

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

2020/CCZ/0008

(Constitutional Jurisdiction)

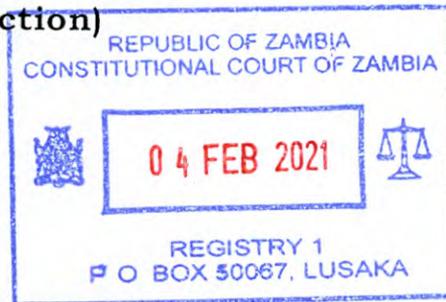
BETWEEN:

ISAAC MWANZA

AND

ELECTORAL COMMISSION OF ZAMBIA

ATTORNEY GENERAL



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

Coram: Sitali, Mulonda and Munalula, JJC on 8th October, 2020 and 4th February, 2021.

For the Applicant:

Mr. A. Mwanza, In Person

For the 1st Respondent:

Mr. Bob Musenga Commission
Secretary ECZ.

Mr. M. Bwalya Legal officer ECZ.

For the 2nd Respondent:

Mrs. K. Mundia Principal State
Advocate.

Mr. S. Mujuda Principal State
Advocate.

JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. Joseph Gereta Chikuta v Chipata Rural Council, SCZ No. 6 of 1983
2. Willoughby v CF Capital PLC[2011] EWCA Civ 1115
3. Sothern v Frank Charlesly and Company, [1981] IRLR 278
4. Christopher Shakafuswa and Isaac Mwanza v Attorney General and Electoral Commission of Zambia, 2018/CCZ/005
5. Munroe v City Poulsbo, No. 27002-1-II-2002
6. Dan Pule and Others v Attorney General and Others 2017/CCZ/004
7. Steven Katuka and Law Association of Zambia v the Attorney General and Ngosa Simbyakula and 63 Others, selected Judgment No. 29 of 2016
8. Kwik-Fit (GB) Limited v Lineham [1992] IRLR 156
9. Templeton v RBC Dominion Securities Inc 2005 NLTD 130

Legislation referred to:

1. The Constitution of Zambia (Amendment) Act No. 2 of 2016
2. Interpretation and General Provisions Act, Cap 2 of the Laws of Zambia

[1] By originating summons filed pursuant to Articles 1(5), 2 and 128 (1) (a) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia, as amended by the Constitution of Zambia, Act No. 2 of 2016 (hereinafter referred to as the Constitution) the applicant Isaac Mwanza, who described himself as a governance activist, asked this Court to determine the following questions:

- (i) Whether Article 157 (2) (b) provides for rescission of a councilor's notice of resignation before the lapse of thirty (30) days;
- (ii) Whether a unilateral notice to rescind a valid resignation by a councilor for reasons accepted or not accepted by the Mayor or Council Chairperson, would necessitate or prevent the holding of a by - election in accordance with Article 57 of the Constitution; and

(iii) Whether a by- election for purposes of Articles 57, 157 (2) (b) and 158 (1) held after a councilor unilaterally rescinds his or her resignation within 30 days, would be valid for all intents.

- [2] The brief facts leading to this action are that on 6th March, 2018, the councilor for Chilongozi Ward in Sinda District of the Eastern Province of Zambia resigned from his position as councilor. He later retracted his resignation by a letter dated 13th March, 2018.
- [3] The applicant, following this development, wrote to the Council Chairperson of Sinda District opposing this unilateral withdrawal of the notice of resignation. This was followed by a letter from the Sinda Council Chairperson to the Chilongozi Ward councilor rejecting the rescission of resignation on account that the Constitution does not provide for withdrawal or retraction of a notice of resignation. This communication was copied to the 1st respondent. Following this, a by-election was conducted for Chilongozi Ward on 5th June, 2018.
- [4] Under similar circumstances, the councilor for Munyambala Ward of Mumfumbwe District in North Western Province of Zambia resigned his position on 27th December, 2019 but later rescinded his decision and withdrew the notice of resignation on 13th January, 2020.
- [5] The 1st respondent on 22nd January, 2020, had an interview with a tabloid - New Diggers - under the headline-A Councilor

can rescind their resignation-ECZ. As a consequence, no by-election was held in Munyambala Ward.

- [6] The applicant yet again wrote a letter this time to the 1st respondent contending that the 1st respondent acted in a contradictory manner in that despite having earlier proceeded to conduct a by- election in Chilongozi Ward of Sinda District, this was not the case in Munyambala Ward of Mumfumbwe District. That the justification of withdrawal of notice of resignation by the 1st respondent remained questionable and amounted to adding non-existent provisions to the Constitution. It is because of these two apparently contradictory positions taken by the 1st respondent that we have been moved to interpret Article 157(2) (b).
- [7] The applicant, states that the moving of this Court to give an interpretation of Article 157(2) (b) of the Constitution is due to the inconsistencies exhibited in interpreting the above article by the 1st respondent and the concerned local authorities.
- [8] That the 1st respondent through its Chief Electoral Officer, Patrick Nshindano, is on record as having stated that a councilor had up to a maximum of 30 days within which to rescind their decision to resign according to the Constitution.
- [9] The applicant holds the view that as a consequence of this position taken by the 1st respondent, no by- election was held in Munyambala Ward following the resignation of the councilor as was the case in Chilongozi Ward. That in both resignations, that is in Chilongozi Ward and Munyambala

Ward respectively, the resignations were retracted or withdrawn.

- [10] In his skeleton arguments, the applicant argues that a literal interpretation of Article 157(2) (b) of the Constitution does not provide for a retraction of a notice of resignation. That this was the position taken by the Sinda Council Chairperson when that office declined to accept the Chilongozi Ward councilor's retraction of resignation on account that the Constitution does not make provision for such retraction.
- [11] The applicant contends that while any person employed or elected could unilaterally terminate their contract or mandate legally or otherwise, according to the case of **Joseph Gereta Chikuta v Chipata Rural Council**,¹ this was not the case when it came to retracting or withdrawing a notice of resignation. That once tendered, a resignation cannot be retracted unilaterally and that even where it is entertained, special circumstances ought to exist that speak to the context in which such a decision was taken.
- [12] Two English authorities were cited to support the view that once a unilateral dismissal or resignation is made by a party to a contract, it cannot be retracted unilaterally or even retracted at all except under special circumstances.
- [13] In the first case cited of **Willoughby v CF Capital PLC**², the Court of Appeal in its judgment delivered by Rimer LJ, following an appeal challenging a decision of the Employment Appeal Tribunal that the claimant Ms Willoughby, had not

been dismissed but resigned from employment as the employer had withdrawn the termination letter, stated that:

The 'rule' is that a notice of resignation or dismissal (whether given orally or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given, it cannot be withdrawn except by consent.

That Rimer LJ went further to state what the Court understood the exception to imply when he stated that:

In my judgment, the true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place - that, in effect, his mind was not in line with his words.

[14] In another case, **Sothorn v Franks Charlesly and Company**³ cited to us, the Court found that a resignation given in the 'heat of a moment' or in a 'state of emotional stress' or as a result of being jostled into a decision by the employer, maybe withdrawn but, if words of resignation are unambiguous, that is the end of the matter.

[15] It was the applicant's submission that based on the **Sothorn**³ case, a notice of resignation tendered by a councilor cannot be withdrawn unilaterally within the 30 days notice period unless with the consent of a mayor or council chairperson who must satisfy themselves that any of the above cited exceptions in the **Sothorn**³ case existed at the time of tendering in the resignation.

[16] In respect of the question whether a unilateral notice to rescind a valid resignation would necessitate or prevent the

holding of a by-election in accordance with Article 57 of the Constitution, the applicant outlines two scenarios he considers would inform the holding of a by-election.

- [17] In the first scenario, it is the applicant's considered view that where a mayor or council chairperson refuses to accept the reasons for withdrawal of the notice of resignation as not being valid, the refusal would compel the 1st respondent to conduct a by-election in accordance with Article 57 of the Constitution. In the second scenario, it is the applicant's contention that when a notice of withdrawal of resignation is accepted based on valid reasons as outlined in the **Sothern**³ case, the 1st respondent is not obliged to hold a by-election as required under Article 57 of the Constitution.
- [18] Lastly, the applicant requests us to determine whether a by-election, for purposes of Articles 57, 157 (2) (b) and 158 (1) held after a councilor unilaterally rescinds his or her resignation within 30 days, would be valid for all intents and purposes.
- [19] It was the applicant's argument that the provisions of Article 157(2)(b) of the Constitution do not provide for the retraction of a notice of resignation, either unilaterally or otherwise by a councilor. That this Court ought to interpret the provision as only allowing retraction subject to consent by a mayor or council chairperson. That in the case of retraction, this can only be done for demonstrable good reasons.
- [20] In conclusion, the applicant submitted that should this Court find that a notice of resignation can unilaterally be withdrawn by

a councilor, then the holding of a by-election in Chilongozi Ward of Sinda District in disregard of the notice of withdrawal of resignation is unconstitutional, null and void.

[21] The 1st respondent relied on its affidavit in opposition deposed to by Rody Katongo the Acting Chief Electoral Officer of the 1st respondent and the skeleton arguments. The 1st respondent like the applicant seeks this Court's interpretation of Article 157 (2) (b) as read together with Articles 158 (1) and 57 (1) of the Constitution. The 1st respondent states that it is common cause that it has no role to play in the resignation of councilors as it is not mandated by law to concern itself with such resignations. That the handling of resignations of councilors is a preserve of mayors and council chairpersons and that its role is merely to conduct by - elections once a vacancy occurs and it is notified of it.

[22] It was the 1st respondent's submission that there is no provision in the Constitution that restricts a mayor or council chairperson from accepting or declining to accept a rescission or withdrawal of a notice of resignation. That the law is silent on whether a councilor who has tendered in a resignation can retract it during the 30 day notice period which the 1st respondent says is defined as a calendar month under section 3 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia.

[23] The 1st respondent submitted that the action before us is timely as the *lacuna* in Article 157 (2) (b) of the Constitution

on retraction or withdrawal of a notice of resignation poses practical challenges in the application of the provision. In this respect, two challenges encountered by the 1st respondent in the application of Article 157 (b) (2) were highlighted namely:

- (i) **The determination of the effective date for Article 57 (1) that requires that a by- election is held within 90days and;**
- (ii) **Whether the 1st respondent is at liberty to ignore a local authority's decision to accept a withdrawal or rescission of a resignation notice.**

[24] It was the 1st respondent's submission that a vacancy in the office of councilor, within the contemplation of Article 157 (2) (b), occurs once the one month notice period lapses and that it is illegal to declare the seat vacant during the notice period. That the question of acceptance or refusal of a rescission or withdrawal of a resignation is one within the jurisdiction of respective local authorities and that this Court should bring clarity on the matter by interpreting the provision for the benefit of all stakeholders. In conclusion, the 1st respondent submitted that this Court is clothed with the requisite jurisdiction to interpret Article 157(2) (b) of the Constitution and that this position is supported by our decision in the case of **Christopher Shakafuswa and Isaac Mwanza v Attorney General and Electoral Commission of Zambia**⁴ where we stated that the role of this Court is to resolve by way of interpretation the problems arising out of the incompleteness or imperfections of the Constitution.

- [25] The 2nd respondent began its response by adopting a definition of resignation as pronounced in the case of **Chikuta v Chipata Rural Council**¹ where the Supreme Court of Zambia held that a resignation was the unilateral free choice of an employee in a contract of personal service to terminate the contract at any stage either contractually or even in breach of contract.
- [26] The 2nd respondent cited a number of authorities where a unilateral repudiation of a contract by a party in breach was held to be ineffectual if the innocent party elected not to accept such repudiation. It was restated that resignation is a unilateral free choice and is not dependent on acceptance by another person. That a resignation is an employer/employee issue which if expressed in clear and unconditional terms brings a contract to an end.
- [27] The 2nd respondent was of the view that the office of councilor being a constitutional office and occupied through an election demands that a resignation from the position and any rescission of such resignation be considered in accordance with the specific constitutional provisions on the subject. The case of **Munroe v City Poulso**⁵ was cited, where the court held that a public official's resignation from office becomes final, thereby creating a vacancy and preventing the official from withdrawing the resignation on the effective date of the resignation. It was submitted that the court further stated that finality was not dependent on whether the resignation had been accepted by the governing authority.

[28] On the import of Article 157 (2) (b) of the Constitution, it was the 2nd respondent's submission that a literal interpretation of the above article particularly considering the word 'resigns' suggests that the action has already occurred. That if this was not the intention of Parliament, the article would show intention or a wish to resign in the form of the words 'intends to resign' or 'wishes to resign'. Further, that a literal reading of the clause suggests that vacation of the office of councilor occurs at the point of tendering in the notice of resignation in writing to the mayor or council chairperson, whichever is the case.

[29] In respect of interpreting the Constitution, the 2nd respondent referred us to a number of our decisions on constitutional interpretation among them **Dan Pule and Others v Attorney General and Others**⁶. It was the 2nd respondent's submission that the primary canon of interpretation is the literal rule and that under this rule, this Court is obliged to consider constitutional provisions in plain and ordinary language unless doing so brings about an absurdity. That the guidance given by this Court underscores the need not to read constitutional provisions in isolation but *in tandem* with other provisions that bear on the subject matter in order to have greater purpose given to the Constitution. We were urged to read Articles 158 and 57 *in tandem* with Article 157 of the Constitution.

[30] On the question of finality of resignation, it was the 2nd respondent's submission that Articles 158 and 57 are

couched in a time-frame fashion and mandate specific offices to perform certain roles within those time -frames particularly the offices of town clerk or council secretary and the Electoral Commission of Zambia. That the mandate of the Electoral Commission of Zambia is to hold by-elections when vacancies occur and that the Constitution does not give the Electoral Commission of Zambia, a mayor or council chairperson or indeed any other office the power to accept or reject a withdrawal of a resignation letter submitted in writing as the act of resignation is final.

[31] It was the 2nd respondent's further submission that in terms of Article 57 of the Constitution, a by-election following a vacancy must be held within 90 days and that if the provisions in Article 157 (2)(b) are not read literally, the 30 day notice period would affect the time-frame set for holding a by-election by the Constitution.

[32] In concluding its submissions, the 2nd respondent took the view that the Constitution does not provide for the rescission of a resignation by a councilor as the office becomes vacant at the point a councilor resigns by one month's notice in writing. That this act of rescission sets off the other provisions of the Constitution which immediately become effective.

Further, that a councilor does not have the right to unilaterally withdraw a notice of resignation once tendered and therefore a by-election held following a resignation would not be invalidated by a retraction of a notice of resignation.

- [33] The applicant in reply to the 1st respondent's submissions submitted that he did not consider the 1st respondent as having a role in the resignation of councilors as this was a councilor's free choice. He, however, stated that the 1st respondent needed to satisfy itself that a vacancy had occurred before conducting a by-election. The applicant went on to submit that this Court was yet to pronounce itself on the import of Article 157 (2) (b) as read together with Article 158 (1) (a) of the Constitution as to when a vacancy occurs since this is not expressly provided for in the Constitution.
- [34] Further in reply, the applicant argued that to allow the 30 day notice period to run its course would in essence be elongating the time-frame created by the Constitution for the holding of a by-election upon a vacancy occurring. In his view, this was so because, the vacancy occurs immediately the notice of resignation is tendered in with the mayor or council chairperson, whichever happens to be the case.
- [35] That while the 1st respondent is not responsible for resignations, it nevertheless conducted a by-election in Chilongozi Ward where a candidate resigned and later retracted his resignation and that yet in another resignation and retraction, the 1st respondent refused to conduct a by-election under similar circumstances. That in the former case, the 1st respondent is on record as stating that the Constitution does not provide for withdrawal or retraction of a notice of resignation.

[36] We have been asked to consider three questions posed to us by the applicant already outlined earlier in the judgment. The 1st respondent has joined the applicant in requesting this Court to interpret Article 157 (2) (b) as read together with Articles 57 and 158 (1) of the Constitution.

[37] The first question for our consideration is :

whether Article 157(2)(b) provides for rescission of a councilor's notice of resignation before the lapse of thirty (30) days.

[38] Article 157 (2) (b) of the Constitution provides that:

The office of Councilor becomes vacant if -

(b) the Councilor resigns by one month's notice, in writing, to the mayor or council chairperson.

[39] In the case of **Steven Katuka and Law Association of Zambia v the Attorney General and Ngosa Simbyakula and 63 Others**⁷, we had occasion to pronounce ourselves on the canon of constructing or interpreting the Constitution. We stated at page J63 that:

In terms of the general or guiding principles of interpretation, the starting point in interpreting words or provisions of the Constitution or indeed any statute, is to first consider the literal or ordinary meaning of the words and articles that touch on the issue or provision in contention. This is premised on the principle that words or provisions in the Constitution or statute must not be read in isolation.

We have applied these principles in determining the issues before us in the present matter.

[40] The applicant in support of his case has argued that a literal interpretation of Article 157(2) (b) of the Constitution reveals that the Article does not permit a retraction of a notice of resignation once it is tendered to a mayor or council chairperson, as the case may be.

[41] The 1st respondent acknowledges the fact that the Constitution does not provide for the rescission of a notice of resignation by a councilor. That notwithstanding the 1st respondent submits that the issue of withdrawal or rescission of a resignation and subsequent acceptance of such rescission is a matter within the jurisdiction of respective local authorities.

[42] On the other hand, the 2nd respondent submits that while a resignation is a unilateral act, rescission is not anticipated or permitted except under special circumstances that may permit rescission of resignation. The 2nd respondent cited to us the case of **Kwik-fit (GB) limited v Lineham**⁸ where the exceptions of an employee resigning in the heat of the moment or pressure on an employee are outlined. It is however, the 2nd respondent's submission that in terms of the **Munroe**⁵ case the resignation of a public official from office becomes final and cannot be withdrawn and that finality is not informed by the relevant authority accepting the resignation.

[43] An examination of Articles 157 and 158 of the Constitution reveals that no option is given to the resigning councilor to

rescind their decision to resign after the letter of resignation is tendered to the mayor or council chairperson, as the case may be. Similarly, no power to accept a rescission of a resignation is given to a mayor or council chairperson of a local authority.

[44] The rescission of a councilor's decision to resign is a substantive issue and in the absence of express provision being made in the Constitution to that effect, we hold that a councilor has no option to rescind the decision to resign within the notice period. It is our view that if the intention of the framers of the Constitution was to allow a councilor who had resigned from office to rescind their decision within the 30 day period, they would have made express provision to that effect in the Constitution. This they did not do. This answers the first question.

[45] Having determined that there is no provision for a Councilor to rescind their decision to resign, the next issue we have to determine is, when does a resignation from office by a councilor take effect? In this respect, we have considered provisions in the Constitution which have a bearing on resignations from elective offices.

Article 106 (4) (b) of the Constitution as amended provides that:

(a) **The office of President becomes vacant if the President -**

- (b) **resigns by notice, in writing, to the speaker of the National Assembly.**

Article 111 (4) (b) provides that:

- (4) **The office of Vice-President becomes vacant if the Vice-President**

- (b) **resigns by notice, in writing, to the President.**

[46] Further Article 72(2) (a) provides that:

- (2) **The office of Member of Parliament becomes vacant if the member -**
 - (a) **resigns by notice, in writing, to the speaker,**

While Article 170 (1) (b) provides that:

- (1) **A member of the House of Chiefs-**
 - (b) **may resign by one month's notice, in writing, to the Chairperson.**

[47] The three resignations cited above namely that of the President, Vice-President and Member of Parliament require no notice period of resignation to be tendered in with the relevant office while in the case of a member of the House of Chiefs, a one month's notice is required as is the case with councilors. The wording in Articles 106, 111 and 72 imply that the resignations take effect upon the notice of resignation being tendered in with the relevant authority. On the other hand, the requirement for a one month's notice in the case of a councilor or a member of the House of Chief's literally means a notice period ought to run upon tendering the letter of resignation and this has an effect on what constitutes the effective date of resignation.

[48] The Canadian Court in **Templeton v RBC Dominion Securities Inc**⁹ noting the distinction between a resignation letter and the resignation itself stated that:

A resignation is the decision to terminate the relationship or, equally, a fact or circumstance which unequivocally reflects that decision. A letter of resignation is simply evidence usually cogent evidence of the employee's decision to end the relationship. But it is no more than that, a letter of resignation is not, in and of itself, the employee's termination of the relationship.

[49] The above authority supports the view that even where a letter of notice of resignation has been tendered by a party, the party continues to perform their obligations under the contract or mandate until the notice period expires. That the notice of resignation letter or notice as referred to in this matter does not end the relationship but is evidence of the employee's decision to end the relationship.

[50] The applicant argues that to allow the 30 day notice period to run its course would in essence be elongating the timeframe created by the Constitution for the holding of a by-election upon a vacancy occurring. The applicant's position is based on the argument that the office of Councilor becomes vacant at the point of tendering in the notice of resignation. Similarly, the 2nd respondent submits that if the resignation is expressed in clear and unconditional terms the relationship is brought to an end. The 2nd respondent submits that a literal

interpretation of clause (2)(b) of Article 157 suggests that vacation of the office of councilor occurs at the point of tendering in the notice of resignation in writing to the mayor or council chairperson. The 2nd respondent cites the case of **Munroe v City of Poulso**⁵ where the Court held that a public official's resignation from office becomes final and thereby creates a vacancy.

[51] Contrary to the positions taken by the applicant and the 2nd respondent, the 1st respondent submits that a vacancy in the office of councilor, within the contemplation of Article 157(2)(b), occurs once the one month notice period lapses and that it is illegal to declare the seat vacant during the notice period.

[52] The applicant and the 2nd respondent's argument that the resignation from office under Article 157(2)(b) of the Constitution occurs at the point when one tenders in the notice of resignation makes the notice period required under the Article redundant. We say so because if that were the intention of the framers of the Constitution, the article would not have provided for the notice period as is the case with resignation under Articles 106(4)(b); 111(4)(b) and 72(2)(a) of the Constitution.

[53] We do not accept the applicant's argument that allowing the notice period to run would elongate the timeframe within

which a by-election must be held within the context of Article 57 of the Constitution. This is so because our understanding of Article 57 is that the 90 day period within which to hold a by-election begins to run from the time the office of councilor becomes vacant. Thus, the vacancy occurs at the end of the notice period being 30 days after the notice of resignation is tendered in with the relevant authority.

[54] The 2nd respondent argues, based on the **Munroe**⁵ case that a public official's resignation from office becomes final and thereby creates a vacancy. We have considered the **Munroe**⁵ case which in our view does not contradict the position we have taken. In our understanding, the issue of finality in the **Munroe**⁵ case has nothing to do with when the resignation takes effect but has to do with retraction or withdrawal of the notice of resignation once tendered.

[55] We agree with the 1st respondent that a vacancy in the office of councilor, within the contemplation of Article 157(2)(b) of the Constitution occurs once the one month notice period lapses. It follows therefore, that in the case of a resignation as councilor under Article 157(2)(b) of the Constitution, the article situates the effective date of resignation at the end of the notice period.

[56] As noted by the 2nd respondent, the matter at hand does not fall squarely into an employer employee relationship and as

such we took caution even as we considered the authorities cited by the parties in support of their arguments save for the **Munroe**⁵ case which involved an elective office. This authority cited by the 2nd respondent was also adopted by the applicant as being good law on the issue of when resignation takes effect.

[57] In concluding, as Article 157(2)(b) of the Constitution does not provide for rescission of a councilor's notice of resignation before the lapse of the notice period of 30 days, the second and third questions put to us become otiose.

[58] As the matter raised important constitutional questions, we order that each of the parties bears their own costs.



.....
A. M. SITALI
CONSTITUTIONAL COURT JUDGE



.....
P. MULONDA
CONSTITUTIONAL COURT JUDGE



.....
M.M. MUNALULA
CONSTITUTIONAL COURT JUDGE