Court, having interpreted Article 106 of the Constitution in the three previous cases, is *functus officio*. That it does not have jurisdiction to rehear and redetermine the same issue based on Article 128 (4) of the Constitution.

[3.3] Lastly, the 1st respondent asserted that the petition herein is out of time as it seeks, indirectly, to challenge or involves the August, 2021 election. He observed that since the petitioner seeks a declaration that the 1st respondent's participation in the August 2021 election was unconstitutional, this act inherently challenges the validity of the August 2021 election. Thus, that the petitioner is obliged to adhere to the constitutionally prescribed procedures for contesting an election as per Article 101(4) (a) and (b) of the Constitution. That the challenge of his candidacy in the 2021 presidential

election should have been pursued within the designated time frame and process and cannot be revisited in this manner after the fact.

[3.4] The 1st respondent submitted that to reopen this issue through a separate petition is legally unsound and exceeds this Court's jurisdiction as it is being raised beyond the stipulated time frame within which such a challenge ought to be raised.

[3.5] The 1st respondent thus urged us to dismiss the petition with costs.

4.0 PETITIONER'S RESPONSE

[4.1] The petitioner filed an affidavit in opposition to the notice of motion. He denied that the petition is fraught with irregularities and contended that the petition is rightly before this Court. He asserted that the notice of motion has no proper merit and that this Court should not entertain it but dismiss it.

[4.2] In his skeleton arguments in opposition to the preliminary issues raised, the petitioner in a nutshell submitted that contrary to the 1st respondent's assertion that the petition is *res judicata* because the issues raised therein were already considered in the *Daniel Pule*⁽¹⁾, *Legal Resources Foundation Limited*⁽³⁾ and related cases, that is not the case.

[4.3] That unlike the decided cases, the petitioner bases his claim on the interpretation of sections 2 and 7 of the Constitution of Zambia Act No. 1 of 2016 as they relate to Article 35 of the Constitution of Zambia 1991 as

amended in 1996 and Article 106 of the Constitution of Zambia. The petitioner contends that Article 106 of the Constitution does not apply at all to the 1st respondent's first term and is therefore a clear distinction from a limited consideration of Article 106 (3) of the Constitution as argued by the 1st respondent.

[4.4] He further argued that the petition is not *res judicata* as the petitioner was not party to the previous cases against the 1st respondent and has advanced distinct grievances and seeks unique reliefs in the public interest in line with section 11(2) (c) of the Constitutional Court Act No. 8 of 2016. He argued that the inclusion of the 2nd respondent to the petition makes this petition different from the *Legal Resources Foundation Limited*⁽³⁾ case. That the rationale of including the 2nd respondent to this matter is to delve into the constitutional implications of the 1st respondent's participation in the 2016 (sic) presidential elections, and not the election of a President as distorted by the 1st respondent in his notice of motion. He argued that this Court, therefore, has jurisdiction to hear the matter.

[4.5] The petitioner further argued that the doctrine of *res judicata* is not absolute but has exceptions which include mistake or *per incuriam*. He contended that the decisions in the *Daniel Pule*⁽¹⁾, *Legal Resources Foundation Limited*⁽³⁾ and related cases were arrived at *per incuriam* as the

Court did not consider sections 2 and 7 of Act No. 1 of 2016 which are relevant as they guide that Article 35 of the Constitution of Zambia 1991 as amended in 1996 applied to the 1st respondent's first term and not Article 106 of the Constitution, which does not have a retrospective effect. He submitted that the principle of *res judicata* does not apply to the petition in this case.

[4.6] The petitioner further denied that the petition is an abuse of court process, that the Court is *functus officio* or that the petition has been brought out of time. He submitted that this Court has jurisdiction to hear and determine the petition. The petitioner argued that the preliminary issues raised are unmeritorious and that the notice of motion should be dismissed.

5.0 2ND AND 3RD RESPONDENTS' POSITION

[5.1] The 2nd respondent filed an affidavit in opposition to the notice of motion wherein it stated that this Court has jurisdiction to hear and determine questions of law and that it would leave the determination of the questions raised by the 1st respondent in the notice of motion to the discretion of the Court.

[5.2] The 3rd respondent filed an affidavit in opposition to the notice of motion and asserted that the matters raised in the petition are not *res judicata* or an abuse of process. Further, that this Court is not *functus officio*.

[5.3] In his lengthy skeleton arguments, the 3rd respondent essentially maintained that the petition is not about the eligibility of the 1st respondent, *per se*, but rather is about the eligibility of any person who has twice held the office of President with intention of protecting the fundamentals of constitutionalism. The 3rd respondent argued that the 1st respondent's notice of motion should be dismissed as the issues raised in the petition are novel and have not been dealt with.

6.1 THE HEARING

[6.1] At the hearing of the motion, the 1st respondent relied on his affidavit in support of the notice of motion and skeleton arguments which he augmented with oral submissions. In opposing the notice of motion, the petitioner relied on his affidavit in opposition and skeleton arguments which he augmented orally. The 2nd respondent relied entirely on its affidavit in opposition to the notice of motion and did not make any oral submissions. The 3rd respondent also relied on his affidavit in opposition to the notice of motion and skeleton arguments, which were augmented orally.

[6.2] As all the parties in their oral arguments essentially restated their written arguments, we will not restate them here.

7.0 DECISION

[7.1] We have considered the preliminary issues raised in the notice of motion as well as the contents of the affidavits and arguments advanced by the parties on both sides. We have succinctly set out the respective parties' arguments in support of, and in opposition to, the notice of motion in order to give a clear basis for the decision which we have taken with regard to the notice of motion.

[7.2] The notice of motion was filed pursuant to Order IX rule 20 and Order X rule 2 of the Constitutional Court Rules, Statutory Instrument No. 37 of 2016 read with Order 14A of the Rules of the Supreme Court, 1999 edition (the White Book). Order 14A of the White Book provides for, among other things, the disposal of an action or matter on a point of law. Specifically, Order 14A rule 1(1), which is relevant to the notice of motion herein, provides for the determination of a question of law or construction of a document which may arise in a cause or matter in the following terms:

14 A. (1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that

- (a) such question is suitable for determination without a full trial of the action; and*
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*

[7.3] In the present case, the 1st respondent has raised four questions which he seeks to have determined as preliminary issues. The questions are set out at paragraph [1.1] of this ruling.

[7.4] Without delving into the merits of the notice of motion, we note that the issues which the 1st respondent wishes us to determine as preliminary issues are the same issues he raised in his defense in answer to the petition. In paragraphs 2 to 7 of his answer, the 1st respondent stated that this Court has already pronounced itself on the issues raised by the petitioner; that the petitioner had an opportunity to raise those issues when the matter was before this Court under three different petitions but neglected to do so; that this Court pronounced itself on Article 35 of the Constitution of Zambia, 1991 as amended in 1996, which Article was repealed by the Constitution of Zambia (Amendment) Act No. 2 of 2016; that this Court should embrace the principle of finality in legal decisions, considering the potential adverse consequences of setting aside a decision that was made in his favour; that this Court thoroughly reviewed all relevant legal provisions, and that the majority decision was not made in ignorance of any applicable law.

[7.5] We have set out the 1st respondent's responses in his answer to the petition in paragraph 7.4 to demonstrate that the issues raised in that answer mirror the issues which the 1st respondent has raised in the notice of motion

for our determination as preliminary issues under Order 14A of the White Book. While the Court has power, at any stage of the proceedings, to determine any question of law arising in a cause or matter, the Court may only do so if it is satisfied that such question is suitable for determination under the procedure provided for in Order 14A of the White Book without a full trial of the action. The Court will not do so where the questions of law to be determined are highly contested and are more suited for determination at trial. In other words, the decision whether or not the Court will determine a cause or matter on a point of law under the summary procedure provided for in Order 14A of the White Book is informed by the nature of the question or action in issue.

[7.6] Given the contending positions taken by the parties in this case, both in the main matter and the notice of motion, our view is that while this Court has power to determine a matter on a point of law in an appropriate case, pursuant to Order 14A of the White Book, the issues raised in the petition are not suitable for determination on a point of law under the procedure set out in that Order. The issues raised in the petition must therefore, be allowed to be addressed on the merits at trial.

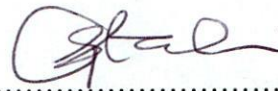
[7.7] For that reason, the notice of motion is dismissed. The matter is sent back to the single Judge to schedule the petition for hearing. Each party will bear their own costs.




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M. M. Munalula, PC
CONSTITUTIONAL COURT JUDGE



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A. M. Shilimi, DPC
CONSTITUTIONAL COURT JUDGE



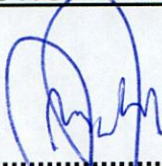
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A. M. Sitali
CONSTITUTIONAL COURT JUDGE



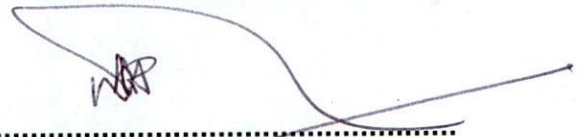
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CONSTITUTIONAL COURT JUDGE



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M. S. Mulenga
CONSTITUTIONAL COURT JUDGE



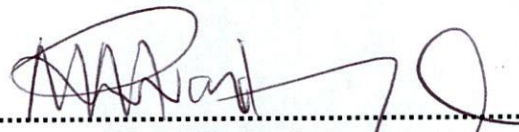
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M. Musaluke
CONSTITUTIONAL COURT JUDGE



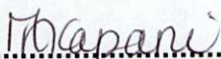
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M. K. Chisunka
CONSTITUTIONAL COURT JUDGE



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J. Z. Mulongoti
CONSTITUTIONAL COURT JUDGE



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M. Z. Mwandenga
CONSTITUTIONAL COURT JUDGE



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M. M. Kawimbe
CONSTITUTIONAL COURT JUDGE



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K. Mulife
CONSTITUTIONAL COURT JUDGE