

2020/CCZ/007

**IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA**

**IN THE MATTER OF: ARTICLES 1 (5) AS READ TOGETHER WITH
ARTICLE 128 (1), (3) OF THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016 OF
THE LAWS OF ZAMBIA. THE JURISDICTION OF
THE CONSTITUTIONAL COURT.**

**IN THE MATTER OF: ARTICLE 1 (1), (2), (3) AND (4) OF THE
CONSTITUTION OF ZAMBIA, THE SUPREMACY
OF THE CONSTITUTION, ITS CONTRAVENTION
IS ILLEGAL AND THAT ALL PERSONS, STATE
ORGANS AND STATE INSTITUTION ARE BOUND
BY IT.**

**IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF ZAMBIA.
THE RIGHT AND DUTY TO DEFEND THE
CONSTITUTION FROM BEING OVERTHROWN,
SUSPENDED OR ILLEGALLY ABROGATED.**

**IN THE MATTER OF: ARTICLE 3 OF THE CONSTITUTION OF ZAMBIA.
THE CONSTITUTION SHALL NOT BE AFFECTED
BY AN UNLAWFUL ACT TO OVERTHROWN,
SUSPEND OR ILLEGALLY ABROGATE ITS
PROVISIONS.**

**IN THE MATTER OF: ARTICLE 60 (2) (d) OF THE CONSTITUTION OF
ZAMBIA. A POLITICAL PARTY WHICH WAS IN
EXISTENCE BY 5TH JANUARY, 2016 WAS INTER
ALIA TO CONDUCT FREE AND FAIR ELECTIONS
WITHIN THE PARTY AND ANY POLITICAL PARTY
WHICH DID NOT CONDUCT A FREE AND FAIR
ELECTION WITHIN 12 MONTHS FROM 5TH
JANUARY, 2019 CEASED TO EXIST AS A PARTY.**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLE 60 OF
THE CONSTITUTION OF ZAMBIA (AMENDMENT)
ACT NO. 2 OF 2016 AND SECTION 18 OF THE
CONSTITUTION OF ZAMBIA ACT NO. 1 OF 2016.**

BETWEEN:

BENJAMIN MWELWA

PETITIONER

AND

THE ATTORNEY GENERAL

1ST RESPONDENT

THE ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

STEVEN KATUKA(In his capacity as
Secretary General of the United Party for
National Development)

**1ST INTERESTED
PARTY**

DAVIES MWILA(In his capacity as
Secretary General of the Patriotic Front)

**2ND INTERESTED
PARTY**

ELIZABETH KATONGO CHITIKA
(In her capacity as National Secretary
for the Movement for Multiparty
Democracy)

**3RD INTERESTED
PARTY**

**Before the Honourable Lady Justice M.S Mulenga on the 17th July,
2020.**

For the Petitioner: In Person

For the 1st Respondent: Ms N.K. Lumbwe, Assistant Senior State Advocate

For the 2nd Respondent: Mr. B.M. Musenga, Commission Secretary
And Mr. M. Bwalya, Legal officer

For the 1st Interested Party: Mr. K. Phiri, Malambo and Company

For the 2nd Interested Party: Mr. S.K. Simwanza standing in for Nganga Yalenga and Associates

For the 3rd Interested Party: Ms. S. Kalima, J & M Advocates

R U L I N G

Cases Cited:

1. *Webby Mulubisha v Attorney General* 2018/CCZ/0013
2. *NFC Mining Plc v Techphro Zambia Limited* (2009) ZR 236
3. *Margaret Mwanakatwe v Charlotte Scott and Attorney General CCZ Selected Ruling No. 11 of 2018*
4. *Hakainde Hichilema and Another v Edgar Chagwa Lungu and 3 Others* 2016/CC/0031, Ruling No. 33 of 2016
5. *Costellow v Somerset County Council* [1993] 1 WLR 256
6. *Finnegan v Parkside Health Authority* [1997] EWCA Civ 2774
7. *Inonge Mubika v Mukelabai Pelekelo CCZ Selected Ruling No. 32 of 2017*

Legislation referred to:

1. *The Constitutional Court Rules, Statutory Instrument No. 37 of 2016.*
2. *The Rules of the Supreme Court 1999 Edition (White Book)*

This ruling is on an application by the 1st Respondent for leave to file an Answer out of time pursuant to Order XV Rule 7 of the Constitutional Court Rules as read together with Order 3 Rule 5 (2) of the Rules of the Supreme Court of England 1999 Edition (White Book).

The brief background to this application is that the Petition herein was filed on 11th May, 2020 by the Petitioner. The matter subsequently came up for a scheduling conference on 28th May, 2020 at which the 1st Respondent was not in attendance. The 1st Respondent's first appearance was on 16th June, 2020 when two applications by the 1st and 2nd Interested Parties were heard and directions given. At this hearing, Counsel for the 1st Respondent sought to make an oral application but was advised to make a formal application, if desired. On 23rd June, 2020 the current application was filed.

At the hearing of the application on 9th July, 2020 both the 1st Respondent and the Petitioner relied on their affidavits and skeleton arguments filed on 23rd June, 2020 and 8th July, 2020, respectively which they augmented with oral submissions. The 1st Respondent's affidavit in support was sworn by one Diana Majokwe Shamabobo who stated that the 1st Respondent was served with the Petition in this matter on 11th May, 2020 and ought to have filed its Answer within 14 days after service of the Petition but failed to do so because of the need for consultations with stakeholders in order to appreciate the full extent of the Petition. The deponent averred that

the 1st Respondent is desirous to file its Answer and affidavit in opposition. She added that no prejudice would be occasioned to the Petitioner if leave was granted to the 1st Respondent to file their Answer out of time.

In the skeleton arguments, the 1st Respondent acknowledged that it was clearly out of time because the Constitutional Court Rules prescribe the time period of 14 days within which an Answer to a Petition ought to be filed. And that since the Petition was filed on 11th May, 2020, the 1st Respondent ought to have filed the Answer on or before 22nd May, 2020.

However, it was the 1st Respondent's submission that Order XV Rule 7 of the Constitutional Court Rules provides for applications for extension of time within which to do something before that time expires whereas Order 3 Rule 5(2) of the White Book gives power to extend time even when the application is made after the expiration of the period. That the 1st Respondent's reliance on Order 3 Rule 5(2) of White Book was by virtue of Order 1 Rule 1 of the Constitutional Court Rules. It was argued that the delay in making the application in time was not deliberate but was due to the need for further consultations as explained in the affidavit in

support. Further, that this was a proper case for the Court to exercise its discretion and grant the 1st Respondent leave to file an Answer out of time as the rights of the parties would not be prejudiced.

Ms. Lumbwe, in augmenting the 1st Respondent's submissions, cited the case of **Webby Mulubisha v Attorney General**¹ in which Judge Munalula allowed an extension of time after noting that such extension was at the court's discretion. She argued that the 1st Respondent's application was made in good faith and should be allowed so that the matter can be properly determined on its merits. She added that what was being requested was the shortest possible time in which to be allowed to file the Answer.

The Petitioner, in opposing the application, stated in his affidavit that the reason given by the 1st Respondent for the failure to file an Answer in time was not convincing because consultations, if any, should have been done within the stated time frame as provided by law. He added that the 1st Respondent had sat on its rights to defend this Petition as it had no defence otherwise the intended Answer would have been exhibited in the affidavit in support of the application, but which was not done. He went on to

state that the 1st Respondent's application had prejudiced the Petitioner by delaying the hearing of the Petition and further, that the application would continue to increase the cost of this matter to the detriment of the Petitioner.

The Petitioner in his filed skeleton arguments stated that when the matter came up for a status conference on the 28th May, 2020, he informed the Court that since the 1st and 2nd Respondents had not complied with Order IV Rule 4(1) of the rules of the Court, his Petition ought to be heard in the absence of the Respondents as provided by Order IX Rule 17(1).

The Petitioner further argued that the effect of Order 3 Rule 5(2) of the White Book was that an application brought under it must be made within the time specified or before the prescribed time lapses. His position therefore was that this Court has no discretion to grant the 1st Respondent's application which was brought after the prescribed 14 days because it was statute barred.

The Petitioner cited, among others, the case of **NFC Mining Plc v Techphro Zambia Limited**² to the effect that the rules of court must be adhered to and that those who choose not to comply do so at their own peril. It was his position that the 1st Respondent had sat

on its rights. He further cited the cases of **Margaret Mwanakatwe v Charlotte Scott and Attorney General**³ and **Hakainde Hichilema and Another v Edgar Chagwa Lungu and 3 Others**⁴ as stating that equity does not assist the indolent.

In augmenting his skeleton arguments, the Petitioner reiterated that because of the absence of convincing reasons for the non-compliance with the mandatory rules and the failure to exhibit the intended Answer, the 1st Respondent's application should be dismissed with costs.

In reply, Ms. Lumbwe maintained that the Court has discretion to grant the application and that what the 1st Respondent was seeking was a short period within which to file its Answer.

I have considered the submissions by the respective parties. Before I delve into the substantive application, I wish to address the submission by the Petitioner that for discretion to be exercised under Order 3 Rule 5(2) of the White Book, the requirement is that the application should be filed before the prescribed time for taking a step lapses, otherwise the application becomes statute barred. The Petitioner did not advance any authority for this proposition

which is contrary to the construction of Rule 5 (2). This argument was thus misconceived.

The 1st Respondent's application has been brought pursuant to Order XV Rule 7 of the Constitutional Court Rules and Order 3 Rule 5(2) of the White Book. Order XV Rule 7(1) of the Constitutional Court Rules provides as follows:

The Court may extend time limited by these rules, or by a decision of the Court except where time is specifically limited by the Constitution.

Order 3 Rule 5(2) of the White Book provides that:

The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

The use of the word 'may' denotes discretion on the part of the court. The purpose of this discretion is elaborated in the explanatory note under paragraph 3/5/2 which provides that "*the object of the rule is to give the court discretion to extend time with a view to the avoidance of injustice to the parties*". Thus, the court in exercising discretion must decide whether or not to excuse a litigant based on the facts and circumstances of each case on its own merits and at the core of exercising this discretion is ensuring that justice is served.

In determining whether to exercise discretion in favour of an applicant, the court must consider the principles by which such discretion is exercised. In the case of **Costellow v Somerset County Council**⁵ it was aptly stated that:

The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court discretion to dismiss on failure to comply with a time limit...The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by Order 3 rule 5, a discretion to be exercised in accordance with the requirements of justice in the particular case.

I must add that these principles apply to all parties to a cause or matter and not only to the plaintiffs or petitioners.

As regards applications under Order 3 Rule 5 of the White Book, it was stated in the **Costellow**⁵ case that:

The approach to applications under Order 3 rule 5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall requirement of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the

defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Order 3 rule 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.

This shows that where a party will suffer prejudice which cannot be compensated for by an appropriate award of costs then it would be inappropriate to exercise the discretion to its detriment in the absence of special or exceptional circumstances.

What is clear therefore is that in judiciously exercising the discretion, the Court has to take into account the overriding principle that justice must be done. Hence, there must be good cause to exercise the discretion because a party in default is not entitled to an automatic or an unfettered right to the exercise of discretion in its favour. Granting the discretion routinely would defeat the whole purpose of court rules and ensuring that the parties abide by them.

Thus, in ascertaining the requirements of justice, the court should consider the reasons for the party's failure to comply with the rules of court and whether the delay was inordinate.

Arising from the submissions by the parties, the issues for determination are firstly, whether the 1st Respondent has proffered

sufficient reasons for failure to file an Answer within the prescribed time; secondly, whether the delay in filing the application was inordinate; and thirdly, whether the Petitioner will be prejudiced should the 1st Respondent's application be granted.

In considering the issues, I wish to recount the facts. The facts are that the Petition was filed on 11th May, 2020 and the Court held hearings on 28th May, 2020 and 16th June, 2020. The 1st Respondent acknowledged that it was served with the documentation in relation to this matter and that it breached the rules of court by not filing an Answer within the prescribed period. The record shows that all the other parties who were served attended both the hearings on the given dates except for the 1st Respondent. The 1st Respondent only attended the second hearing and subsequently filed an application for leave to file an Answer out of time on 23rd June, 2020. The reason proffered by the 1st Respondent for the delay in filing the Answer was that it needed to consult relevant stakeholders in order to appreciate the full extent of the Petition.

With regard to the first issue, the Petitioner herein has argued that the reasons given by the 1st Respondent for its failure to file an

Answer within the prescribed time are not convincing. The case of **Finnegan v Parkside Health Authority**⁶ addressed a similar argument regarding the sufficiency of the reasons provided by a party. It was stated that the court has the widest discretion in such matters after considering the circumstances of the particular case and further that:

The absence of a good reason is not always and in itself sufficient to justify the court in refusing to exercise its discretion.

I note that the 1st Respondent has offered one brief reason that they were still consulting with stakeholders, hence the delay. The issue is not whether the reason was ‘convincing’, in the words of the Petitioner, but whether it is good or sufficient. In the circumstances of this case, it can barely pass for a sufficient reason. The other argument by the Petitioner regarding the need to attach an intended Answer is not a critical factor in this case in the absence of an express requirement.

The second issue is whether the delay by the 1st Respondent in filing the application was inordinate. I have considered the fact that the 1st Respondent raised the issue of leave to file out of time verbally at its first appearance in this matter on 16th June, 2020

and was advised to make an appropriate formal application. This is what apparently led to the filing of the current application. I am alive to the delay in making this application, which was filed about a month after the expiration of time, and the tardy manner in which the 1st Respondent proceeded in this matter. I must state that consultations with stakeholders or challenges encountered in obtaining instructions are not a basis to prevent the 1st Respondent from complying with the rules or at least promptly make an application for leave to file an Answer out of time. This notwithstanding, the issue of inordinate delay has to be considered holistically in light of all the circumstances in this case.

The third issue is that of prejudice to be occasioned to the Petitioner. Two aspects of prejudice raised by the Petitioner are namely, that the hearing of his Petition would be delayed and that his costs will be increased. I however note that at the current stage of the proceedings, where there is a pending motion by the 1st Interested Party to dismiss the Petition, the prejudice likely to be suffered by the Petitioner with regard to this matter is in relation to the costs. In view of the conduct of the 1st Respondent which has

caused the Petitioner to defend this application, an award of costs is justifiable.

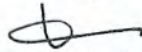
As discussed above, the Court is at liberty to exercise its discretion where no prejudice will be suffered by the other party and where the circumstances of the case so require in the interest of justice unless there is some special or exceptional circumstance. This principle has long been established by precedent including in this Court in several cases. These include the case of **Webby Mulubisha**¹ cited by the 1st Respondent and the case of **Inonge Mubika v Mukelabai Pelekelo** where it was held that all the circumstances of the case should be considered.

Having considered the circumstances of this case, I am satisfied that this is a case where discretion can be exercised and the 1st Respondent condemned in costs.

I hereby grant the 1st Respondent application for leave to file its Answer and affidavit in opposition out of time. The Answer and affidavit in opposition must be filed by 24th July, 2020 failure to which the application shall stand dismissed.

Costs for this application are for the Petitioner.

Delivered at Lusaka this 17th day of July, 2020



M.S Mulenga
Constitutional Court Judge