

**IN THE LOCAL GOVERNMENT ELECTION
PETITION TRIBUNAL FOR THE KAFUE DISTRICT
HOLDEN AT KAFUE
(Constitutional Jurisdiction)**

**IN THE MATTER OF: ARTICLE 47(3), 153(1) And 159(3) Of The Constitution Of
 The Republic Of Zambia (Amendment) Act No: 2 Of 2016.**

AND

**IN THE MATTER OF: SECTION 72(1) (B), 96(1) (C)(I), 98 (C), 99 AND 100(3) Of
 The Electoral Process Act No:35 Of 2016.**

AND

**IN THE MATTER OF: The Local Government Elections Tribunal Rules, 2016
 Statutory Instrument No: 60 Of 2016**

AND

**IN THE MATTER OF: Local Government Elections for Chiawa Ward held on the 12th
 August, 2021.**

BETWEEN:

JEREMIAH MULINGANIZA

PETITIONER

AND

JONES KATIYO

1ST RESPONDENT

ELECTORAL COMMISSION OF ZAMBIA

2ND RESPONDENT

CORAM: I.T. Wishimanga, J. Mataliro and K.N Mundia

For the Petitioner: In Person

For the First Respondent: Mr. Khosa BCM Legal Practitioners

RULING

Cases Referred to:

- 1. Leopard Walfold Limited vs. Unifreight SCZ Judgment No.23 of 1985*

- 2. *City Express Service Limited vs. Southern Cross Motors Limited* (2007) ZR 263**
- 3. *Ndhlovu & Another vs. AL Shams Building Materials Company Limited* (2002) ZR 48**
- 4. *Gift Luyako Chilombo v Biton Manje Hamaleke* 2016/CC/A004 (App. No.2 of 2016)**
- 5. *Henry M. Kapoko Vs The People* 2016/CC/0023**
- 6. *NFC Africa Mining Plc Vs. Techro Zambia Limited* SCJ Judgment No. 22 of 2009**
- 7. *JCN Holdings Limited vs. Development Bank of Zambia* (2013) 3 ZR 299**
- 8. *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited* (1989) KLR 19**
- 9. *Elias Tembo vs. Florence Chiwela Salati & Others* SCZ Appeal No. 200 of 2016**

Legislation Referred to:

- 1. *The High Court Act Chapter 27***
- 2. *The Electoral Process Act No. 35 of 2016***
- 3. *The Local Government Election Tribunal Rules SI No. 60 of 2016***
- 4. *The Rules of the Supreme Court of England, 1999 Edition***

Other Works Referred to:

- 1. *Zambian Civil Procedure Commentary and Cases LexisNexis 1st Ed. 2017 Vol. 1 at page 469***

Read by Mr. J. Mataliro

1.0 Introduction

1.1 This is an application by the 1st Respondent herein by way of preliminary issue to dismiss the petition for irregularity. According to the Notice of Intention to Raise Preliminary Issue filed into this Tribunal, the preliminary issue has been raised pursuant to Rule 21 of the Local Government Electoral Tribunal Rules, Statutory Instrument No. 60 of 2016. The 1st Respondent, in his Notice to Raise Preliminary Issue has asked this Tribunal to determine whether the petition before us should not be dismissed for irregularity based on the fact that the petition and affidavit verifying the petition did not comply with the mandatory provisions of sections 99 and 100 of the Electoral Process Act No. 35 of 2016 and Order V of the High Court Rules chapter 27 of the laws of Zambia respectively.

1.2 In arguing this application counsel for the Respondent Mr. Khoza has stated that the petition in its form and content offends the mandatory provisions of sections 100 of the Electoral Process Act aforesaid. He has stated that the petition before us has no relief in it. Counsel has argued that rule 9 of the Local Government Election Tribunal Rules under Statutory Instrument No. 60 of 2016 makes it mandatory for a petition to have a prayer as a relief. But the petition before us, he argued, has no such prayer thereby offending the said rule.

1.3 Mr. Khosa has also argued in the second limb of his argument that the affidavit verifying the said petition also offends Order 5 of the High Court Rules, in particular rules 16, 17, 18 and 20 of the said Order 5. He argued that

the affidavit in question contains extraneous matters that are not supposed to be contained in an affidavit.

1.4 In response, the Petitioner does not dispute the fact that the petition and affidavit are defective but merely argues that such defects are curable. In support of such an argument the Petitioner has cited Article 118 (2) (e) of the Republican Constitution as amended by Act No. 2 of 2016. He has also cited the case of **Leopard Walfold Limited vs. Unifreight SCZ Judgment No. 23 of 1985** in support of his argument.

1.5 We have considered the documents filed into this Tribunal and indeed the submission by counsel and the Petitioner.

1.6 We are quick to state that Rule 21 of the Local Government Elections Tribunal Rules Statutory Instrument No. 60 of 2016 provides for power of this Tribunal to entertain and determine any preliminary issue that may be raised by a party. The preliminary issue has been raised on a point of law.

1.7 It is a common and trite principle of law that a preliminary issue such as this one before us now can be raised at any point during trial of a matter. In the case of **City Express Service Limited vs. Southern Cross Motors Limited (2007) ZR 263** it was held that a preliminary issue touching on the question of limitation period is a point of law which can be raised and considered at any stage of the proceedings.

1.8 **Order 18.r.11 of the RSC 1999 Ed.** States that a defendant may at trial raise a point of law open to him even though not pleaded.

1.9 In the case of **Ndhlovu & Another vs. AL Shams Building Materials Company Limited (2002) ZR 48** it was held that there can be no estoppel against a statute. A litigant can plead the benefit of a statute at any stage.

1.10 In his book '**Zambian Civil Procedure Commentary and Cases**' **LexisNexis 1st Ed. 2017 Vol. 1 at page 469** his lordship Mr. Justice Dr. Patrick Matibini SC stated that an application under rule 1 of order 14A of the RSC 1999 ed. may be made by summons or motion or may be made orally in the course of any interlocutory application to the court.

1.11 In the premises, we are satisfied that the 1st Respondent is within his right to raise this preliminary issue at this point as he is within the law to so do. Therefore, we are satisfied that we do have jurisdiction to hear the preliminary issue in question as it is on a point of law.

2.0 The Application

2.1 The question that has been raised in the first issue is whether the petition is properly before this Tribunal and therefore this Tribunal has jurisdiction to hear and determine it.

2.2 The law governing the form of an election petition is prescribed under section 100 of the Electoral Process Act No 35 of 2016. Under the said provision mandatory requirements have been set as to how an election petition, be it local government or parliamentary, should be in content and form.

2.3 Section 100(1) states that an election petition shall be in such form as the Chief Justice may by Rules prescribe. Rule 8, and not Rule 9 as was stated by Mr.

Khoza in his submission, of the Local Government Election Tribunal Rules has prescribed the form of the petition. The form is found in the First Schedule of the said Rules.

2.4 From the above provisions, it is clear that there are mandatory requirements which the petition must comply with. One of such requirements is that the petition must be in substantial conformity with the form under the First Schedule of the Rules.

2.5 We observe from our reading of the said form in the First Schedule aforesaid that a petition must not only state the facts and grounds upon which the petitioner relies but also must state the relief which the petitioner is seeking the Tribunal to grant.

2.6 Our perusal of the petition before us reveals that the said petition does not state any facts and or grounds upon which the petitioner is relying. It also doesn't state what relief the petitioner is seeking.

2.7 With such findings the next question is whether this Tribunal can consider such a petition as being in substantial conformity in form and content with the form provided in the First Schedule of the Local Government Election Tribunal Rules, and more so that the petition complies with provisions of section 100 of the Electoral Process Act No. 35 of 2016.

2.8 As stated above, the petition has no grounds or facts upon which the petitioner is relying. Further, the Petitioner has not stated any relief he is seeking before this Tribunal.

2.9 We are alive of the argument which the Petitioner has put up in his argument and indeed the provisions of Rules 9 (3) of the Local Government Election Tribunal Rules Statutory Instrument No. 60 of 2016. The said Rule 9 (3) empowers this Tribunal to make an order requiring any party to make available any particulars that may be necessary or that such particulars be excluded for the fair hearing of a petition. The said Rule 9 (3) flows from Rule 9 (2) which prohibits the inclusion of evidence in a petition.

2.10 Thus, the question is whether a relief in a petition can be said to be particulars envisaged under Rule 9 (3) such that it can be said that this Tribunal is clothed with discretionary powers to order that a party provides such lacking particulars.

2.11 In order to settle this issue we have looked at how the superior courts have interpreted section 100 of the Electoral Process Act. In the case of **Gift Luyako Chilombo v Biton Manje Hamaleke 2016/CC/A004 (App. No.2 of 2016)** the Constitutional Court held that there was no petition before the Tribunal where it was established that the election petition did not meet the mandatory requirements of section 100 (3) of the Act. In that case, the Petitioner did not sign the petition and the Constitutional Court held that the requirement for the petitioner to sign the petition was a mandatory requirement. In the same case the court emphasized the need for a strict application of the Rules.

2.12 Thus, it our considered view that the relief in a petition is as important a part as the petitioner's signature, such that the lack thereof renders a petition not a petition at all. A relief and petitioner's signature are such particulars that are not and do not fall within the purview of the particulars being

envisaged under Rule 9 (3) of the Rules such that it can be said that the lack thereof creates a defect that is curable under the said Rule as it has been argued by the Petitioner. Our view is that the particulars envisaged under Rule 9 (3) are those particulars relating to facts as distinguished from evidence which is being proscribed by Rule 9(2) of the Rules.

2.13 We have held the position that the relief in a petition is as important as the petitioner's signature taking into account the fact that both requirements flow from the same section of the law and there is no reason why one requirement should be considered to be subservient to the other. Thus the absence of a relief in a petition is as fatal as the absence of a petitioner's signature in a petition is. Our position is actually buttressed by the fact that it is trite that a court and later on a tribunal cannot grant a relief which a party has not specifically pleaded.

2.14 Thus, it is clear that the petition before us offends not only section 100 of the Electoral Process Act No. 35 of 2016 but also Rule 8 of the Local Government Election Tribunal Rules Statutory Instrument No. 60 of 2016. The Petitioner as admitted by himself, failed to comply with the Rules.

2.15 His argument that the omission is curable cannot stand. His reliance of Article 118 (2) (e) of the Constitution aforesaid is incorrect. We say so because the said Article is not intended to protect those who willingly choose to ignore the rules.

2.16 In interpreting the same Article the Constitutional Court in the case of **Henry M. Kapoko Vs The People 2016/CC/0023** the court stated that Article 118 (2) (e) of the constitution is not intended to do away with existing

principles, laws and procedures even where the same constitute technicalities. The court stated that it is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality. The court went further to state that rules are necessary to enable the parties to anticipate their role in the legal proceedings and make sense of the litigation process. The court stated that the common law adversarial system which is the foundation of the legal system is founded on procedural justice as the means to manifestation of substantive justice. By following prescribed rules the court is held to an objective standard and justice is not only done it is seen to be done.

2.17 In the case of **NFC Africa Mining Plc Vs. Techro Zambia Limited SCJ Judgment No. 22 of 2009** the Supreme Court stated that rules of court are intended to assist in the proper and orderly administration of justice. In the case of **Twampane Mining Co-operative Society Limited vs. E and M Storti Mining Limited SCZ Judgment No. 20 of 2011** the Supreme Court stated that it is important to adhere to Rules of Court in order to ensure that matters are heard in an orderly and expeditious manner. Those who choose to ignore Rules of Court do so at their own peril.

2.18 It is our considered view that the above authorities do not support the view taken by the Petitioner that the defects are curable.

2.19 Thus, having established that the petition has no relief is it then possible to say that this Tribunal has jurisdiction to entertain it and proceed to make any orders under it?

2.20 Our position is that this Tribunal is divested of any jurisdiction to hear this petition. Thus it cannot make any order that would be competent as it lacks jurisdiction.

2.21 In the case of **JCN Holdings Limited vs. Development Bank of Zambia (2013) 3 ZR 299** the Supreme Court stated as follows;

“It is clear from the Chikuta and New Plast Industries cases that if a court has no jurisdiction to hear and determine a matter, it cannot make any lawful orders or grant any remedies sought by a party to that matter.”

2.22 In the case of **Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Limited (1989) KLR 19** the Kenyan Court of Appeal stated as follows;

“It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings...A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.”

2.23 In the case of **Elias Tembo vs. Florence Chiwela Salati & Others SCZ Appeal No. 200 of 2016** the Supreme Court of Zambia in its ruling on a

preliminary issue it raised on its own volition stated that "*Out of nothing, comes nothing*"

2.24 Based on the forgoing we hold that this Tribunal has no jurisdiction to hear this petition or make any order at all. The petition is therefore dismissible and we accordingly dismiss it.

2.25 Having resolved the first issue as we have done hereinbefore, we find it irrelevant to consider other issue of an affidavit.

2.26 We make no orders as to costs.

Dated this.....^{17th}.....day of.....^{September}.....2021



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Hon. I.T. Wishimanga – Chairperson



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Mr. J. Mataliro – Member



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Mrs. K. N. Mundia - Member