

**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2011/HP/744

BETWEEN:

WYNTER MUNACAAMBWA KABIMBA

(Suing in his Capacity as Secretary
General of the Patriotic Front)

PLAINTIFF

AND

THE ATTORNEY- GENERAL

1ST DEFENDANT

RICHARD KACHINGWE

(Sued in his Capacity as National
Secretary of the Movement For
Multiparty Democracy)

2ND DEFENDANT

THE ELECTORAL COMMISSION OF ZAMBIA

3RD DEFENDANT

**BEFORE the Honourable Mrs. Justice J. K. Kabuka in Chambers on
the 9th Day of August 2011.**

For the Plaintiff:

**Mr. B. C. Mutale, SC; Mr. K. Kaunda,
Messrs. Ellis & Co.;**

Dr. J. Mulwila, Messrs. Ituna Partners;

**Mr. A .D. Mumba, Messrs. A. D.
Mumba & Co.;**

**Mr. A. Mwansa, Messrs. A. M. C.
Legal- Practitioners;**

**Mr. C. Chama, Messrs. Chola Chama
Legal – Practitioners;**

For the 1ST Defendant:

**MR. A. J. Shonga Jnr. SC, Attorney
General;**

Mr. M. Kondolo, SC Solicitor General;

Mrs. M. Kombe, Chief State Advocate.

For the 2nd Defendant:

**Prof. P. Mvunga, SC, Mr. S. Musune,
Messrs. Mvunga & Associates;**

Mr. Sunday Nkonde SC. Mr B.Mubanga

Messrs. SBN Legal-Practitioners;

**Mr. E Silwamba SC, Mr. L. Linyama
Messrs. Eric Silwamba & Co.;**

**Mr. R. Mukuka, Messrs. George
Kunda & Co.**

R U L I N G

CASES REFERRED TO:-

- 1. Newplast Industries vs. The Commissioner of Lands and The Attorney – General (2001) Z. R. 51**
- 2. Zambia National Holdings Limited and National Independence Party (UNIP) vs. The Attorney – General ZNPF Board Vs The Attorney General and Others (1994) S J 22**
- 3. Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mung’omba, Ebastian Saizi Zulu and Jennifer Mwaba Vs Fredrick Jacob Titus Chiluba (1998) Z. R. 49**

- 4. N. B. Mbazima and Others Joint Liquidators of ZIMCO limited (in liquidation) vs. Rueben Vera (2001) Z. R. 43**
- 5. Kawana Mwangela Vs. Ronald Bwale Nsokoshi and Ndola City Council. Appeal no. 29 of 2000**
- 6. Chikuta Vs Chipata Rural Council (1994) Z. R 241**
- 7. Nkumbula Vs. Attorney- General (1972) Z. R. 111**
- 8. Attorney –General, the Movement For Multiparty Democracy vs. Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine SCZ Judgment No. 2 of 1994**
- 9. Bank of Zambia vs. Jonas Tembo and others (1994) SCZ no. 2**
- 10. George Belamoan Vs. Aidan Gaffney (1971) Z. R. 29**
- 11. Costa I. Tembo vs. Hybrid Farm (Z) Limited. SCZ NO. 13 of 2002**
- 12. Lipkin Gorman (a firm) vs. Karpnale Ltd and Another (1989) 1 WLR 1340**
- 13. Saviour Chishimba vs. Micheal Sata and three others 2008/HP/0963 (unreported)**
- 14.**
- 15. Godfrey Kenneth Miyanda vs. The Attorney General (2009) Z. R. 76**

LEGISLATION AND OTHER WORKS CITED:

THE CONSTITUTION OF ZAMBIA CAP. 1 ARTICLES 34 (3) (b) (9); 41; 41 (2); 43 (1); 92 (5); 94 (1)

THE ELECTORAL ACT NO. 12 OF 2006 SECTIONS 20, 21 (1); (3)

THE HIGH COURT ACT CAP. 27 PART IV

THE HIGH COURT RULES ORDERS: 6; 11 r. 4; 14 r. 5 (2).

RULES OF THE SUPREME COURT (WHITE BOOK) 1999 EDITION VOL. 1
ORDERS 2 r. 2; 14 A r. 1; 29 r 1; 33 r. 3.

On the 3rd day of August 2011, the plaintiff issued a writ of summons from the High Court Principal Registry at Lusaka, in which he is seeking against the defendants, the following substantive reliefs:

- 1. a declaratory judgment or order that the parents of Rupiah Bwezani Banda, the current Republican President, are or were not citizens of Zambia by birth and that the second defendant's political party cannot by law sponsor him as a presidential candidate in the 2011 presidential and general elections to be held on 20th September 2011.*
- 2. An interim order of injunction against the 2nd defendant to restrain the 2nd defendant from supporting the said Rupiah Bwezani Banda.*
- 3. A declaratory judgment or order against the 3rd defendant that it cannot and should not by law accept nomination papers from Rupiah Bwezani*

Banda as a presidential candidate of the 2nd defendant as his parents are or were not Zambian citizens by birth.

- 4. An interim order of injunction against the 3rd defendant restraining the 3^d defendant from accepting and/ or processing nomination papers from the 2nd defendant's presidential candidate Rupiah Bwezani Banda.*
- 5. an order of disclosure of documents against the 1st defendant in respect of the Director General of births, deaths and marriages and the Chief Passport Officer in respect of birth or National Registration Card or passport records for Rupiah Bwezani Banda.*

In the statement of claim accompanying the writ, the plaintiff contended that, on the 26th day of September 2008, the second defendant's party the movement for Multi Party Democracy (MMD) sponsored one Rupiah Bwezani Banda of National Registration Card no. 285314/11/1 as it's presidential candidate in the 30th October 2008, presidential by-election which followed the death of President Levy Patrick Mwanawasa.

The third defendant, the Electoral Commission of Zambia, accepted the sponsorship aforesaid and the said candidate filed and submitted through the returning officer a declaration of compliance by candidates and political parties. The plaintiff contended, under the sponsorship and with the full knowledge of the second defendant, in his capacity as National Secretary of MMD, Rupiah Bwezani Banda swore under oath and submitted an affidavit of citizenship and presidential candidate's parents which was attested by the returning officer. In the said affidavit, the deponent swore that his father

Bwezani Banda was born in Chipata (Chikuwe) and his mother Sarah Zulu, was also born in Chipata, on the basis of which the third defendant, the Electoral Commission of Zambia proceeded to accept as valid and processed his nomination, for his presidential candidature in the election.

The plaintiff also contends, by so doing, the second and third defendants committed a dereliction of duty when they failed to refer to authentic records in government departments and other sources, which would have established and confirmed that Rupiah Bwezani Banda's father was born in Malawi, then Nyasaland and not in Zambia. Thus making him ineligible for sponsorship as a presidential candidate by the second defendant or to have his nomination papers and candidacy validated by the third defendant.

It was the plaintiff's further contention, the second defendant's pronouncement to sponsor Rupiah Bwezani Banda as their candidate in the September 20th 2011, presidential and general elections, is in breach of the provisions of Article 34 (3) (b) of the Republican Constitution. Hence, the present action for the reliefs as herein earlier set out.

The plaintiff also filed, together with the writ, an ex -parte application for an interim order of injunction which I directed to be heard inter - partes.

Upon effecting service of the process on the 1st and 2nd defendants, the said defendants, each caused to be filed, a conditional memorandum of appearance.

Subsequently, the first defendant made two applications. The first was to strike out the 3rd defendant for misjoinder. This application was made pursuant to Order 14 rule 5 (2) of the High Court Rules. The ground relied on was that the Electoral Commission of Zambia is not a corporate body under the Electoral Commission Act no. 24 of 1996 of the laws of Zambia, capable of suing or being sued in its corporate name. That the proper party to be sued was the Attorney- General, under the provisions of the State Proceedings Act. The second application was for disposal of the matter on a point of law pursuant to Rules of the Supreme Court Order 14 rule 2, the question being:

"Whether or not any issue relating to nomination or election of the president can be commenced before elections are held and (if so) in the High Court."

On behalf of the 2nd defendant, a notice of intention to raise preliminary issues (*in limine*) was filed in line with the Conditional Memorandum of Appearance entered on the 4th of August, 2011. The notice was issued pursuant to the provisions of Rules of the Supreme Court order 33 rule 3. The grounds relied on were stated as follows:

- 1. That the originating process – writ of summons and statement of claim is the wrong mode of commencement to impugn the qualifications of election to the office of president as stipulated by the provisions of Article 34 of the Constitution of Zambia as read with the provisions of sections 20 and 21 of the Electoral Act no. 12 of 2006;*

2. *The High Court of judicature for Zambia is wanting in jurisdiction as any question which may arise as to whether any provision of the Constitution of Zambia or any law relating to the election of president has been complied with:*
 - (i) *must be referred to and be determined by the full bench of Supreme Court of Zambia pursuant to the provisions of Article 41 of the Constitution of Zambia; and*
 - (ii) *can only be commenced after the election to the office of president has been conducted and the president sworn into office.*
3. *That in terms of the provisions of article 43 (1) of the Constitution of Zambia a person holding the office of president is protected from any civil court proceedings and this court, is legally and effectively precluded from considering the interests of non parties in this case. The proceedings herein purportedly instituted against the 2nd defendant but with Rupiah Bwezani Banda; esquire as the principal subject matter, are incompetent.*
4. *That the 2nd defendant would invoke the legal maxim **interest republicae us sit finis litium**, meaning that it is in the public interest that there should be an end to litigation.*

Further to the notice of intention to raise preliminary issues filed on behalf of the 2nd defendant and in line with the conditional memorandum of appearance filed, an application to set aside originating process for irregularity pursuant to the provisions of Order VI and order XI Rule 4 of the High Court Rules and order 2 rule 2 as read with order 14 A of the Rules of the Supreme Court, was also filed on the 5th of August, 2011. The ground relied on was want of jurisdiction to hear the matter on the part of the court. Order 11 r. 4 reads:

(4) any person served with a writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction.

In view of the nomination for the presidential election that had already been set for the week commencing from the 7th – 12 August 2011, time was of the essence. I thus set Friday the 5th of August 2011 for hearing. When the matter came up for hearing as scheduled, I directed that all the interlocutory applications substantially raising the same preliminary issues, made by the defendants, be argued under the application to set aside originating process. This was agreed and with the further consent of all counsel involved in the matter on both sides, the court was informed they all intended to file written submissions, upon which they would wholly rely.

Learned counsel for the first defendant in their submissions proposed to dwell on two issues, which they considered prominent and were stated to be:

- (a) *Whether or not this court has jurisdiction to hear the present action ; and*
- (b) *Whether or not the Electoral Commission of Zambia, the 3^d defendant herein, may be sued as a party in the manner employed by the plaintiff.*

On the question whether or not this court has jurisdiction to hear this matter, the learned Attorney –General argued for the 1st and 3rd defendants, the mode chosen by a party to commence an action is largely responsible for determining whether that action sees its day in court or whether it is arrested and terminated barely past service of process stage. The Supreme Court decision in the case of **Newplast Industries vs. the Commissioner of Lands and the Attorney – General (1)** was called in aid of this submission, where the holding on the point was that:

".....the mode of commencement of any action is generally provided for by the relevant statute and where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure..."

Learned Counsel continued, though not directly so framed, analysis of the writ and statement of claim filed by the plaintiff in this action reveals the main thrust of the claim is that it seeks to prevent the incumbent, Rupiah Bwezani Banda from being allowed to file his nomination documents for election to the office of president of the Republic of Zambia. That the plaintiff's action clearly revolves around and centres on the election to the office of president. The

allegations as disclosed in paragraphs 7- 11 of the statement of claim being that, the president does not satisfy the provisions of article 34 (3) (b) of Republican Constitution which reads as follows:

34. (3) a person shall be qualified to be a candidate for election as president if –

(b) both his parents are Zambians by birth or descent;

It was argued in this regard, that the framers of the Constitution were alive to and did in fact contemplate that disputes may arise. Hence, the Constitution went even further as to dictate where such disputes should be heard and determined under Article 41 (2) which provides that:

41 (2) Any question which may arise as to whether –

(a) any provision of this Constitution or any law relating to election of a president has been complied with;

(b) any person has been validly elected as president under article 34;

shall be referred to and determined by the full bench of the Supreme Court.

Counsel further argued, the provisions in the Electoral Act, no. 12 of 2006; are, in every respect, consistent with the dictates of the Constitution of the Republic of Zambia; and which by section 21 (3) directs as follows:

21. (3) any question by any person, which may arise as to whether any provision of the Constitution or any law relating to nomination or election of president has been complied with shall be referred, by such person to the full bench of the Supreme Court within 14 days of the person elected as president being sworn in, in accordance with clause 9 of Article 34 of the Constitution.

Learned counsel submitted, there can be no doubt that the questions raised by the plaintiff directly emanate from Article 34 of the Constitution. It was also patently clear that the correct court to hear such questions, as guided by both the Constitution of Zambia and the Electoral Act, is the Supreme Court, which is mandated to constitute a full bench. Further, that such proceedings would need to be commenced by petition. Consequently, that this court possesses no jurisdiction to entertain the matter.

On the definition of "*jurisdiction*" the court was referred to the case of **Zambia National Holdings Limited and National Independence Party (UNIP) vs. The Attorney – General (2)** where the Supreme Court had this to say:

"The term "jurisdiction" should first be understood. In the one sense, it is the authority which the court has to decide matters that are litigated before it; in another sense it is the authority which the court has to take cognisance of matters presented in a formal way for its decision. The

limits of authority of each of the courts in Zambia are stated in the appropriate legislation.....”

Counsel went on to submit, the authority the High Court enjoys is set out in section 4 of the High Court Act Chapter 27 of the Laws Zambia which provides that:

“Subject to any express provision to the contrary, all the judges shall have and may exercise, in all respects, equal power authority and jurisdiction, and, subject as aforesaid, any judge may exercise all or any part of the jurisdiction by this Act or otherwise vested in the court, and for such purpose, shall be and form a court.”

That the supreme law of the land, the Republican Constitution, has expressly made provision for all questions related to election to the office of president to be determined by the Supreme Court. By so doing, the Constitution has, by necessary implication, ousted the jurisdiction of the High Court from hearing any matters related to Article 34 of the Constitution. Judicial precedent was there, and in specific instance where the court has recognised that situations will occur where the jurisdiction of the High Court may be ousted and this is expressly so stated by statute. This court was referred to the case of **ZNPF Board Vs The Attorney General and Others (3)** where the Supreme Court observed:

".....after very anxious moments following upon the Privy Council decision, I hold that section 101 (3) of the Industrial Relations Act, cap. 517 excludes the power of the High Court to issue orders of certiorari removing the proceedings or decisions of the Industrial Relations Court into the High Court for purposes of (if bad) quashing the same."

Stressing that in terms of section 21 (3) of Act no. 12 as earlier herein quoted, the law provides that, any issue relating to the nomination and election of the president can only be taken to court after the elections have been held and the person elected sworn in, in accordance with Clause 9 of Article 34 of the Constitution.

Counsel submitted, in conclusion on this limb, as the elections in issue were yet to take place, the present action was prematurely instituted. On the challenge relating to citing the 3rd defendant as a party to the present action, the argument was that the said 3rd defendant namely, the Electoral Commission of Zambia, is established pursuant to section 4 of The Electoral Commission Act Chapter 17 of the laws of Zambia, which provides that:

5 (1) The commission as established by Article 76 of the Constitution shall have the functions specified in the Article.

Article 76 of the constitution states:

“76. (1) There is hereby established an autonomous Electoral Commission to supervise the registration of voters, to conduct presidential and parliamentary elections and to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National Assembly.”

The submissions in this regard were that, the Electoral Commission of Zambia is not endowed with the status of a body corporate. It can neither sue nor be sued and it must accordingly follow that all suits by or against the Electoral Commission of Zambia are suits by and against the State and the provisions of section 12 of the State Proceedings Act chapter 71 of the laws of Zambia would apply to the Electoral Commission of Zambia. This section provides as follows:

“12. (1) Subject to the provisions of any other written law, civil proceedings by or against the State shall be instituted by or against the Attorney – General as the case may be.”

Finally, counsel urged, the Electoral Commission of Zambia cannot be sued in any manner other than through the Attorney–General, pursuant to the provisions of the State Proceedings Act and should therefore be removed from these proceedings. That the provisions of Article 41 (2) of the Constitution and section 21 (3) of the Electoral Act ,no. 12 of 2006, both speak the same language: they demand that a party taking issue with matters to do with nomination or election of the president must refer the matter to the Supreme

Court. The High Court clearly, simply has no jurisdiction to entertain or to hear any such application touching on the nomination or election to the office of president.

The court was urged to set aside the writ for irregularity as well as for want of jurisdiction pursuant to Order 2 rule 2 of the Supreme Court Rules and further, that the plaintiff be condemned in costs especially since the issues at the heart of this action, having been subject of previous court decisions are not novel.

In their submissions of behalf of the 2nd defendant, learned counsel approached the issues in controversy as being: '*mode of commencement*' and '*wrong forum*', respectively.

Regarding the argument on wrong forum, it was submitted, the High Court of judicature for Zambia is wanting in jurisdiction. That when one wants to impugn the qualification of any person with respect to election to the office of president the competent forum is the Supreme Court of Zambia, in terms of Article 41, which provides as follows:

41 (1) The Chief Justice shall be the returning officer for the purpose of elections to the office of President.

(2) Any question which may arise as to whether –

- (a) any provision of this Constitution or any law relating to the election of a President has been complied with; or**
 - (b) any person has been validly elected as President under Article 34 ;**
- Shall be referred to and determined by the full bench of the Supreme Court.**

Further reference was made to Article 92 (5) providing that:

“When the Supreme Court is determining any matter, other than an interlocutory matter it shall be composed of an uneven number of judges not being less than three except as provided for under article 41.

The case of **Akashambatwa Mbikusita Lewanika, Hicuunga Evaristo Kambaila, Dean Namulya Mung’omba, Sebastian Saizi Zulu and Jennifer Mwaba Vs Fredrick Jacob Titus Chiluba (4)** was relied on where Ngulube C. J., as he then was, opined:

“it should be noted, as a novel point that this was the first time ever when this court which is essentially an appellate court had to sit as a trial court of first and last instance under the very special jurisdiction given by the Constitution for the trial of presidential election petition. Quite early in the proceedings, what would be “the full bench of the supreme court” to hear the case as required by article 41 of the

constitution when it became apparent that there were practical difficulties and distinct possibility of trial never taking off. The requirement was found to be fulfilled by construing the maximum available odd number of judges of the court that could be mastered to hear the case....."

Counsel submitted that, forum goes to jurisdiction. Various judicial decisions on the point were called in aid of this submission and included the case of **N. B. Mbazima and others joint liquidators of ZIMCO limited (in liquidation) vs. Rueben Vera (5)** where the Supreme Court observed:

"quite clearly section 85 (2) and 108 of the Industrial and Labour Relations Act show that the jurisdiction of the Industrial Relations Court is limited to settling of labour disputes falling under the Act. It is an alternative forum to the High Court only in cases of labour disputes. The IRC has limited but exclusive jurisdiction in such labour disputes as provided in section 85 (2) and 108 of the Industrial and Labour relations Act, Cap. 269.

"In our view, in those proceedings before the Industrial Relations Court and even the present proceedings before us, the respondents were and are impugning the certificate of title issued to miss Charity Kowa... the Industrial and Labour Relations Court has no jurisdiction in conveyancing matters, such issues can only be dealt with by the High Court. In Kawana Mwangela Vs. Ronald Bwale Nsokoshi and Ndola City

Council we considered the jurisdiction of the lands tribunal. In that case we made the same point and held that: -

In our opinion a reading of sections 18 and 22 of the Lands Act shows quite clearly that the jurisdiction of the Lands Tribunal is limited to the settlement of "land disputes" under the Acts and is not an alternative forum to the High Court where parties can go to, even for issuance of prerogative writs such as mandamus. In these proceedings the appellant was seeking to impugn a certificate of title issued to the 1st respondent and under the Lands and Deeds Registry Act, cap. 185 of the laws, only the High Court has jurisdiction to entertain such proceedings."

Counsel further submitted, the question of forum regarding any question which may arise as to whether any provision of the Constitution of Zambia or any law relating to election has been complied with is settled law. The cases of *Akashambatwa Mbikusita Lewanika, Hicunga Evaristo Kambaila, Dean Namulya Mung'omba, Sebastian Saizi Zulu, Jennifer Mwaba, vs. Fredrick Jacob Titus Chiluba, Anderson Kambela Mazoka and Others Vs. Levy Patrick Mwanawasa; Godfrey Kenneth Miyanda, Kambela Anderson Mazoka, Christon Tembo, Nevers Mumba, Tilyenji Kaunda, Ben Mwila and The Attorney-General, The Electoral Commission and The Returning Officer For The Presidential Election (6)*; were cited as authority for the submission. The following excerpt from the Miyanda's case was specifically referred to, in particular where the court observed that:

"For the avoidance of doubt, I must say at the outset that this ruling does not decide that the applicants have no valid case in their complaints against the elections and / or that the elections were fairly and properly conducted. These are not issues for this forum but for the Supreme Court when it sits to hear any presidential election petition. The Supreme Court is the court with jurisdiction in these matters."

Counsel for the 2nd defendant concluded, on this limb of the argument, that the High Court was the wrong forum and had no jurisdiction to hear the matter.

Coming to the argument on mode of commencement of the present action, learned counsel relied on the provisions of Order VI rule 1 of the High Court Rules and submitted, the mode of commencement is determined by the regime of the legislation that governs the particular issue in dispute. The order relied on reads as follows:

" (1) Except as otherwise provided by any written law and these rules every action in the High Court shall be commenced by Writ of Summons endorsed and accompanied by a full statement of claim."

It was counsel's further submission, the election of the president and all matters incidental thereto is the preserve of the Constitution of Zambia; the Electoral Code of Conduct; and attendant subsidiary legislation, the correct forum being the Supreme Court as provided by article 41 of the Constitution.

The plaintiff having commenced the action in both a wrong court and invoking irregular mode of commencement the present action was incompetent and

the court was urged to dismiss it accordingly. The case of *New Plast Industries vs. Commissioner of Lands and Attorney-General* earlier herein referred to in the submissions of the 1st defendant, was cited as authority for the submission. On the fate of matters wrongly commenced, the case of **Chikuta Vs Chipata Rural Council (7)** was further relied on as decided that:

"Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declarations."

There was a third limb to the 2nd defendant's arguments specifically that the matter herein was commenced prematurely. Learned counsel noted that the plaintiff in paragraph 11 of his statement of claim is attempting to assert that there will be a future breach of the provisions of article 34 of the Constitution and submitted, it is indeed premature to seek relief for a breach that has not occurred. That the provisions of section 21 (3) of the Electoral Act no. 12 of 2006 *op cited* only provide for redress 14 days after the person elected as president has been sworn in. The Miyanda case was relied on for this submission.

In that case the applicants had sought to move the court by way of judicial review to prevent the swearing in of the elected President pending their request for verification of the vote. The court's observations were as follows:

" in fact after reading the relevant provisions in the Electoral Act and the Constitution, I am certain in my mind that it has never been the

intention of Parliament and the framers of the Constitution that the Presidential election process can be arrested before the President is sworn in. In my view, the repeal and replacement of section 9(3) of the Electoral Act by the Electoral (amendment act) no. 23 of 1996 appears to have been aimed at forestalling litigation before the electoral process of a President is completed. It is clear to me that the litigation in these matters can only start after the event. That is after the President whose election is impugned has taken office. The applicants have spoken too soon and their action is premature."

Counsel argued in the alternative, that the plaintiff is precluded from asserting a right which is anchored in the main on an intention. The cases of **Nkumbula Vs. Attorney- General (8)** and the **Attorney –General, the Movement For Multiparty Democracy vs. Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine (9)** were cited as authority for the proposition. In the latter case it was held:

"The trial judge misdirected herself by construing the intentions to join a party that was to be going to be formed as an act of joining that party. Intention alone is not sufficient."

In concluding this aspect of the argument, counsel referred the court to Constitutional provisions relating to the jurisdiction of the High Court as by Article 94 set out as well as Part IV of the High Court Act Cap. 27 on the same issue, which were reproduced. Article 94 (1) reads as follows:

94.1 There shall be a High Court for the Republic which shall have, except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction under the Industrial and Labour Relations Act, unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law or and such jurisdiction and powers as may be conferred on it by this Constitution or any other law."

Counsel submitted that although article 94 (1) of the Constitution of Zambia confers unlimited jurisdiction on the High Court of judicature for Zambia, the jurisdiction is not limitless and has to be exercised within the circumscribed spheres of the law. Amongst other decided cases, this court was also referred to the case of *Miyanda vs. the People* and in particular the following observations:

*"The term jurisdiction should first be understood. In one sense, it is the authority which the court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognisance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court cognisance or the area to which it extends, or both. Faced with a similar question of jurisdiction, two of their lordships in *Codron Macntyre vs. Shaw*, had this to say:*

Tredgold, C. J, cautioned at page 420

"It is important to bear in mind the distinction between the right to relief and the procedure by which such relief is obtained. The former is a matter of substantive law, the latter of adjective or procedural law."

Briggs, F. J., said, at page 433:

"Confusion may arise from the two different meanings of the word "jurisdiction."

On an application for mandamus in England the King's Bench Division may, because of a certain fact proved say "there is no jurisdiction" to grant mandamus on a case of this kind. *"That refers to an obstacle of substantive or procedural law which prevents the success of the application, but not to any limits on the general jurisdiction of the court to hear and determine the application."*

"I think it is important to understand the various aspects of jurisdiction to which I have referred."

"We have no reason to disagree with the fore going."

Counsel submitted, this court's jurisdiction is regulated by article 41 of the constitution of Zambia and section 21 of the Electoral Act 2006 and should accordingly decline the plaintiff's misconceived invitation to jurisdiction. That the court was legally and effectively precluded from considering the interests

of non parties, in this case Rupiah Bwezani Banda, esquire a person holding the office of President and as such in terms of article 43 civil proceedings purportedly instituted against the 2nd defendant but with Rupiah Bwezani Banda as the principal subject are incompetent. The relevant part of Article 43 of the Constitution on the protection of the President in respect of legal proceedings stipulates that:

"43.(1) civil proceedings shall not be instituted or continued against a person holding the office of the President or performing the functions of that office in respect of which relief is claimed against him in respect of anything done or omitted to be done in his private capacity."

on the legal maxim that it is in the public interest that there should be an end to litigation interest *republicae us sit finis litium* the court's attention was drawn to paragraphs 5-10 of the plaintiff's statement of claim which refers to the presidential election of 2008. The submission here, was that the, plaintiff having petitioned the result of those elections but later abandoned the same cannot re- litigate that matter. The case of **Bank of Zambia vs. Jonas Tembo and others (10)** where the Supreme Court observed:

".....the matters in which we are being asked to adjudicate upon in this appeal are the same issues that we ruled upon in our judgment of 30th

September, 1997 and 25th January, 2002, namely "the effective date of the retrenchment and the salary."

*We would uphold the preliminary point raised by counsel for the respondent and in conclusion we would invoke the legal maxim **interest reipublicae us sit finis**, meaning that there should be an end of litigation. This appeal is incompetent and we dismiss it with costs....."*

In conclusion, counsel referred the court to Order XI rule 6 on its discretionary power to award costs and the general rule that costs will normally abide the outcome of the case. Counsel submitted, having demonstrated that this matter is characterised by gross irregularity and that it has been litigated upon in various matters, it was incumbent upon the court to condemn the plaintiff to pay the costs of these proceedings. Counsel relied on the case of **George Belamoan Vs. Aiden Gaffney (11)** where it was held:

".....that if a plaintiff chooses a wrong mode of action and thereby makes the defendant to incur costs he should not thereafter allege that any costs incurred by the defendant have been incurred unnecessarily."

Further relying on the cases of **Costa I. Tembo vs. Hybrid Farm (12)** and **Lipkin Gorman (a firm) vs. Karpnale Ltd and another (13)** the court was urged, the winner of a case is generally entitled to costs.

In their response to the preliminary issues raised by the defence, plaintiff's counsel proposed to address the same under three main questions stated as follows:

- (a) *whether the matter was properly commenced by way of Writ of Summons;*
- (b) *whether the High Court has jurisdiction to adjudicate upon the matter;*
- (c) *whether the 3rd defendant was properly sued.*

The mode of commencement and jurisdiction raised in (a) and (b) above were argued together. Learned counsel for the defendant argued the defendant's advocates had misconceived the import of Article 34 of the Constitution as read with sections 20 and 21 of the Electoral Act No. 12 of 2006.

Counsel submitted the said provisions relate to the nomination or election of the President. Therefore, the import of the same comes into effect only after valid nomination and election of a President. To emphasise the following words as in the said provisions contained were highlighted.

Article 41 (2) (b)

(2) any question which may arise as to whether-

(a) any person of this Constitution or any law relating to *election* of a President has been compiled with;

(c) any person has been *validly elected* as President under Article 34 shall be referred to and determined by the full bench of the Supreme Court.

And section 21 (3) of the Electoral Act No. 12 of 2006

“Any question, by any person.....as to whether any provisions of the constitution *has been compiled with* shall be referred to the full bench of the Supreme Court *within 14 days of the person elected as President been sworn in, in accordance with Clause 9 of Article 34 of the Constitution”*

It was further argued that **“candidate”** as defined by section 20 of the Electoral Act as read with regulation 2 of S. I. No. 52 of 2011 (Electoral Code of Conduct 2011 defines candidate as:

*“Any person **nominated** as candidate for an election”*

That Black’s Law Dictionary 8th Edition defines **“nominate”** as “to propose a person for election or appointment”

And section 2 of the electoral Act defines **“nomination day”** as

“The day appointed by the commission as the day on which candidates file their nomination papers with the commission”

Proceeding from the provisions of the Law as cited by plaintiff’s counsel in their submissions as I understood them, were that, Article 34 of the Constitution which confers exclusive jurisdiction over Presidential elections refers to validly nominated candidates. That section 21 (3) of the Electoral Act No. 12 of 2006 which gives the 14 day limitation to challenge the election

is inapplicable to the present circumstances. The applicable section is 21 (1) of the Electoral Act which deals with filing of nominations papers and that political parties ensure compliance with the requirement. Hence, the action against the sponsoring party (MMD) to pre-empt an unqualified person from being nominated to stand as a President.

That Order VI of the High Court Rules Cap. 27 prescribes the writ as General mode for commencing actions. The case of **Saviour Chishimba vs. Michael Sata and others (14)** was so commenced. And Article 43 on Presidential immunity does not extend to a sponsoring party.

As to whether the Electoral Commission of Zambia has been properly enjoined as a party to these proceedings, that argument is on, Article 76 of the Constitution, which enacts an autonomous ECZ to be established by an act of parliament and section 3 of the Electoral Act No. 12 of 2006 states that:

“The commission shall not be subject to direction of any other person or authority.”

Therefore, the Electoral commission of Zambia (ECZ) is not covered by section 12 of the State Proceedings Act. That previous actions have had in fact ECZ as a party in election petitions which have been entertained by the Supreme Court. *Miyanda and Others vs. The Attorney-General and ECZ (15)*, was cited as an illustration.

These were the submissions from learned counsel for the parties herein, case law and, other authorities, the court was referred to, for which I am greatly indebted.

The issues in controversy in this matter relate to: mode of commencement of proceedings; the jurisdiction of this court to hear "*pre-nomination*" matters arising from disputes touching on the presidential election; the legal capacity of the Electoral commission of Zambia and the immunity of an incumbent president seeking re-election.

Starting with the mode of commencement of actions in the matters relating to the election process of the president. It was common ground they must be commenced by petition. It was also common ground that Article 41 (2) of the constitution of Zambia confers exclusive jurisdiction, to hear and determine disputes relating to the election of a president, in the Supreme Court. That such jurisdiction is post election and only exercised by the full bench of the Supreme Court within 14 days after the swearing in, of the person elected as president. This is as provided by clause 9 of Article 34 as read with section 21 (3) of the Electoral Act no. 12 of 2006 which state as follows:

34 (9) any person elected as president under this Article shall be sworn in and assume office immediately but not later than twenty four hours from the time of declaring the election.

21 (3) any questions, by any person, which may arise as to whether any provision of the Constitution or any law

relating to nomination or election of the president has been compiled with shall be referred, by such person to the full bench of the Supreme court within fourteen days of the person elected as president being sworn, in accordance with clause 9 of Article 34 of the Constitution.

The question here is whether by reason of the general provision of Article 41 (2), and section 21 (3) in particular, I am precluded from hearing the present action?

Plaintiff's counsel's arguments are that I am not so precluded as the issue before me falls outside the ambit of the Constitutional provisions referred to by learned counsel for the defendants and the cases cited by them in this respect, decided pursuant to these provisions of the law, which relate to the election process from nomination to post election and swearing in of the president.

I agree.

The dispute here, relates to ineligibility of an incumbent Presidential aspirant in the pre-nomination period. Article 41 and section 21 (3) relied on by learned counsel for the defendants are meant to govern the resolution of disputes in the election process of the president but arising between nomination period to post election and cannot be relied upon to resolve disputes arising in the pre-nomination period. Hence, *I find the provisions*

granting exclusive jurisdiction to the Supreme Court cannot be invoked to extend to the pre-nomination period and are inapplicable to the said period.

Order VI r. 1 of the High court Rules cap. 27 which provides for commencement actions before the High Court gives the Writ of Summons as the general mode of commencing actions in this court. The remedies of declaratory judgments and orders endorsed in the writ issued herein are claims falling within the ambit of matters that can be commenced by Writ of Summons. *I find the Writ of Summons was properly issued and further, that the reliefs sought in the present action are within the jurisdiction of this court to hear and determine.*

It is not in dispute that Article 76 conferring autonomy on the ECZ to function independently was intended to promote the said image in the democratic dispensation of governance and entrench the confidence of fairness in the electorate. This "autonomy" and "independence" is rooted in the Constitution. The purposive construction of this status can only be in consonance with these ideals. This is the capacity with which it has been clothed and accepted by the courts, as in the Supreme Court case of *Miyanda and Others* cited by the plaintiff. *I accordingly find the Electoral Commission of Zambia was properly enjoined to this action as 3rd defendant.*

Finally, on Article 43 (1) providing for the protection of the president in respect of legal proceedings. The object of the immunity, according to learned authors of *CONSTITUTIONAL LANDMARKS IN MALAYSIA* LEXIS NEXIS 2007, AT 229 is that:

".....the importance of such a privilege must be based on the importance of the Rulers' role in helping a constitutional government to function according to its ideals."

The immunity is thus conferred in relation to official discharge of functions, only. In our own case of **Godfrey Miyanda vs. The Attorney General (15)**, Mambilima, DCJ, aptly stated the object of immunity as follows:

"2. In Zambia we have an express Constitutional provision, Article 43, granting immunity to the president. The rationale for the immunity is to avoid the president being unduly cautious in the discharge of his official duties. Such immunity can only be lifted in accordance with the provisions of the Constitution."

"4. Notwithstanding the immunity granted by Article 43 to a sitting president, there is nothing to stop a court from determining whether the president in the discharge of his duties has acted within the law, and granting any remedy found to be appropriate against the government. This position is fortified by the State Proceedings Act, which has brought the president within the realm of a public officer. The president is not above the law."

The question that begs the issue then, is: whether in light of the legal exposition of the object of immunity, it can be said that immunity should extend to protect an incumbent president against answering questions on the aspect of his qualification to stand for re-election. Clearly the Attorney General cannot answer such questions of a personal nature on his behalf. Aspiring for election or re-elections to the office of president is a personal issue not falling

within the discharge of official functions of the presidency. Put differently, can immunity be pleaded in these circumstances? I think not. All intending candidates for the presidential election should be on equal standing and must meet the qualification for each and every election.

The immunity provided for under Article 43 (1) does not in my opinion apply to the particular circumstances of this case where the consequences would be to offer protection from answering questions relevant to qualification for the position of president for purposes of re-election.

However, the effect, of proceeding in this case would be determining the matter , without affording the subject an opportunity to be heard. In the case of **Mwaba vs. The Attorney-General (1993) C. L. R. At page 166** Ngulube C. J. as he then was, had this to say on the point of not affording a person likely to be affected by a court decision a chance to be heard.

"we must now comment on the forum and direction taken by these proceedings. Although the motion ostensibly questioned whether there was dignity and leadership in the exercise by the President of his Constitutional power to appoint the two ministers, the blows were landing on the two individuals who have never been heard, and who stood to be condemned and unheard, and stripped of office.

No court of justice can be called upon to make a declaration which is a discretionary remedy when obvious injustice would be visited upon persons who have not been heard but who could be directly affected by the declaratory order."

As orders sought in this action would have a direct effect on a person who is a non-party without affording such a person a hearing, this could be contrary to the tenets of justice that persons should be a subject of proceedings to which they are denied an opportunity to be heard.

For the reasons given; the preliminary issues fail, except as relates to depriving a hearing to the person subject of the action, who is directly to suffer the consequences, which is hereby upheld. This action is accordingly dismissed on point of law pursuant to order 14 A of the Rules of the Supreme Court which states that:

- (1) the court may upon the application of a party or its own motion determine any questions 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 issues therein.**

- (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.**

On the issue of costs, firstly, I do not accept the defence claim suggesting this matter was subject of a court decision, hence *re judicata*. At the most the same can only go to abuse of the process of court.

In the event, I find the questions raised are of vital public interest on the constitutional issue of the extent of presidential immunity and an appropriate order in the circumstances, is for each party to bear own costs and I so order.

J. K. KABUKA
JUDGE