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Dunia P. Zongwe
University of Namibia

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Hichilema and Another v Lungu and Another
(2016/CC/0031)[2016] ZMCC 4 (5 September 2016)

Minority Judgement

Dunia P. Zongwe

On September 5th 2016, there was tension in the packed Constitutional Court. Three out of five Constitutional Court judges (i.e., Anne Mwewa-Sitali, Mugeni Mulenga and Palan Mulonda) dismissed the election petition of Presidential candidate Hakainde Hichilema and his running mate Geoffrey Mwamba, on the grounds that the time for hearing the petition had lapsed. The President of the Court Justice Hildah Chibomba, and Justice Margaret Munalula dissented.

Dividing the Court was the interpretation and effect of Articles 101(5) and 103(2) of the Constitution of Zambia. Articles 101 (5) and 103 (2) provide that the Constitutional Court must hear a Presidential election petition within 14 days of the filing of the petition. The Constitution is silent as to what happens when the hearing of a petition exceeds the 14-day period. While the majority of the Court dismissed the petition on the grounds that the 14-day period had elapsed, the minority dissented, and held that maintaining the time frame was unworkable, and that the petitioners had a right to be, and therefore should have been, heard.

This comment discusses the dissenting opinion of the judgment. It focuses primarily on Justice Munalula's dissent since Justice Chibomba's judgement largely echoed Justice Munalula's dissenting opinion.

The dissent

According to Justice Munalula, the decision of the majority was based on a literal construction of Articles 101(5) and 103(2) of the Constitution of Zambia. In short, whereas the majority of the Court interpreted Article 101(5) strictly, the minority did not believe that a proper interpretation

of the article was to deny the petitioners the right to a hearing once the 14 days had expired.

Justice Munalula advocated the construction of the Constitution as a whole and held that the issue of a Presidential election petition was too important to be left to a mechanical interpretation of article 105 and 103. Justice Munalula began her judgment by stating that while the common and ordinary meaning of the actual words used is the starting point in the construction of a constitutional provision, an “unrelieved focus” on the words “within fourteen days of the filing of the petition” cannot yield a correct answer to the question at hand. She insisted that a literal interpretation of Articles 101(5) and 103(2) entails interpreting the provisions in isolation from the rest of the Constitution.

Furthermore, she considered two aspects of the Constitution as relevant to the interpretation at hand: first, the issue of implied powers and second, the Bill of Rights. Article 271 of the Constitution provides for implied powers while article 267 provides for an interpretation of the Constitution in line with the Bill of Rights. Justice Munalula held that under Article 271 of the Constitution, the Court enjoys implied powers to interpret Article 101(5) liberally. She then reminded the Court that Article 261, read with Article 9, imposes the obligation on the Court to interpret the Constitution in a manner that is consonant with the Bill of Rights and the values and principles of the Constitution. National unity and democracy are two such values. She further pointed out that Article 118 provides that judicial authority emanates from the people and that the courts must apply that power “without undue regard to procedural technicalities”, and in a manner that promotes accountability.

Munalula also noted that, when conceiving the 14-day requirement, the authors of the Zambian Constitution had in mind the “endemic delays” that had characterized previous Presidential election petitions making “a mockery of the process”. The framers of the constitution sought to

balance the need for a speedy resolution of election petitions against the need to actually have a hearing. She pointed out further that the primary purpose of setting a time limit is to enable the Court to hear and determine a petition without undue delay as well as make one of the specified pronouncements based on a solid finding of both fact and law.

If the process of hearing the petition is not completed she reasoned, the purpose of the 14-day requirement is frustrated. In her view, complying with the 14-day deadline without the intended event having been achieved results in an absurdity. Justice Munalula concluded that the Court would have best served the nation by allowing a full hearing rather than relying on a technicality to deny a hearing.

Analysis

The 14-Day Time Frame

Both dissenting opinions agreed that the time frame for hearing Presidential petitions, as provided for in the Constitution, was not practical. Justice Munalula wondered if such a time frame is ‘feasible’ at all. The expectation that, within that strict time frame, pleadings and other pre-trial process would be exchanged, witnesses heard, and judgment handed down appeared unrealistic to both dissenting justices.

Justice Munalula pointed out that, as soon as the order to hear witnesses and evidence was given on September 2nd 2016, the petitioners should have moved for an interpretation of Article 101(5). She lamented their failure to do so. However it appears that interpretation of the 14-day requirement was not the real issue. The real issue was whether 14 days was sufficient for the petitioners to present their case thus satisfying their right to be heard. This is less a question of interpretation than one of fact. It is not conclusively clear whether 14 days are sufficient or not. The 2013 Presidential election petition in Kenya suggests that, with certain adjustments to court procedures, complying with a 14-day time frame is possible. However in looking at the Kenyan example, one

must remember that in order for the court to comply with the 14-day requirement, it dispensed with hearing witnesses and restricted itself to affidavit evidence only. Additionally, while it gave its ruling within 14 days, it gave the reasons for the ruling later. These are drastic measures for a court to take, and it is not clear that complying with a time frame always justifies the imposition of such measures.

Incisively, Justice Munalula held that contrary to the claim of the majority, the hands of the Court were not tied. This is because Article 118(2)(e) of the Zambian Constitution allows the Court to override procedural technicalities. Surely, a Constitutional court ought to have the power to interpret the Constitution broadly and avoid “the austerity of tabulated legalism”, she reasoned. A constitutional court cannot be a prisoner to the text of the constitution it is tasked to interpret, and much less a slave of its procedural rules.

However, even though the Court did not expressly couch it in those terms, it emerges from both the majority and minority judgment that the outcome of the petition was heavily influenced by the failure on the part of the petitioners to avail themselves of the time, however short, and the opportunity they were given to make their case. The Court seems to be saying that, even if there had been more time, the petitioners’ lawyers were not keen on using that time productively.

The lawyers’ conduct

At first blush, the conduct of the petitioners’ lawyers appears erratic and self-defeatist. If there is a point on which the entire Constitutional Court agreed, it was without a doubt, in the condemnation of the strange and ostensibly self-defeating behaviour of the petitioners’ lawyers in the case. On September 2nd, the petitioners’ lawyers lodged several motions that took most of the day. The court dismissed the motions. By early evening, it was clear to the Court that the petitioners’ lawyers had no intention of calling witnesses. The Court announced that only four hours remained

of the 14-day time frame. The court asked the petitioners' lawyers to proceed. Rather than proceed, the petitioners' lawyers withdrew from the case on the grounds that they were not able to present their case in the remaining 4 hours. At this point, the petitioners, representing themselves in person, asked the Court for additional time to find new lawyers to represent them. The Court obliged.

But what may initially appear as erratic behaviour on the part of the petitioners' lawyers, must be understood in the context of the Court's own conduct.

The Court's own conduct

On September 2, the day that was supposedly to be the first day of the hearing, the Court stressed that the 14-day period was rigid and that the hearing had to be concluded on the same day around 23h45, and that the available hours that remained would be shared equally between the petitioners and the respondents. Later that same night, the full bench of the Constitutional Court would tell the parties to the electoral disputes that they would have two days each to present their case, and that trial would begin on September 5th and end on September 8th. However, on September 8th, in a 180-degree turn, the majority reversed the earlier full bench ruling on the grounds that because the 14-day period for the hearing of the petition had expired on September 2nd, the court did not have jurisdiction to continue the proceedings.

It follows from the observations made above that the call by Justices Chibomba and Munalula for the extension of the time in this particular petition would have been more persuasive if they had based that call on the fact that the Court did not properly conduct itself, and had failed to ensure that the constitutional mandate to actually have a hearing was complied with. This is especially so in light of the fact that the extension of time was agreed to by all the judges of the Constitutional Court on Friday the 2nd of September, and then mysteriously reversed two days later.

Speedy resolution versus fair hearing

Justice Munalula brought out the competing interests behind the ‘technicality’ that call for careful balancing. She wrote that although the framers of the Zambian Constitution were interested in the speedy resolution of Presidential election petitions, that interest must be tempered by the constitutional need to actually have a hearing. Justice Munalula was right in extrapolating the tension between speedy resolution and actual hearing, but failed to justify why the Court should have tipped the balance in favour of having a hearing, and away from speedy resolution, especially since she blamed the petitioners’ for time wasting. Condemning the petitioner’s time-wasting motions, on the one hand, and arguing for an extension of the time for the hearing, on the other, seems inconsistent.

The underlying issue

In closing her dissenting opinion, Justice Munalula made a perceptive observation. She said that neither party to the electoral dispute trusted the Court to do the right thing. “If we as a country want to develop constitutionalism in this country we need to begin to trust the institutions and the persons in those institutions,” she held.

Assuming that Munalula was correct in observing that neither party trusted the Court, then the inevitable outcome is that the Court’s decision was bound to be rejected. In other words, rejection of the Court’s adjudication would be automatic and 100% guaranteed to happen. It is a classic case of ‘damned if you do, damned if you don’t’.

In the final analysis, the lack of trust of the court, from either party, though not visible on the surface, appears to be underlying problem in this whole matter and it accounts for the conduct of the petitioners’ legal representatives inside the courtroom.

This underlying problem however, is one that the Constitution addresses

indirectly: It requires that the Court be impartial and procedurally fair. In this case, any impression of impartiality was dashed by the Court's conduct that culminated in the weekend meeting to overturn the full bench decision of the court on the night of September 2.

Conclusion

It is not easy for a court to make a decision on a deeply polarizing and acrimonious issue, especially when election results are as close as those of the 2016 Zambian Presidential elections. This difficulty is made worse if neither party to the dispute trusts the Court. In such circumstances, whatever the outcome of a court's deliberations, it is certain to be perceived as biased.

It is clear that the Constitutional Court of Zambia failed to bring sanity to what was a chaotic process. Litigation in Zambia is judge-driven, and the Court has a duty to control the courtroom and the proceedings therein. The flip-flopping of court directions worsened the situation and apparently caught Justices Chibomba and Munalula off guard, putting them in the embarrassing position of writing a rushed judgment. The rushed judgment may also explain why, unlike the majority judgment, none of the dissenting opinions directly spoke to the question of whether the Court had jurisdiction to hear the petition after the expiry of the 14-day period, although this was a question expressly raised as a preliminary objection by the Attorney-General.

In the end, the court's behaviour left commentators and observers with an acute sense that something had gone terribly wrong in the Constitutional Court. If parties have to comply with a 14-day time frame, then the Court's directions and proceedings should have been organised accordingly, as the Kenyan Supreme Court did in its conduct of the 2013 Presidential petition before it. The judges of the Zambian Constitutional Court were of one mind in condemning the behaviour of the petitioners'

lawyers, who questioned the Court's impartiality. Nonetheless, in view of the unsatisfactory conduct of the proceedings by the Court, the Court should have taken a more introspective, if not critical view of their own conduct.