

THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF: THE CONSTITUTION OF ZAMBIA, CAP 1 OF THE LAWS
OF ZAMBIA

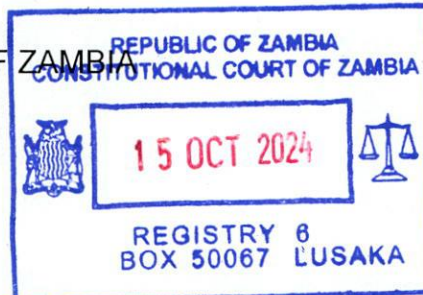
IN THE MATTER OF: THE INTERPRETATION OF ARTICLE 52(4) AND ARTICLE
157(E) AND 155 OF THE CONSTITUTION OF ZAMBIA AS
AMENDED BY ACT NO.2 OF 2016

BETWEEN:

ELECTORAL COMMISSION OF ZAMBIA

And

BELEMU SIBANZE



APPLICANT

RESPONDENT

Coram: Munalula, PC, Mulongoti, Mwandenga, Kawimbe and Mulife JJC in
Open Court

On 10th October, 2024 and 14th October, 2024

For the Applicant: Mr M. Lisimba of Messrs Mambwe, Siwila & Lisimba Advocates

For the Respondent: Mr. S. Nsomboshi of Messrs Mulenga Nsomboshi & Associates

JUDGMENT

MUNALULA, PC, delivered the Judgment of the Court

Cases referred to:

1. Gift Luyako v Biton Manje Hamaleke 2016/CCZ/0045
2. Hakainde Hichilema & Geoffrey Mwamba v Edgar Chagwa Lungu, Inonge Wina, Electoral Commission of Zambia and Attorney General 2016/CCZ/0031
3. Bernard Kanengo v The Attorney General 2022/CCZ/24
4. Lloyd Chembo v Attorney General 2017/CCZ/0011
5. Fredson Kango Yamba v The Principal Resident Magistrate, Anti-Corruption Commission and the Attorney General 2023/CCZ/003
6. Bric Back Limited T/A Gamawe Ranches v Neil Kirk Patrick 2021/CCZ/002

7. Felix Mutati v Winnie Zalomis S.C.Z. judgment No. 31 of 2018

Legislation referred to:

The Constitution of Zambia as amended by the Constitution (Amendment) Act No. 2 of 2016

The Electoral Process Act No.35 of 2016

Local Government Act No.2 of 2019

The Constitutional Court Rules, Statutory Instrument No. 37 of 2016

[1] The Electoral Commission of Zambia (the Applicant) moved this Court by way of Originating Summons under Order IV rule 2(2) of the Constitutional Court Rules Statutory Instrument No. 37 of 2016 (the Rules). The sum of the plea for interpretation is the meaning of constitutional timelines in election related matters.

[2] The summons was accompanied by a certificate of urgency hence the parties were immediately summoned and directions issued to the effect that the Respondent should file his opposing affidavit and skeleton arguments on Tuesday 8th October, 2024 with the reply if any, being filed on Wednesday 9th October, 2024 so the matter could be heard on Thursday 10th October, 2024.

[3] The factual context to the application, as deposed to by Mr Brown Kasaro the Applicant's Chief Electoral Officer in his affidavit filed together with the Summons, is that on 20th August, 2024, the Kabwe Municipal Council, following up an earlier letter of 7th August, 2024, enclosed a judgment in which Mr Belemu Sibanze (the Respondent herein) who was councillor for

Lukanga Ward in Kabwe was convicted of theft. He further deposed that the seat had become vacant on 30th July, 2024 as a result of the conviction. That on 14th August, 2024 the Applicant issued a press release stating that following the vacancy created in Lukanga Ward a by-election would be held on Thursday 19th September, 2024 with nominations slated for Tuesday 20th August, 2024.

[4] Mr Kasaro exhibited a court order marked "BK1" showing that the Respondent filed in Kabwe High Court an application for judicial review which was granted on 20th August, 2024 together with an order staying the Applicant's declaration of the Lukanga Ward by-election and nomination of candidates. The Judicial review application was given the return date of 10th September, 2024.

[5] On that day, the Applicant raised a preliminary issue to discharge the leave granted, which issue was dismissed, and the *inter-partes* hearing of the judicial review application was scheduled for 14th to 15th November, 2024. A further application for abridgement of the time for hearing the judicial review application made by the Applicant on 13th September, 2024, was dismissed by the High Court on 20th September, 2024.

[6] The transcript of the proceedings of 20th September, 2024 shows that on that day, the Applicant's counsel, Mr Lisimba asked the Court to address the issue of Article 52 (4) of the Constitution of Zambia as amended by the Constitution (Amendment) Act No. 2 of 2016 (the Constitution) which requires that a challenge to a nomination must be determined within 21 days and as such the High Court had been divested of its jurisdiction once the 21 days lapsed on the 10th of September, 2024. That any decision thereafter was a nullity.

[7] In opposing Mr Lisimba's averment, Mr Nsomboshi, Counsel for the Respondent, contended that the application for judicial review was not about nominations but questioned the exercise of the Applicant's power to call for nominations and hold a by-election, in view of the provisions of the Local Government Act No. 2 of 2019 (LGA). That the High Court was not being asked to interpret the Constitution, a power which it did not have.

[8] In his reply Mr Lisimba essentially argued that the High Court had to apply its mind to the Constitution as this was within its jurisdiction.

[9] In its ruling, the High Court stated that its concern was judicial review with regard to whether procedure was followed by the Applicant in its actions. It added:

I am not in any way a tribunal determining whether or not a candidate won or was duly nominated. I am being invited to delve or dwell on other issues which may not be within my jurisdiction, as issues of constitutionality have a Constitutional Court which you can quickly run to, which has the jurisdiction to address such. The dates which were earlier communicated to the parties are in line with my calendar... I decline the application and direct that we proceed with the Judicial review.

[10] Armed with the High Court's response, the Applicant moved us to interpret the provisions governing time limitations in the by-election process. In support of the Originating Summons, the Applicant filed skeleton arguments, in which it was submitted that the High Court's delay, in hearing the application for judicial review would create a constitutional crisis as the elections would be held outside the mandated 90 days as per Article 57 of the Constitution which provides as follows:

57(1) Where a vacancy occurs in the office of Member of Parliament, mayor, council chairperson or councillor, a by-election shall be held within ninety days of the occurrence of the vacancy.

[11] It was submitted that Article 57(1) of the Constitution was a mandatory provision; that setting the date of hearing for the Judicial Review outside the 90 days creates a constitutional crisis.

[12] The Applicant called in aid the case of **Gift Luyako v Biton Manje Hamaleke**¹ where this Court held that no person or authority or Court has the power to enlarge time stipulated in the Constitution. The Applicant also

called in aid the case of **Hakainde Hichilema & Geoffrey Mwamba v Edgar Chagwa Lungu, Inonge Wina, Electoral Commission of Zambia and Attorney General**² where this Court stated that the period for hearing the Presidential Election was prescribed by the Constitution itself thereby making it a rigid time frame and not giving the Court discretion to enlarge it.

[13] That the Respondent was in the judicial review application, in effect challenging the nominations set by the Applicant following his conviction by the Magistrate's Court. And in this regard, it was pointed out that according to Article 52(4) of the Constitution such a challenge must be done within seven days of the close of nominations and the Court shall hear the case within 21 days of its lodgment.

[14] According to the Applicant, adjourning the matter to the 14th and 15th November, 2024 went beyond the 21 days prescribed by the Constitution thus rendering any ruling a nullity. In this regard the Applicant called in aid the case of **Bernard Kanengo v The Attorney General**³.

[15] It was further submitted that the hearing date outside the prescribed period is extremely prejudicial to the Applicant and creates a constitutional crisis. That it was not in dispute that the Respondent was convicted of theft and that he had appealed against the conviction. It was thus submitted that notwithstanding the appeal and there being no stay of the conviction the

period as stated in the Constitution for holding nominations for by-elections cannot be stopped. It was submitted that the conviction is testimony that the Respondent criminally misconducted himself and therefore that he cannot be expected to remain a civic leader as per the Constitution.

[16] In concluding the written submissions the Applicant contended that this was a fit and proper case for this Court to pronounce itself on the provisions of Articles 52(4), 155, 157(e) and 57(1) of the Constitution.

[17] When the matter came up for hearing before us, on Thursday 10th October, 2024, the Respondent indicated that he had attempted to file a motion challenging the Court's jurisdiction to hear the Originating Summons but was denied permission by the Registry and advised to make his application before Court. That as his attempt to make the application before the Court had been denied too, he sought an adjournment to enable him to file his opposing affidavit.

[18] Due to time constraints, we declined the application and stood down the matter briefly. When we resumed the sitting, the parties addressed us on both the substance of the Summons as well as our jurisdiction to entertain the Summons. For the sake of brevity, we will refer to the parties' arguments as and when necessary.

[19] We will begin with the issue of jurisdiction which must be settled before we can consider the Originating Summons on the merits. It was Mr Nsomboshi who raised the issue in his oral submissions. He contended that this Court has no jurisdiction over this matter for two reasons. First on account of multiplicity of actions as the same issues arising from the same set of facts and involving the same parties, in which constitutional issues were raised, were already before the High Court, in cause No. 2024/HB/27.

[20] Secondly, that the Applicant cannot ignore the constitutional provisions on the mode of dealing with constitutional issues or questions that arise before a Court. Specifically, Article 128 (2) of the Constitution which provides that where a constitutional question arises in a court, the person presiding in that Court shall refer the question to the Constitutional Court. That accordingly, the Applicant should have raised the constitutional issue before the High Court and asked that Court to refer the issue to the Constitutional Court as opposed to commencing a fresh action.

[21] In reply, Mr Lisimba, relied on the proceedings of 20th September, 2024 to contend that the issue of a constitutional reference had been raised before the High Court. That raising the issue was as far as the Applicant could go as it was for the High Court to make the reference to the Constitutional Court

once the constitutional issue was raised but the said Court had declined to do so.

[22] We have considered the issue of jurisdiction. Ordinarily, where a constitutional question or issue arises in another court, it must come to us by way of a constitutional reference as provided for in Article 128(2) of the Constitution. This, as we stated in **Lloyd Chembo v Attorney General**⁴ is necessary to ensure good order and comity between the courts. We may add that it also ensures that matters are commenced and concluded in the proper court empowered to make the relevant orders and attend to matters ancillary thereto. We have had occasion to pronounce on the law in the following cases, among others.

[23] In the case of **Fredson Kango Yamba v Principal Resident Magistrate, Anti-Corruption Commission and the Attorney General**⁵ we said:

Article 128(2) of the Constitution takes care of a scenario where a constitutional issue arises in any court by providing for referral. In such instances, the court, **on its own motion or on application by a party, can refer a constitutional question or issue that arises in that court.** Where this is done, the referring court must frame the constitutional question or issue for this Court's determination...(emphasis added)

[24] In the case of **Bric Back Limited T/A Gamawe Ranches v Neil**

KirkPatrick⁶ we further stated:

...The Court's guidance is that a party that is dissatisfied with the presiding person's decision refusing to refer an alleged constitutional question to this Court ought to...initiate a separate action for interpretation of the issue by this Court in accordance with Order IV of the CCR.

We have consistently upheld these positions and we re-affirm them.

[25] The Summons before us has come to us directly as opposed to coming by way of a constitutional reference however, in view of the peculiar circumstances of the case it is our firm view that it is properly before us.

[26] We say so because the judicial review process that gave rise to the Constitutional issues before us seeks to enquire into the actions of the Applicant in conducting a Local Government by -election in Lukanga Ward on the grounds that the seat had become vacant following the conviction of the Respondent.

[27] The Constitution not only specifies the forum for resolving Local Government election disputes, but also specifies when they are to be prosecuted. It singles out the question of when a councillor's office may be said to have been vacated by stating in Article 159 (1) (b) of the Constitution, that the Chief Justice shall establish an *ad hoc* tribunal to hear whether the

office of councillor has become vacant. Article 159(2) provides that the Local Government Elections Tribunal (LGET) shall be presided over by a magistrate of competent jurisdiction and a petition filed before it shall be heard within 30 days of the filing.

[28] This is the authority behind section 96 of the Electoral Process Act No. 35 of 2016 (EPA), which provides that a question about whether a vacancy has occurred in the office of councillor will be heard using the powers, practice and procedure modified as necessary, of an election petition under Part IX of the EPA. Settling the question of whether a councillor's office has become vacant must be done after the election has taken place.

[29] As the Constitution and relevant legislation provide that matters to do with councillors are the preserve of LGETs it is apparent that the judicial review process is not only mis-conceived, but is a nullity for lack of jurisdiction on the part of the High Court. The High Court could therefore not make a valid referral to this Court. We wish to add that even if the matter had been properly before a tribunal, it could only constitute a nomination challenge. Furthermore, it would have still been a nullity due to effluxion of time which started to run on 7th August, 2024 after the Council wrote to the Applicant, thereby triggering Articles 158, 57 and 52(4) of the Constitution.

[30] We take cognizance that courts will not refer to us a constitutional issue arising in a matter that is improperly before them. This was said by the Supreme Court in the case of **Felix Mutati and Others v Winnie Zaloumis**.⁷ It follows that such constitutional issues must be commenced before the Constitutional Court. Our conclusion is that there were no valid proceedings subsisting before the High Court to facilitate a referral or to constitute an abuse of process arising from multiplicity of actions.

[31] We now turn to the substantive issue. In doing so we wish to make it clear that the matter having come by way of our interpretative jurisdiction we will not delve into any personalized or contentious questions arising from the factual context but confine ourselves to interpreting the impugned constitutional provisions. Our intention is to prevent a violation of the Constitution from occurring in accordance with our mandate under Article 128 (1) (a) of the Constitution.

[32] The Originating Summons seeks interpretation of the following questions which we have recast for clarity:

1. Whether pursuant to Article 57 of the Constitution the prescribed period of 90 days within which to hold or conduct a by-election can stop running by virtue of a Stay arising from an application for judicial review or any other application.
2. Whether pursuant to Article 52(4) of the Constitution the prescribed period of 21 days within which to hear a challenge relating to nomination of a candidate can be enlarged by a Court in a judicial review application.

3. Whether the High Court has jurisdiction to circumvent the provisions of Article 52(4) through a judicial review application
4. Whether a conviction in criminal proceedings amounts to misconduct as envisaged in Article 157 (e) and 155 of the Constitution of Zambia.
5. Whether an appeal without a stay of execution from a criminal conviction stays the period for holding by-elections as envisaged in Article 57 (1) of the Constitution of Zambia.
6. Whether any further or other relief that the Court may seem fit should be awarded.
7. Costs of this action be borne by the Respondent.

[33] In his skeleton arguments which he augmented at the hearing, Mr Lisimba, contended that the judicial review proceedings before the High Court were likely to derail the 90-day period stipulated in the Constitution for the holding of a by-election. That the time had started running once a vacancy was declared hence the by-election had to be held by 30th October, 2024. That failure to hold the election within the 90 days would result in a Constitutional crisis. He contended further, that the judicial review proceedings constituted a nomination challenge and therefore had gone beyond the 21-day period stipulated in Article 52 (4) of the Constitution. As authority, Mr Lisimba cited our decision in **Bernard Kanengo v Attorney General and the Electoral Commission of Zambia**³.

[34] In his oral submissions, Mr Nsomboshi agreed that the timelines stipulated in the Constitution must be respected. He however contended that there was no vacancy which had been properly declared in accordance with

the LGA to trigger the 90-day period. That this was the issue for judicial review. Further that there was no nomination challenge to trigger the timelines in Article 52(4) of the Constitution.

[35] The sum of the Applicant's case is that judicial review proceedings and indeed any other court process however commenced and prosecuted including court orders such as a stay cannot ignore or validly continue outside of the time limits prescribed by the Constitution for the holding of by-elections. The Applicant makes specific reference to time limits in Articles 52 and 57 of the Constitution.

[36] In view of the approach we have taken, it is our considered view that these provisions which are impugned in questions 1, 2, 3 and 5 may be interpreted and the questions answered in a manner that builds on the interpretation in the **Bernard Kanengo**³ case and thereby pre-empts the looming Constitutional crisis.

[37] It follows that we shall not deal with Question 4. It cannot be dealt with as it relates to issues that go beyond the constitutional time limits in issue and cannot properly be resolved before us. It is in fact rendered otiose by the interpretation of the issues which are properly before us. Question 6 on the other hand is not specific or substantive and therefore does not require

interpretation. Question 7 which is on costs will be dealt with before we conclude.

[38] We now return to the four questions which are suitable for interpretation. For convenience, we will deal with the issues raised in the questions together. In doing so, we focus only on the timelines encapsulated in the impugned provisions.

[39] Our interpretation is as follows. The supremacy of the Constitution is enshrined in Article 1(1) of the Constitution. Article 1 (3) of the Constitution provides that the Constitution binds all persons in Zambia as well as State organs and institutions. Article 45 (2) (e) of the Constitution, on the electoral systems and process, provides that the process and system for administering elections shall ensure timely resolution of electoral disputes. And Articles 48 and 49 of the Constitution provide that the system of administering elections and the process for electing a councillor among others shall be prescribed, that is provided for in an Act of Parliament.

[40] Thus, whilst we must read together all related constitutional provisions, we do so, keeping in mind the legislation that has been enacted to effectuate the said constitutional provisions. The factual context before us, brings to mind the EPA and the LGA.

[41] The key constitutional provisions are as follows: Article 57 (1) of the Constitution which provides that where a vacancy occurs in the office of councillor, among others, a by-election shall be held within 90 days of the vacancy. Article 52(4) of the Constitution provides that a nomination challenge must be filed within 7 days of the close of nominations and the court shall hear the case within 21 days of its lodgment. The sum of the two provisions is that the entire process of a by-election must take place within 90 days from the date when a vacancy occurs. The time does not stop running.

[42] In the **Bernard Kanengo**³ case, we said:

The ordinary or literal meaning of Article 52(4) reproduced above is simply that all cases filed before a Court of competent jurisdiction should be concluded within 21 days. The Article is clear and unambiguous in its terms. It makes provision for a person to challenge a nomination before a Court or tribunal. The Electoral Process Act designates the High Court as the Court of competent jurisdiction to hear a nomination challenge under Article 52(4). Article 52(4) further provides that the person challenging a nomination under Article 52(4) should do so within seven (7) days of close of nomination. It does not stop there, it goes to further provide that the Court before which the nomination is brought shall hear the case within twenty-one (days) of the lodgment of the petition.

[43] The only court process provided for once a vacancy is declared and notified to the Applicant falls under Article 52 of the Constitution. Nor is there provision for appeal. Hence the only constitutionally mandated legal challenge which maybe mounted during the 90-day by-election process is a

nomination challenge. It must be determined within the specific timelines set for such a challenge. Hence the election process once triggered by the vacancy must run its course until the election and there is no provision for its extension or re-alignment outside of the provisions of the Constitution. As we said in the **Bernard Kanengo**³ case:

...going by the Hakainde Hichilema case, once the 21 days expires the High Court is divested of jurisdiction rendering the case before it nugatory and an academic exercise

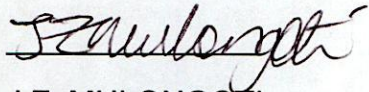
[44] We reiterate that the election timetable set by the Applicant in section 28 of the EPA is subject to the Constitution. The import of this is that the law does not contemplate any other processes being undertaken during the 90 days let alone permit those processes to undermine the constitutional time limits. Hence, once the Applicant receives notification of a vacancy having arisen it is under compulsion to set in motion the by-election process and conclude it within the 90 days in Article 57.

[45] Each party shall bear their own costs.




M.M. MUNALULA (JSD)

PRESIDENT CONSTITUTIONAL COURT



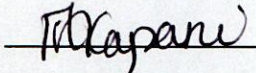
J.Z. MULONGOTI

CONSTITUTIONAL COURT JUDGE



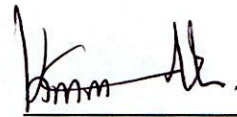
M.Z. MWANDENGA

CONSTITUTIONAL COURT JUDGE



M.M.KAWIMBE

CONSTITUTIONAL COURT JUDGE



K. MULIFE

CONSTITUTIONAL COURT JUDGE