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Is the Constitutional Court Fanning the Flames of Potential Unrest? A Review of Recent Political Cases

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Is the Constitutional Court Fanning the Flames of Potential Unrest? A Review of Recent Political Cases[1]

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Facts

On 14 May 2021, the Constitutional Court of Zambia (ConCourt) delivered a ruling in the case where Charles Mathias Zulu[5] had requested interpretation of Article 70 (1)(d) of the Constitution of Zambia as it relates to an aspirant Member of Parliament (MP) having obtained a Grade twelve certificate or its equivalent, as the minimum academic qualification. The ConCourt delivered a five-page ruling dismissing the case on the ground that the interpretation of Article 71(1)(d) of the Constitution was well settled in its earlier decision in *Bizwayo Newton Nkunika v Lawrence Nyirenda and Another (2019/CCZ/005),* delivered on 10 March 2021.

Without delving into the merits of the Zulu case, we are deeply concerned about the impoverished character of this ruling which, when analysed in the context of some recent decisions and actions of the ConCourt in politically inclined cases, establishes a disturbing pattern which is an affront to constitutionalism, rule of law and access to justice in Zambia. We argue that the recent decisions and actions of the ConCourt in relation to most constitutional and political cases, have the potential to cause political unrest. This is so because public confidence in the capacity of the ConCourt to dispense justice in political problems of a constitutional nature, is likely to be diminished. We demonstrate this view by reviewing at least four recent constitutional and political cases which the ConCourt has settled, but against the principles of constitutionalism, rule of law and access to justice.

Significance

We start by unpacking the ruling in the Zulu case. After reproducing the questions raised by the applicants and the preliminary issues by the Attorney General, the ConCourt tersely held: 'We have considered the issues raised in the Motion, the affidavit evidence by both sides and the skeleton arguments. We have also considered the oral submissions made during the hearing. We agree that the interpretation of Article 70(1)(d) of the Constitution was well settled in the case of *Bizwayo Newton Nkunika v Lawrence Nyirenda and Another*.'[6]

From that premise, the ConCourt renders its decision thus: 'Accordingly, we find merit in the first preliminary issue. Given our position regarding the first preliminary issue, the second preliminary issue, therefore, falls away.'[7] How is this ruling an act of judging when the judges have not analysed anything? The Supreme Court of Zambia, in the case, *Minister of Home Affairs and Attorney General v Lee Habasonde (2007) ZR 207* and several other cases, has given guidance on the minimum standard expected of every judicial decision: 'Every judgment must reveal a review of evidence, where applicable, a summary of the arguments and

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[5] Charles Mathias Zulu v Electoral Commission of Zambia and Attorney General 2021/CCZ/0015
[6] Ibid
[7] Ibid

submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities if any, to the facts.'

The retired Nigerian Supreme Court judge, Odemwengie Uwaifo, beautifully summed the nature of court decisions as follows: 'a judge should not just write his judgment. He must let it appear he made it with a clear commitment to convince. That must be demonstrated by the quality of its analysis and transparency. An unconvincing judgment is like a song rendered in awkward decibel: it can neither entertain nor can it be danced to.'[8]

We cannot find these minimum standards of writing court decisions in the decision reached by the ConCourt in the Zulu case. At the very least, it was expected that the ConCourt would have engaged with the principles of law on the concept of res judicata and show, based on the facts of the Zulu case, how the concept was applied and upheld in this particular case. To succeed, the party relying on res judicata must show that the cause of action is the same or that the claimant had an opportunity to recover from the first action what they are seeking in the second, but for their own fault. The ConCourt failed to do so by not rendering a reasoned ruling, in line with the Supreme Court guidance we have alluded to. As a matter of emphasis, the ConCourt was obliged to explain to both the Applicant and the general public how it interpreted Article 70(1)(d) of the Constitution with regard to the specific question posed by the Applicant, that is, whether tertiary qualifications which are not equivalent to a Grade 12 Certificate would be considered separately, the Grade 12 Certificate and its equivalent being the minimum requirement.

The second case we wish to highlight is *Bampi Aubrey Kapalasa and Joseph Busenga v The Attorney General 2021/CCZ/011/0014* which was filed into the Concourt on 13 April 2021. The gist of the Petitioners' claim was for the ConCourt to 'clarify if President Edgar Chagwa Lungu is eligible to contest the 2021 Presidential Elections.' The ConCourt dismissed the application with regard to the eligibility question by upholding a preliminary issue raised by the Attorney General. According to the Attorney General, the issues raised by the Petitioners were res judicata on account of the ConCourt's controversial 2018 judgment in *Daniel Pule and Others v The Attorney General and Others*. The matter was dismissed on 5 May 2021 and the Concourt reserved its ruling to a later date. The written ruling was subsequently delivered on 18 May 2021, a day after President Lungu had successfully filed his nomination with the Electoral Commission of Zambia (ECZ).

In its ruling, the ConCourt changed the preliminary issue raised by the Attorney General from the matter being res judicata and functus officio to it being an abuse of the process of court. This peculiar method of constitutional adjudication whereby an adjudicator substitutes parties' claims, which we also saw in the ConCourt's judgment in Daniel Pule, remains under active legal inquiry. The ConCourt then proceeded to extensively quote from its judgment in the Pule case in an effort to demonstrate that it had answered the question posed by the Petitioners. The ConCourt then held: 'it was conclusively determined (in the Pule judgment) that the term of office that spanned a period from 25 January 2015 to 13 September 2016 did not constitute a term for the purposes of Article 106(3) as read together with Article 106(6) of the Constitution. It follows that the same cannot be counted as a term for the purposes of Article 106(3) of the Constitution.'

[8] Justice Odemwingie Uwaifo's Valedictory Speech on His Retirement as Justice of the Supreme Court on 24 January 2004

The import of this finding is that the Pule judgment is altered by the ConCourt, by linking the period said to not constitute a full term to Article 106(3). In so doing, the ConCourt, whilst still evading the specific question in relation to President Lungu, is effectively admitting that this recurring legal and constitutional question was not answered exhaustively in the Pule judgment or alternatively, that the answer remains unclear. This could possibly explain the ConCourt's decision compelling Kapalasa and Busenga to prosecute the Petition which the Petitioners themselves had otherwise sought to withdraw. This is another curious decision where a written ruling was not rendered, thereby inviting speculation in relation to the ConCourt's motivation for expending its resources on a matter that it deemed to be an abuse of the process of court and against the wishes of the Petitioners.

Consequently, this trend of issuing rulings with inadequately articulated reasons erodes the public confidence in the judiciary. The public should be able to see that justice has been done thereby reinforcing public confidence in the judicial system. Reasoned decisions also motivate confidence and respect in the technical competence and qualifications of judges. On the whole, a judgment without reason lacks both legal and moral force to convince a losing litigant to accept the outcome of the decision. As constitutional law scholar Koos Malan has argued, it is 'through their legal knowledge, wisdom and reasoned decision-making [that] they earn respect and high esteem and command moral authority. That respect is the source of the court's moral power.'[9] It is therefore not surprising that in order to command respect, the ConCourt in the *Kapalasa and Busenga v. Attorney General* ruling has dedicated two entire paragraphs towards demanding respect, at the expense of articulating a well - reasoned decision, which in turn would naturally and effortlessly, assert the superiority and importance of the ConCourt in Zambia.

The third case we wish to highlight is the Petition by Chapter One Foundation (COF)[10] challenging the decision by the ECZ to discard the valid and lawfully established voters' register and conduct fresh registration of voters for the 2021 elections within a period of 30 days. This decision by ECZ was subject to three legal challenges, including two judicial review applications in the High Court which were not heard on account of this ConCourt matter.

COF commenced this public interest case on 3 August 2020 seeking two reliefs: an order directing ECZ to conduct continuous voter registration and another directing the Ministry of Home Affairs to conduct mobile issuance of National Registration Cards throughout the country. COF amended its process on 1 October 2020 after ECZ announced its decision to abolish the existing voter register to include a third relief, 'a declaration that ECZ's decision and intention to disallow currently registered voters from voting in the 2021 general election and future elections is unconstitutional and, therefore, null and void.' To date, the ConCourt has not heard this matter, notwithstanding that its non-resolution has now had the actual effect of disenfranchising tens of thousands of voters without legal recourse.

What is curious about this case is the inordinate delay in hearing the matter and giving a timely remedy which could have prevented many Zambians from being disenfranchised. Admittedly, timeous resolution of disputes is a key principle of access to justice which is expressed in Article 118(2)(b) of the Constitution of Zambia as follows: 'justice shall not be delayed.'

[9] Koos Malan, *There is No Supreme Constitution: A Critique of Statist-Individualist Constitutionalism* (Sun Press, 2019) 170

[10] < https://diggers.news/courts/2020/08/07/chapter-one-drags-ecz-to-concourt-over-30-days-voter-registration-exercise/ > accessed 20 May 2021

The ECZ having completed the fresh registration of voters between 9 November and 20 December 2020 (almost six weeks after COF requested the order of invalidity), any decision that the ConCourt may render on this matter will be moot. This leaves citizens with a sense of hopelessness in the capacity of the ConCourt to give effective remedies to constitutional challenges. Compared to the urgency given to subsequent cases, such as the Kapalasa and Busenga case (which we have already considered above) and the John Sangwa case (which we consider below), one would not be faulted for thinking that the ConCourt is more preoccupied with furthering the political interests of the elites, whilst denying access to justice to the ordinary people from whom they derive judicial authority. At this juncture, we underscore the view that respect for any court emanates from that court's own penchant for unambiguously upholding the law, irrespective of who is affected.

The final case we evaluate is the Petition filed by John Sangwa, SC on 4 May 2021[11] which sought an order to compel the ECZ to amend the Affidavit which accompanies the application for nomination of presidential candidates to include the qualifications under Article 106(3) of the Constitution. The Attorney General and another interested party, Lewis Mosho joined the proceedings and opposed the Petition. The Petitioner objected to the joinder of the Attorney General on ground that the action undermined the independence of the ECZ. Further, the Petitioner objected to Mosho's application on grounds that Mosho lacked the requisite standing to raise the issues raised as an interested party.

Yet again, the ConCourt dismissed the Petition with costs on 5 May 2021, and without delivering a written or reasoned ruling for the dismissal. Without speculating on the reasons for dismissing such a profound matter, in the absence of a reasoned ruling, we are shockedby the subsequent order for costs in this constitutional matter. Moreover, it is not clear if this order for costs covers both the Attorney General and the intervening party who joined the proceedings at their own instance. If media reports doing the rounds are anything to go by, the Attorney General and the interested party have since issued a demand for the respective colossal sums of K5 million and K3 million in costs.

Challenging the constitutionality of a practice or law is an exercise of a fundamental constitutional entitlement and duty according to Article 2 (a) and (b) as read with several other provisions of the Constitution. This duty in defence of the Constitution should not carry any risk of costs. The importance of this inviolable principle was forcefully stated by the Supreme Court in Zambia in the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others (2005) ZR 138* as follows: 'As we have always said on costs in matters of this nature, it is in the interest of the proper function of our democracy that challenges to the election of the president, which are permitted by the Constitution and which are not frivolous should not be inhibited by unwarranted condemnation in costs.' That the court did not render a ruling makes it impossible to decipher exactly how the Petition filed by Sangwa can reasonably be considered frivolous considering that it raised a novel, pertinent and fundamental constitutional question, falling within the legal mandate of the ConCourt.

Undoubtedly, this condemnation of Sangwa to costs has also exposed the ConCourt's deficiency in comparative research, which has led to the churning out of legally impoverished judgments, lacking in intellectual candour and depth. The South African Constitutional Court, for example, in the case of *Trustees for the Time Being of the Biowatch Trust v Registrar Genetic (2009)*, has elaborated a three-fold rationale for ordinarily not ordering costs in constitutional matters. First, it diminishes the chilling effect that adverse costs orders can have

[11] < https://www.lusakatimes.com/2021/05/14/john-sangwa-suffers-major-setback-in-his-case-against-electoral-commission-of-zambia/ > accessed 29 May 2021

on parties asserting constitutional rights and might have the effect of citizens foregoing meritorious constitutional claims. Secondly, constitutional litigation, regardless of the outcome, might bear not only on the interests of litigants directly involved in a matter, but may also have consequences on the rights of others similarly situated. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the constitution and the law. The fact that the ConCourt did not find in favour of a litigant is not sufficient warrant to order costs. The ConCourt must take a broader look at matters raised and consider how a costs order may hinder or promote the advancement of justice. Courts in Lesotho have equally taken the South African approach. Writing for the unanimous Lesotho Court of Appeal, Justice Philip Musonda (who, by the way, is a retired judge of the Zambian Supreme Court), held that in constitutional matters, even if a litigant laboured under the misconception that they had a good case, that alone is not sufficient ground for the court to order costs when the case is lost (see the cases of *Kananelo Mosito and Others v Ohalehang and Others (2018)* and *The President of the Court of Appeal v The Prime Minister (2013*)).

An additional, and perhaps more compelling reason for not ordinarily condemning public interest litigants to costs, is that allowing aggrieved parties to seek relief in the courts without risking being condemned to costs potentially opens the courts widely to the people. As distinguished Ghanaian constitutional law scholar, Kwasi Prempeh put it, it allows judges to 'take the courts to the people.'[12] In effect, this would ensure that courts become the commonly used avenues for resolution of contested democratic claims as opposed to resorting to street violence or other self-help means. As opined in this article, the approach taken by the Constitutional Court of Zambia could potentially be encouraging people to take their constitutional and political contests to the streets, thereby fanning flames of unrest that may, regrettably, be difficult to quench.

In the final analysis, the cases we have discussed in this article raise fundamental questions about access to justice. Inefficient delivery of judgments, issuance of unreasoned or thinly reasoned rulings, inordinate delay in hearing matters, and awarding of unwarranted costs in public interest matters all militate against access to justice. Access to justice is important in maintaining law and order and promoting the rule of law. As US Supreme Court Judge, Stevens, stated in *Bush v Gore 531 US 98 (2000)*, 'It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.' Where institutions fail, the public may resort to self-help mechanisms as a means to exercise their sovereign power under the Constitution which may negatively affect the consolidation of democracy. The warning of Julius Nyerere, first President of Tanzania seems more relevant to the Constitutional Court of Zambia today than ever before: unless judges do their work properly, 'none of the objectives of our democratic society can be implemented.'[13]

[12] Cited in O'Brien Kaaba, "The People v The Patents and Companies Registration Agency Ex-Partes Finsbury Investment Limited and Zambezi Portland Limited," (2019) 2 *Saipar Case Review*, 7-12

[13] Cited in O'Brien Kaaba, The Challenges of Adjudicating Presidential Election Disputes in Africa: Exploring the Viability of Establishing an African Supranational Elections Tribunal," (LLD Thesis, University of South Africa, 2015) 79