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Katuka v Electoral Commission of Zambia
(2016/CC/0025) [2016] ZMCC 2 (9 August 2016)

Chanda Chungu

The Facts

The dispute concerned the Parliamentary election in the Petauke constituency in the Eastern Province of Zambia. The Petitioner was seeking an order by the Constitutional court compelling the Electoral Commission of Zambia (“ECZ”) to cancel the Parliamentary elections in Petauke Central constituency and call for fresh nominations.

According to Article 52(6) of the Constitution of Zambia (Amendment) Act, elections must be cancelled when a candidate withdraws, dies or is disqualified before the election date. The Petitioner based his claim on the alleged withdrawal of one of the candidates for the Parliamentary seat, Mr. Josab Changa. The Petitioner relied on newspaper articles and media reports that alluded to the fact that Mr. Changa had withdrawn his candidacy for the Petauke Central Parliamentary seat. The Petitioner alleged that Mr. Changa’s failure to clarify the media reports when asked to do so by ECZ was evidence that he had withdrawn from the election, and therefore the election had to be cancelled and fresh nominations called for.

In response, the Electoral Commission of Zambia averred that it was a public body established to serve the interest of the people of Zambia and could not, when discharging its functions, be driven by rumors. The ECZ further averred that after calling Mr. Changa to a meeting and asking him to submit a formal withdrawal of his candidature, he failed to do so. As a result of not receiving official notification of his withdrawal as a candidate, the commission argued that they had no reasonable cause to cancel the election in terms of Article 52(6).

Legal Issues

Substantively, the legal issue to be determined by the court was this; what constitutes withdrawal of candidature for an election to the National Assembly?

The Holding

The court held that since a Petitioner who alleges a fact must prove it to the required standard, the fact that the Petitioner did not provide documentary proof (besides media reports), meant that the evidentiary burden was not discharged. The failure of the Petitioner to cite Mr. Changa as a respondent was also detrimental to this case, as he could not definitively state if he had actually withdrawn his candidature.

The court was emphatic that a withdrawal of candidature must be formal, that is, expressed in writing to the Electoral Commission of Zambia. The court held that in the same manner one formally files nomination papers to run for a Parliamentary seat, one must also formally write to the commission when withdrawing from an election. Notably, the court refused to take judicial notice of newspaper reports of Mr. Changa's alleged withdrawal.

Because no formal communication or letter of withdrawal was received, the court held that ECZ had no legal basis on which to cancel elections and call for fresh nominations and that consequently; Article 52(6) was not breached.

The Significance

The case raises interesting questions about judicial notice. The Shamwana¹ case is probably the leading case on judicial notice in Zambia. It held that a court may take judicial notice of facts which are common knowledge and in doing so may refer to its own record.² In the well-known British

1 *The People v Edward Jack Shamwana and 12 others* (1982) Z.R. 122 (HC)

2 *Ibid* at page 11.

case of *Commonwealth Shipping v Peninsular Branch Service*,³ the court held that judicial notice shall be taken from facts which are of “general knowledge” or from “inquiries to be made by himself for his own information from sources to which it is proper to refer”.⁴ Whether or not taking judicial notice of the facts as reported by a newspaper article would be “proper to refer” was a question that the court did not directly engage in. As was accepted in *Shamwana*, it would be pedantic and futile for a court to insist on further proof when the facts presented before the court are that which everyone is fully aware of.⁵

However the conservative approach taken to judicial notice of newspaper articles by the court cannot be assailed, considering the fact that it may not always be possible for a court to verify the authenticity of media reports. Unverified media reports can be erroneous and even malicious, and it would thus be a grave injustice for a court to permanently alter the rights of a party based on conjecture. However judicial notice of facts contained in newspaper articles have been given effect in other jurisdictions.⁶ It would therefore have been useful for the court to consider comparative jurisprudential developments of the doctrine of judicial notice and engage with the principles established in the *Shamwana* case. The *Shamwana* court did hint at the fact that courts may take judicial notice of facts contained in newspaper articles provided that those facts are supported by another form of proof.⁷ This was the perfect opportunity for the highest court to extrapolate this matter and establish the circumstances under which media reports can be relied upon, if any.

The court went on to hold that formal withdrawal of candidacy is required in the same way that formal notification of a nomination is required. It is

3 (1923) *A.C. (House of Lords) 1922.*

4 *Commonwealth Shipping (n3) at p. 212.*

5 Also confirmed in *The People v. Fred M'membe and others 1996//HP/38*

6 See *The Washington Post v. Robinson, 935 F.2d 282, 291-92 [D.C. Cir. 1991]*

7 *Shamwana (n3) at page 12.*

interesting that the court did not make reference to section 31(2) of the Electoral Process Act,⁸ which requires written notice for the withdrawal of nomination for an election in any constituency. The requirement of formal written notice is clear, and it was the intention of the legislature (and the court in this instance) to insist on formal withdrawal to ensure certainty. It is rather strange that the Court did not make reference to the Electoral Process Act since Article 52 (6) of the Constitution cannot be viewed in isolation from that Act. Fortunately, despite not referring to the Act which regulates the process for elections in Zambia, they upheld the requirement for formal, written notice of withdrawal.

It therefore follows that even if judicial notice was taken of the newspaper article, and that article had been allowed to inform the decision to invoke Article 52(6) and call for fresh nominations, such a decision would have been contrary to the Electoral Process Act which requires formal written notice of withdrawal.

The implication of this Constitutional court decision is that formal withdrawal is necessary. Not only would this be in line with the pre-existing law in the Electoral Act, it also ensures that the candidacy process is formal at both the nomination and withdrawal stage rather than having separate processes which could cause confusion and uncertainty in the administration of elections.

The court commented on the failure of the Applicants to cite Mr. Changa as a party to these proceedings. Election petition cases cite both the Electoral Commission of Zambia and the winning candidate as respondents⁹ to afford that candidate an opportunity to make representations. It must be noted that citing of the winning or relevant

⁸ No. 35 of 2016 (repealed the Electoral Act No. 12 of 2006).

⁹ See for example: *Vincent Mwale v Eustarckio Kazonga and ECZ 2011/HP/EP/53 and Simunyawa and Sikufele v Musoktwane and ECZ (Appeal No. 170/2013) (2016) ZMSC*

candidate in petition proceedings is implicitly required by the Electoral Process Act.¹⁰ However there is no such requirement for disputes relating to the withdrawal of a candidate. It would follow however that citing Mr. Changa as a respondent was necessary to allow the court to take his representations into consideration. This practice should apply to all such disputes to ensure the relevant candidate can make representations, in the same way Election petition matters usually proceed. The failure to cite Mr. Changa as a respondent was a glaring omission on the part of the applicants. Had he been cited, he would have had to declare the status of his candidature before the court.

This Constitutional court decision established that formal withdrawal of candidature is necessary. However in its reasoning, reference should have been made to section 31(2) of the Electoral Act which explicitly states that formal withdrawal of candidacy is necessary. This would complement the enquiry as to when Article 52(6) of the Constitution can be invoked. Additionally, it would have allowed the court to entirely sidestep the question of judicial notice and promptly dispose of the question at hand.

¹⁰ See definition of “respondent” in the Act.

