

**IN THE CONSTITUTIONAL COURT OF ZAMBIA**

**APPEAL NO. 20/2017**

**AT THE CONSTITUTIONAL COURT REGISTRY**

**2016/CCZ/A010**

**HOLDEN AT LUSAKA**

**(CONSTITUTIONAL JURISDICTION)**

**IN THE MATTER OF: THE LOCAL GOVERNMENT STATE RANCH WARD ELECTIONS HELD IN ZAMBIA ON THE 11<sup>TH</sup> DAY OF AUGUST, 2016**

**IN THE MATTER OF: ARTICLE 46, 54 AND 73 OF THE CONSTITUTION OF ZAMBIA, CHAPTER 1 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTIONS 81, 82, 83, 84, 85, 86, 87, 89, 92, 94, 97, 98, 99, 100 AND 110 OF THE ELECTORAL ACT NO. 35 OF 2016**

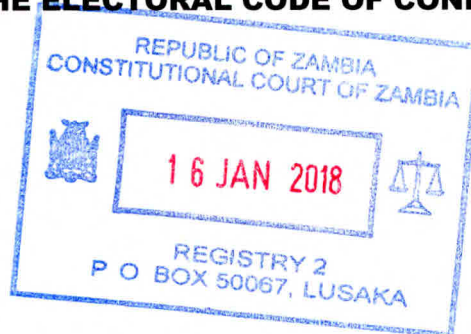
**IN THE MATTER OF: THE ELECTORAL CODE OF CONDUCT 2016**

**BETWEEN**

**MUSHILWA MUYATWA**

**AND**

**KAWINA MUSIPILI**



**APPELLANT**

**RESPONDENT**

**CORAM:** Mulenga, Mulonda, Munalula JJC on 21<sup>st</sup> November, 2017 and on 16<sup>th</sup> January, 2018

For the Appellant : Ms M. Mushipe, Mesdames Mushipe and Associates

For the Respondent : Ms D.M. Mwewa, Messrs KBF and Partners

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## **R U L I N G**

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**Mulenga, delivered the Ruling of the Court**

**Cases referred to:**

- 1. D.E. Nkhuwa v Lusaka Tyre Services Limited (1977) Z.R. 43 (SC)**

2. **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited S.C.Z. Judgment no. 20 of 2011**
3. **Edinburgh Street Tramways v Torbain [1877] 3 A.C. 58**
4. **Attorney General for Canada v Hallet and Carey Ltd [1952] A.C. 427**
5. **Attorney General, the Movement for Multi Party Democracy v Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine (1994) S.J. (SC)**

**Legislation referred to:**

1. **The Constitution of Zambia Amendment Act No.2 of 2016**
2. **The Electoral Process Act No. 35 of 2016**
3. **The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**
4. **The Local Government Elections Tribunals Rules, S.I. No. 60 of 2016**
5. **Supreme Court Rules of England 1999 Edition (White Book) (RCS)**

This is a ruling on the Appellant's motion on a point of law made pursuant to Order IX Rule 20 (2) of the Constitutional Court Rules and Order 14A Rule 1 of the Rules of the Supreme Court of England 1965. By way of this motion, the Appellant seeks the following orders:

1. **An Order that the Respondent's Petition, the proceedings in the Tribunal below as well as the Appeal before this Honourable Court be declared null and void *ab initio* as the Respondent filed his petition out of time contrary to the provisions of the law as contained in the Local Government Elections Tribunals Rules, Statutory Instrument no. 60 of 2016 of the Laws of Zambia;**
2. **An Order for the costs of the proceedings in the Tribunal below as well as the Appeal herein be for the Appellant.**

In the affidavit in support of the motion sworn by the Appellant, it was deposed that on 11<sup>th</sup> August, 2016, general elections were held in the country. The Appellant and the Respondent vied for the office of

Ward Councillor in the State Ranch Ward in Shangómbó District. That on 13<sup>th</sup> August, 2016, the Appellant was declared as the duly elected Councillor for State Ranch ward as per exhibit marked “MM/1”, a copy of the declaration of the result of the poll. The Respondent filed an election petition on 29<sup>th</sup> August, 2016 before the Tribunal of Local Government Elections challenging the election of the Appellant.

The Appellant averred that he has been advised by his advocates that a cursory perusal of the Respondent’s Petition reveals that the Petition was filed sixteen (16) days after the declaration of the election results contrary to the Local Government Elections Tribunal Rules which stipulate a period of seven (7) days. That by filing the Petition outside the stipulated time period, the Respondent contravened the rules of procedure and *prima facie* renders the Petition, the proceedings in the tribunal below as well as the Appeal null and void *ab initio*. Further that this is a proper case for the Court to grant the Orders being sought in the interest of justice as the Respondent failed to adhere to rules of procedure.

Learned counsel for the Appellant, Ms M. Mushipe, relied on the skeleton arguments in support of the motion in which it was argued, on the strength of rule 8 (1) and (2) of the Local Government Elections



Tribunals Rules, that the discretion to file an election petition before a tribunal is restricted to seven (7) days. Filing a petition, as the Respondent did, after the expiration of the said seven days contravenes the provisions of the law. The Appellant ventured that the Respondent should have applied for leave to file the petition out of time or extend the time in which to file. That his failure to do so in the light of **D. E. Nkhuwa v Lusaka Tyre Services Limited**<sup>1</sup>, was a blatant disregard of well established rules of procedure. That the fact that the petition was filed sixteen (16) days after the declaration of the Appellant's election as Councillor without permission to file the same out of time entails that the petition was never filed nor was it duly before the tribunal and as a consequence renders the proceedings of the tribunal, the judgment and the appeal herein null and void from the outset.

The Appellant states that allowing the Respondent's petition, the proceeding in the tribunal and the appeal would be encouraging laxity and non-observance of well established rules which position was castigated by the Supreme Court in **Twampane Mining Co-operative Society Limited v E and M Storti Mining Limited**<sup>2</sup>. Further, that the interest of justice would be served by this Court in granting the orders

sought because the failure by the Respondent to adhere to the rules of the Tribunal as well as the rules regarding filing of pleadings out of time was done at his own peril.

In augmenting the skeleton arguments, Ms Mushipe reiterated that the Respondent filed his Petition before the Local Government Elections Tribunal out of time. That since the Respondent failed to comply with procedural imperatives, this Court should declare the petition and consequently, the Appeal null and void.

In opposing the motion, the learned counsel for the Respondent, Ms D. M. Mwewa, relied on the Respondent's filed skeleton arguments in which it is posited that Article 159 of the Constitution as amended and rule 8 of the Local Government Elections Tribunals Rules provide that a person may file an election petition with the tribunal. It is not mandatory for a person to file an election petition within the seven (7) days provided in rule 8 (2) as the said time frame provided is of no consequence in light of section 100 of the Electoral Process Act which provides for a longer period of 14 days. Therefore, that the subject petition from which the appeal emanates was neither filed out of time nor contrary to the Local Government Elections Tribunal Rules as it was filed within the requisite 14 days as provided in the Electoral

Process Act. Reference was made to Article 269 clauses (a) and (b) of the Constitution and section 35 of the Interpretation and General Provisions Act on computation of time. The Respondent submitted that from the relevant dates, the day the petition was filed was the fourteenth and final day and therefore the Respondent was in time.

Further, that the Appellant's arguments are misplaced and the case law cited in his skeleton arguments is completely distinguishable from the case *in casu* in that the Appellant had taken a fresh step by filing an Appeal against a decision he believes to be void *ab initio*. Order 2 of the Rules of the Supreme Court was cited in support of this argument. The Respondent concluded that the Appellant's application was misplaced and should be dismissed with costs.

Ms Mwewa augmented the skeleton arguments in opposition and pointed out that this Court is not bound by the case authorities cited by the Appellant. Ms Mwewa urged us to take into consideration the fact that the provisions of the Constitution, the Electoral Process Act and the Local Government Elections Tribunals Rules are fairly new law and this Court must not follow authorities decided prior to the said enactments. Further that the Local Government Elections Tribunals Rules should not be interpreted in isolation but an all-round



approach should be adopted which will reveal that the Respondent in the matter did not breach any rules nor was he out of time when filing the petition.

In reply, Ms Mushipe, relied on the Appellant's filed skeleton arguments in reply in which it was argued that it was misleading and contrary to the intention of the Legislature for the Respondent to argue that the time frame of seven (7) days within which a person may file an election petition stipulated in rule 8 (2) of the Local Government Elections Tribunals Rules is of no consequence. It was argued that it was the intention of the Legislature to restrict discretion with respect to filing petitions before a tribunal and hence the procedural requirement that any person who intends to file an election petition does so within seven (7) days. The Appellant supported this position with arguments on the interpretation of statutes. Reference was made to two English decided cases, namely **Edinburgh Street Tramways v Torbain**<sup>3</sup> and **Attorney General for Canada v Hallet and Carey Ltd**<sup>4</sup> as well as the Supreme Court of Zambia case of the **Attorney General, the Movement for Multi Party Democracy v Akashambatwa Mbikusita Lewanika, Fabian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine**<sup>5</sup>.

Addressing the Respondent's position on section 100 (3) of the Electoral Process Act, the Appellant submitted that the said provision can only be applicable to the case at hand if there were no rules prescribed by the Chief Justice to govern procedures before the tribunal. That as there is no ambiguity in rule 8 (2) of the Local Government Elections Tribunals Rules, recourse to the Electoral Process Act was unwarranted.

It was further argued that the Appellant made the application at hand within a reasonable time after becoming aware of the irregularity in question and before the Respondent could even file its heads of argument in response to the Appeal. That the Court can still hear and determine the motion and the issues made, on a point of law at any stage of the proceedings.

In augmenting the arguments in reply, Ms Mushipe emphasised that this Court is governed by the Constitution which is a *grund* norm. That since Article 159 gives mandate to the Local Government Elections Tribunals Rules, the Respondent's breach of the said rules renders the proceedings of the Tribunal void *ab initio*.

We have carefully considered the motion at hand. While a number of arguments were advanced by the opposing parties, it is our



considered view that the essence of this motion is merely calling upon us to determine whether or not the Respondent filed his petition before the Local Government Elections Tribunal within the prescribed time frame.

The starting point as we see it is the Electoral Process Act which is the regulating legislation for elections. The preamble reads in part as follows:

**An Act to provide for a comprehensive process for a general election;.....; provide for election petitions and the hearing and determination of applications relating to a general election;.....; repeal and replace the Electoral Act, 2006; and provide for matters connected with, or incidental to, the foregoing. (Emphasis ours)**

With specific reference to the period within which an election petition is to be brought, section 100 (3) of the Electoral Process Act provides as follows:

**“(3) An election petition shall be signed by the petitioner or by all the petitioners, if more than one, and shall be presented not later than fourteen days after the date on which the result of the election to which it relates is duly declared.”**

It further provides in section 102 (1) that:

**“(1) Subject to the other provisions of this Act, the Chief Justice may make rules regulating generally the practice and procedure of the High Court and tribunals with respect to the presentation and trial of election petitions, including rules as to the time within which any requirement of the rules is to be complied with and as to the costs of and incidental to the presentation and trial of the election petitions and as to the fees to be charged in respect of**

**proceedings therein, and generally as regard to any other matters relating thereto as the Chief Justice may consider necessary or desirable.**

Pursuant to section 102 (1), the Local Government Elections Tribunals Rules were enacted. Rule 8 (2) of the said Rules provide as follows:

**“A person may file an election petition within seven days of the date on which the result of the election is declared.”**

From the reading of the provisions set out above, it is clear that there is a conflict between the Electoral Process Act which is the enabling legislation and the subsidiary legislation, namely, the Local Government Elections Tribunal Rules in that while the limitation period within which one is to file an election petition is fourteen (14) days under the Act, the Local Government Elections Tribunals Rules prescribes seven (7) days.

The Appellant has argued that based on the literal interpretation of rule 8 (2) of the Local Government Elections Tribunal Rules, the requirement to file the petition within seven (7) days is mandatory. We agree that the words “may file an election petition within seven days” are words of limitation. Hence, the word “may” in this context does not confer discretion on a petitioner as regards whether or not to comply with it but is mandatory in terms of the requirement to file petitions

within the prescribed time frame. The issue, as we see it, is whether the mandatory provision in rule 8 (2) of the Local Government Elections Tribunal Rules can be allowed to stand against the provision in section 100 (3) of the Electoral Process Act. Put differently, can subsidiary legislation be allowed to contradict the enabling legislation?

It is trite law that subsidiary legislation is subject to the provisions of enabling legislation and where the subsidiary legislation is at variance with the enabling Act, it is void to the extent of the inconsistency. Section 20 (4) of the Interpretation and General Provisions Act instructively provides as follows:

**“(4) Any provision of a statutory instrument which is inconsistent with any provision of an Act, Applied Act or Ordinance shall be void to the extent of the inconsistency.”**

It therefore follows that the period within which an election petition challenging ward election results can be filed before the Local Government Election Tribunal is fourteen (14) days as opposed to the seven (7) days stated by the Local Government Elections Tribunals Rules. There is thus need for rule 8 (2) of the Local Government Elections Tribunals Rules to be amended to address the inconsistency and conform to the Electoral Process Act.



Having found that the petition was required to be filed within fourteen (14) days, the next question to consider is whether or not the Respondent filed its petition within this time frame. The affidavit evidence reveals that the election results for State Ranch Ward were declared on 13<sup>th</sup> August, 2016. The 14 day period thus ran from 14<sup>th</sup> August to 27<sup>th</sup> August, 2016, however since the said 27<sup>th</sup> August fell on an excluded day being Saturday, the applicable date is Monday, 29<sup>th</sup> August, 2016. It is thus apparent that the Respondent was in the nick of time when he filed his petition on the said date.

It follows that the Respondent filed his petition in time and in the premises, we cannot grant the reliefs sought by the Appellant. We accordingly dismiss the motion for lack of merit.

Each party is to bear its own costs.



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**M.S. MULENGA**

**CONSTITUTIONAL COURT JUDGE**



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**P. MULONDA**  
**CONSTITUTIONAL COURT JUDGE**



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**M.M. MUNALULA**  
**CONSTITUTIONAL COURTJUDGE**