

**THE ROLE OF THE JUDICIARY IN THE EFFECTIVE RESOLUTION OF
ELECTORAL DISPUTES IN ZAMBIA**

BY

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**A DISSERTATION SUBMITTED TO THE UNIVERSITY OF ZAMBIA
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DEDICATION

I dedicate this to my late mother, Christine Zulu whom I dearly miss and who would have been proud to be part of this stage of my life. I also dedicate this to my father, Lazarous Chungu Bwalya who has not only been a father but a friend, my pillar of strength, inspiration, and ever so supportive each step of my life.

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ABSTRACT

The reality of electoral disputes is a characteristic of every competitive democratic process. History has shown that these disputes are caused by various factors and evidently manifest in so many ways within the democratic process. The effects of electoral disputes if not determined efficiently could be fatal both to human life and the economic and social development of a nation. To this effect, there is need to have a system of dispute settlement that can effectively and expediently settle and determine these disputes within the Judicial system of a nation. Although other mechanisms of electoral dispute settlement should be encouraged, the Judiciary of the nation must have oversight and command respect and confidence from stakeholders in the way it handles electoral disputes. This is because other mechanisms such as administrative and political mechanisms of electoral dispute resolution may generally be alleged to be impartial due to their structures and composition.

Zambia has had a fair share of electoral disputes since the emergence of competitive politics. There is evidence of a number of presidential election petitions and an even greater number of parliamentary election petitions that have gone before the courts of law. This paper analyzes the effectiveness of the courts in the settlement of these disputes.

The Zambian judiciary has been known to delay in the delivery of judgments on electoral disputes. As a result, stakeholders have lost confidence in the courts to resolve electoral disputes. Recent cases of parliamentary petitions have taken as long as four years to be determined for a seat which has tenure of five years. This has raised many questions as to the relevance, impartiality, transparency and independence of the court system in Zambia by both local and international eyes. It has further caused the loss of confidence in the judicial system of the nation by the electorate and other stakeholders.

In comparison to neighboring countries like Malawi and Kenya, Zambia's judicial system regarding electoral dispute resolution is unsatisfactory. It is for this reason that this paper has recommended that judicial reforms be implemented such as an institution of an Electoral Tribunal which will deal with electoral disputes specifically to expedite their determination. In the alternative, going by the Draft Constitution by the Technical Committee, the Constitutional Court should be mandated to handle such disputes in order to efficiently deliver within time. Further, the paper recommends that these disputes be bound by a predetermined timeframe within which they are to be determined. Finally, to restore confidence by the electorates and other stakeholders in the judicial system, there should be a vetting system of judges to investigate those judges whose credibility and/or impartiality has fallen to question. It is hoped that the recommendations resulting from this study will contribute to the enhancement of the efficiency of the judiciary as it endeavors to deliver justice in electoral disputes.

TABLE OF STATUTES

1. The Constitution as amended in 1996, Chapter 1 of the Laws of Zambia
2. The Electoral Act No.12 of 2006 of the Laws of Zambia
3. The Supreme Court Act, Chapter 25 of the Laws of Zambia
4. The High Court Act, Chapter 27 of the Laws of Zambia
5. The Electoral Code of Conduct SI. 52 of 2011 of the Laws of Zambia

TABLE OF CASES

1. *Banda v Siliya (Appeal no. 95 2012) [2013] ZMSC 20*
2. *Ngimbu v Kakoma and Another Appeal No. 19/2013 SCZ*
3. *Malwa v Mulusa and The Electoral Commission of Zambia Appeal 125/2012 SCZ*
4. *Miyanda v The High Court (1984) ZR 62*
5. *Mwale v Kazonga and Another Appeal 123/2013 SCZ*
6. *Akashambatwa Mbikusita Lewanika and Four Others v Fredrick J.T Chiluba (1998)ZR 49 (SC)*
7. *Mazoka and Others v Mwanawasa and Others SCZ/EP/011/02/03/2002*
8. *Namulambe and electoral commission of Zambia v Chilufya (Appeal No. 180/2013) [2014] ZMSC 40*
9. *Williams J in Queen v. Kirby ex parte Boilermakers's Society of Australia (1956) 94 CLR 254 at 30*
10. *Kumachenga v Majoni and Electoral Commission Civil Cause No. 18of 2004*

TABLE OF CONTENTS

CONTENT	PAGE
Title.....	i
Copyright Declaration.....	ii
Approval.....	iii
Dedication	iv
Acknowledgment.....	v
Abstract.....	vi
Table of Statutes.....	viii
Table of Cases.....	ix
Table of Contents.....	x
 CHAPTER ONE: Introduction	
1.1 Introduction.....	1
1.2 Background.....	2
1.3 Problem statement.....	4
1.4 Research Questions.....	4
1.5 Objective of Study.....	5
1.6 Significance of Study.....	5
1.7 Literature Review.....	6
1.8 Methodology.....	10
1.9 Outline of Chapters.....	10
1.10 Conclusion.....	11
 CHAPTER TWO: Causes, Manifestation and Effects of Electoral Disputes	
2.1 Introduction.....	12
2.2 Causes of Electoral Disputes.....	12
2.3 Manifestation of Electoral Disputes.....	19
2.4 Effects of Electoral Disputes.....	23
2.5 Conclusion.....	25
 CHAPTER THREE: Mechanisms of Electoral Dispute Resolution in Zambia	
3.1 Introduction.....	26
3.2 The Ordinary Courts (Judiciary) of Zambia.....	26
3.3 Administrative System of Dispute Resolution.....	30
3.4 The Political System of Dispute Resolution.....	31
3.5 Conclusion.....	32
 CHAPTER FOUR: The Effectiveness of the Judiciary in Resolving Electoral Disputes	
4.1 Introduction	33

4.2 The Zambian Judiciary (Settlement of Electoral Disputes)	33
4.3 Comparing with Malawi and Kenya	36
4.4 Conclusion.....	39
CHAPTER FIVE: Conclusions and Recommendations	
5.1 Introduction.....	40
5.2 Conclusion.....	40
5.3 Recommendations.....	42

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

An election is a formal decision making process by which a population chooses an individual to hold public office. The holding of regular elections is a fundamental characteristic of any democratic society. Zambia being a democratic society is characterized by such elections. The elections held include: presidential elections, parliamentary elections and local government elections. In order for the electorates to exercise their right to franchise with confidence, the electoral system has to be safe and legally reliable, hence, there are rules and regulations enacted to govern the electoral process.

Zambia's electoral process results into a number of disputes that arise due to allegations of breach of the electoral laws.¹ The Electoral Commission of Zambia (ECZ) has come under attack every time the country holds elections. Many stakeholders view the Commission as merely a tool for the party in power. Mwaba in his work argues that this has brought the lack of integrity of the Commission in the management of elections and resolution of disputes that arise thereof.²

These disputes are subject to be resolved through a number of mechanisms which will be discussed in Chapter Three of this paper. Among these mechanisms, the primary mechanism is the Judiciary as it is the arm of government that is ultimately responsible for the delivery of

¹ Interview: Eric Kamwi, Electoral Commission of Zambia Commission Secretary.

² Clifford E. Mwaba, "The Electoral Commission of Zambia: The Challenges of being Autonomous and Independent", (LLB Obligatory Essay, University of Zambia, 2011), 30.

justice in the nation. Therefore, this paper aims at critically evaluating the role of the Zambian Courts in the resolution of electoral disputes and to assess their effectiveness in the resolution of the said disputes.

1.2 BACKGROUND

In Zambia, elections have been the usual mechanism by which our modern representative democracy has operated since the country gained independence in 1964. Be that as it is, elections are held from time to time to fill offices for presidency, legislature and local government. This process is also used in many other private business organizations, from clubs to voluntary associations and corporations.

To this effect there are various laws governing elections and among them is the Constitution of Zambia as amended by Act No. 18 of 1996, Chapter 1 of the Laws of Zambia, the Public Order Act, Chapter 113 of the Laws of Zambia, the Anti-Corruption Act No.3 of 2012 , the Local Government Elections Act, Chapter 282 of the Laws of Zambia, the Electoral Commission Act of 1996 of the Laws of Zambia, the Electoral Code of Conduct regulation of 2006 and the Electoral Act No.12 of 2006 of the Laws of Zambia. The Electoral Act empowers the Electoral Commission of Zambia (ECZ) to make election regulations and provides for offences and penalties in connection with elections. The Act also provides for election petitions and the hearing and determination of applications relating to parliament and for matters incidental to or connected with the foregoing.³

The laws cited above provide for fairness and effectiveness in the electoral process. However, there are incidents where candidates engage in electoral conflicts, electoral offences, corruption

³ Preamble of the Electoral Act No. 12 of 2006 of the Laws of Zambia.

and other malpractices during the journey to elections. In cases of electoral conflict, the ECZ is empowered to resolve the conflicts and disputes through conciliation or mediation and to set up conflict management committees to resolve disputes.⁴ Conversely, if a candidate wishes to challenge election results, the only process through which that can be done is by way of election petition.⁵

In Zambia, the forum for starting Presidential election petitions is the Supreme Court and the legal basis for this is article 41 (2) of the constitution. This Article is supplemented by rule 72 A statutory instrument No 1 of 2002.

Parliamentary election petitions are heard by the High Court for Zambia which has limited jurisdiction. Section 93 (2) of the Electoral Act provides for grounds on which the election of a candidate as a member of the national assembly shall be void if proved to the satisfaction of the high court upon the trial of an election petition. Section 94 of the Act regulates the presentation of parliamentary election petitions to the High Court.

Petitions to elections of Councilor are brought pursuant to section 18 of the Local Government Elections Act, before the High Court. It goes without saying that invariably, when a petition is lodged against an election, there are four possible outcomes:

11. The election may be declared void and a direction is issued for a new election.
12. The election may be held to have been undue, in such a case, the original return is quashed and another candidate is declared to have been elected.

⁴ Section 110 of the Electoral Act No. 12 of 2006 of the Laws of Zambia.

⁵ Section 93 of the Electoral Act No. 12 of 2006 of the Laws of Zambia.

13. The election may be upheld in some instances and if so, the member returned is found to have been duly elected.

14. The petition may also be withdrawn. This may occur when the petitioner fails to attend a hearing, or when parliament is dissolved before the petition process is complete.

1.3 PROBLEM STATEMENT

Since the emergence of competitive politics by the introduction of multi-partism in Zambia, there have been a number of disputes arising from the process of elections at all levels. Courts have traditionally and primarily been employed in the resolution of electoral disputes in Zambia. This has put the Judiciary in a position that requires much attention to the many disputes that are brought before it to resolve. There has been the growing concern of the autonomy of the Judiciary in deciding such disputes, this view was clearly demonstrated by the opposition post the 2006 elections when they completely ruled out the option of going to court even when they did not agree with the election results. They argued that experience showed that going to court was a waste of time and that it was just an academic exercise that only served to legitimize an illegitimate regime. This inadvertently presents the problem of the resolution of such disputes in society vis-a-vis the role of the Courts.

1.4 RESEARCH QUESTIONS

In essence, this paper is aimed at asking the following questions:

1. Does the Zambian Electoral System experience electoral disputes? How and what are the effects?

2. Are there mechanisms in place for the resolution of these disputes and what is the role of the Judiciary?

3. Is the Judiciary effective and efficient in its role?

4. Is there any way to improve the Judiciary's efficiency in the resolution of electoral disputes?

1.5 OBJECTIVES OF STUDY

This study is intended to make a critical review of how effective the courts have been in the settlements of electoral disputes. A further objective of this study is to make recommendations intended to enhance the effectiveness of the courts or offer alternatives altogether on how best such disputes can be determined amicably and rapidly.

The study will be guided by the following objectives:

- i. To establish the causes, manifestation and effects of electoral disputes
- ii. To examine the various electoral dispute resolution mechanisms and their effectiveness and to establish the importance of the judiciary in the settlement of these disputes.
- iii. To examine the effectiveness of the judiciary in the settlement of electoral disputes.
- iv. To give recommendations for improvement.

1.6 SIGNIFICANCE OF THE STUDY

This study is significant because an efficient and effective electoral justice system is fundamental to securing the objective of elections such as providing legitimacy to the government. Elections are at the core of the democratic process. The competitive and politically divisive nature of

elections and their technical complexity make them vulnerable to abuse, fraud or perceptions thereof. Hence the need for an effective mechanism to prevent, mitigate or resolve disputes that are likely to arise in every electoral process, and to preserve and when necessary restore the real and perceived equality of citizens and their representatives is necessary.

Without an effective and efficient system to mitigate and manage inequality or perceptions of inequality, even the best management of an electoral process may lead to mistrust in the legitimacy of a democracy.

An independent judiciary is an essential ingredient in free and fair elections. Nyerere, the former president of Tanzania, argued that “unless judges perform their work properly, none of the objectives of [a] democratic society can be met.”⁶ Accordingly, any initiative that seeks to reform the electoral process in Zambia must also focus on the judicial system, due to the central role that courts play in the resolution of electoral disputes in particular and the promotion and protection of democracy in general.⁷

Thus, this study will allow the various stakeholders in elections to appreciate the role of the Judiciary concerning electoral disputes and give the Judiciary an evaluation of its effectiveness in resolution of electoral disputes. The study will also give possible recommendations for improvement that the Judiciary can explore.

1.7 LITERATURE REVIEW

The judicial function is associated with the courts where the Judge acts as an independent referee who applies rules to the dispute. The independence of the Judiciary means that the Judges should

⁶ Julius Nyerere, “Freedom and Socialism” (Oxford University Press: Dar es Salam, 1968) , 110.

⁷ Williams J in Queen v. Kirby ex parte Boilermakers’s Society of Australia (1956) 94 CLR 254 , 301

be free to decide matters before them impartially given the facts and in accordance with the law without any restrictions or influence. The Judiciary is a creation of the Constitution, under Article 91 the Constitution provides for the establishment of the Courts in Zambia. Article 92 of the Constitution provides for the Supreme Court while Article 94(1) provides for the High Court and its jurisdiction. Article 72 provides for the powers of the High Court in resolution of disputes involving parliamentary elections. In the same provision, it is provided that any appeal of electoral disputes shall lie to the Supreme Court. These provisions are supplemented by the Electoral Act and Electoral Regulations of 2011.

Part VIII of the Electoral Act provides for election petitions. Under section 93(1), it is provided how an election of a member of the National Assembly can be questioned. A court exercising a judicial function cannot initiate action but must respond to disputes which others bring before it.

Matlosa in his work stated that elections are a high stakes contest and that conflict is likely. Further, he stated that this conflict cannot be wished away and bemoaning its occurrence is not enough. He suggested that the solution is to devise institutionalized mechanisms that manage the contest constructively. In short, elections related conflicts and disputes are a reality of politics.⁸ It is from this that this paper recognizes the unending presence of electoral disputes and realizes that the question should be whether there is an effective and reliable Judiciary in Zambia to ensure that these disputes are rapidly settled.

In *Malwa v Mulusa and Electoral Commission of Zambia*⁹, the election petition motion was brought before court under the provisions of Article 72 of the Constitution. This motion was

⁸ Khabele Matlosa, "Democratization at crossroads: Challenges for the SADC Principles and Guidelines Governing Democratic Elections" (ISS Paper 118, October 2005),2.

⁹ [2014] ZMSC 41

supplemented by Section 63, 79 to 86 and 93 to 95 of the Electoral Act as well as provisions of the Electoral Regulations of 2011. Similarly, the cases involving *Mwale v Kazonga and Electoral Commission of Zambia*¹⁰ and *Ngimbu v Kakoma and Electoral Commission of Zambia* were brought to court using the same provisions. In these cases, the appellants managed to prove the contravention of these provisions of the Electoral Act and Regulations of 2011. This resulted in the nullification of the election results by the Supreme Court. It is thus important to ensure that the Court system is checked to ensure that these disputes are settled efficiently and effectively.

Clearly the area of electoral disputes and their resolution has been an interest of study, scholars like Malavu have looked into alternative ways in which the resolution of such disputes can be made. In his work, Malavu takes an alternative dispute resolution (ADR) approach to addressing the need of an efficient mechanism in which such disputes can be resolved. He recognizes that even though the courts are the primary mechanism of resolution of such disputes, there are other ways through which they can be handled. Consequently, he outlines the various Electoral Dispute Resolution (EDR) systems with their attributes and further recommends which he thinks are the best for a society like Zambia.¹¹ This paper unlike the direction Malavu takes analyses the role of and effectiveness of the Courts as the primary mechanism of electoral dispute mechanism. This is unlike the exploration of alternative mechanisms that was done by Malavu.

Mulenga, in his work, looks at the issue of corruption as a source of such disputes. He looks into ways through which such can be avoided and takes the approach of curbing corruption as a possible way to lessen these disputes hence reducing the pressure on the electoral dispute resolution mechanism that has been flooded with so many of these disputes such that their

¹⁰ Appeal No. 123/2012

¹¹ Sikaaba Malavu, "Electoral Disputes: An Evaluation of the Electoral Dispute Resolution Systems in Zambia" (LLB Obligatory Essay, University of Zambia, 2009).

efficiency has been hindered.¹² This paper, as opposed to Mulenga's approach of trying to find ways of lessening electoral disputes as a way of ensuring efficiency in the settlement of electoral disputes takes an understanding that electoral disputes are inherent in the electoral system, therefore the only option is to strengthen the mechanisms of settlement regardless the number of disputes. Thus, the Judiciary as the institution that is the primary dispute resolution mechanism in the nation has to ensure utmost efficiency in the resolution of electoral disputes.

Muchangani is yet another scholar who has touched the study of issues to do with elections and the electoral process. In his study, he questions the autonomy of the Electoral Commission of Zambia (ECZ). In his analysis, he highlights that the question of the autonomy of the ECZ is a major one if we are to ensure that disputes arising from the electoral process are both minimized and handled efficiently.¹³ Different from his approach, this paper puts forward that enhanced autonomy of the Judiciary is what will ensure that disputes arising from the electoral process are both minimized and handled efficiently.

Further, cases such as the *Namulambe and electoral commission of Zambia v Chilufya*¹⁴ go to show the level of disputes that result from the electoral process, statistics obtained from parliament show the number of parliamentary seat petitions that resulted from the recent 2011 general elections, the statistics show a total of (80) petitions lodged with; eleven (11) upheld, forty-seven (47) dismissed, eleven (11) withdrawn, two (92) dismissed for want of persecution,

¹² Chipasha Mulenga, "Corruption in the Electoral Process: What is the Way Forward?" (LLB Obligatory Essay, University of Zambia, 2005).

¹³ Kanyanga Muchangani, "The Independence of the Electoral Commission of Zambia and the Appointment of the Election Date by the President" (LLB Obligatory Essay, University of Zambia, 2012).

¹⁴ (Appeal No. 180/2013) [2014] ZMSC 40

three (3) set aside for non-compliance to the rules, one (1) pending high court judgment and five (5) pending supreme court judgment.¹⁵

Though an area of much compliant over the years, previous work has not made any evaluation of the effectiveness of the Zambian Judiciary in the settlement of electoral disputes. Therefore, this study will analyze the role of the Judiciary in the effective resolution of electoral disputes in Zambia. Recommendations for improvement will then be given.

1.8 METHODOLOGY

The basic method of research will be desk research. Interviews with some stakeholders will also be done.

1.9 OUTLINE OF CHAPTERS

This research follows the structure below:

Chapter two outlines and discusses the causes, manifestations and effects of electoral disputes. It endeavors to show what causes these kinds of disputes, how these disputes are evident in society and what their effects are on the society. Chapter three examines how electoral disputes are resolved in Zambia, that is, the different avenues that are available to address and settle such disputes in Zambia. Within this chapter, the judiciary will be discussed as the primary avenue for the settlement of electoral disputes. Chapter four proceeds to evaluate the judiciary's effectiveness in the settlement and determination of electoral disputes. This will be done by examining past and current cases in Zambia. Other jurisdictions will also be looked at on a comparative basis to the Zambian to suggest whether there are reforms that can be implemented

¹⁵"Election Petition Statistics" (National Assembly Library. Accessed on 3/10/14).

to enhance the effectiveness of the Zambian Judiciary in the determination of electoral disputes. Finally, Chapter five concludes the paper and give recommendations.

1.10 CONCLUSION

The Chapter has given a general introduction to the topic of electoral disputes and their need to be resolved effectively and efficiently. The historical background of the topic of elections and the issues of disputes arising from the present electoral framework has been discussed as having been an existent problem in the political system of the nation. It is against this that there is need to examine the efficiency of the settling of these disputes by our judiciary. On this premise, the next Chapter outlines and discusses the causes, manifestation and effects of electoral disputes. An understanding of this will ensure appreciation for the need to have an efficient mechanism of resolving these disputes.

CHAPTER TWO

CAUSES, MANIFESTATION AND EFFECTS OF ELECTORAL DISPUTES

2.1 INTRODUCTION

In this Chapter, the major causes of electoral disputes will be outlined and discussed. Among such causes are; 'Power', the Electoral System itself, the Legal Framework of elections, Election Management Bodies, the vice of abuse of public resources, the countries' political culture and environment, the media and the law enforcement agencies. Further, Chapter Two will look at how these disputes actually manifest in society, that is, the different ways in which the caused conflicts are manifest in society, for example, through apathy, writing of petitions, complaints through press conferences, peaceful protests, boycotts, litigation and violent protests. The Chapter finalises by analysing the effects of these disputes on society. This is done by an analysis of how different societies have been affected by such disputes.

2.2 CAUSES OF ELECTORAL DISPUTES

The point has to be made from the outset that disputes are inherent to elections. This is largely because the process is organised within an adversarial framework: the gains of a candidate constitute the losses of his opponent. Hence, disputes should be expected in every election even in the developed world where democratic practices are said to have been consolidated. Those who lose unfairly must always challenge the winners. Those who won could also challenge the process to establish the point that they did not win in the way they wish to win.

Causes of electoral disputes are varied. An attempt to come up with an exhaustive list is clearly a futile exercise. Nonetheless, it is instructive to outline some of the major causes of electoral

disputes. Identification of the major causes of electoral disputes is important, as any effective Electoral Dispute Resolution (EDR) system should be responsive and alive to the underlying causes of electoral disputes in a given environment. Whilst an attempt has been made to list some of the major causes as distinct, it is submitted that these causes are, more often than not, interrelated.

2.2.1 “POWER” AS THE ARCHITECTURE OF DISPUTES

Power refers to the capacity or potential to cause change in or influence others’ behaviour and attitudes. It has to do with the “transformative capacity” to intervene in a given set of events so as in some way to alter them.¹

It is difficult to appreciate the role of power in elections without first taking a careful look at the type of powers that exist in a society. There are five major types and sources of power. The first is expert power, this kind of power comes from the knowledge that a person brings into what he or she does. If, for example, a man has over the years demonstrated the ability to deal creatively with a particular governance issue (most especially economic management), he is most likely to be recognised as a powerful person that should be voted into public office. All over the world people are looking for this kind of persons to lead them. Referent power, which is the second type, is a logical product of the first. It emanates from the respect that the people have for an individual owing to his past activities. Such a power could also come from the prevailing tradition in the community. For example, religious leaders are highly respected among a religious people. Similarly, people holding traditional chieftaincy titles are highly respected in

¹ Talcott Parsons, “The Concept of Political Power”. The American Philosophical Society Vol. 107, No. 3 (1963), 232-262.

many African societies. A person with this kind of power could be formally or informally invited by the people to lead them.

The third kind of power is known as legitimate power.² This is the kind of power that is conferred on a person by the office that he occupies. In an election system, the officials of an EMB have legitimate power which they can exercise freely on the other stakeholders in the election. In the same way, the parliament which makes laws can exercise some powers on the EMB itself. But the most important legitimate power that anybody can exercise in an election is the power of voters to elect the persons they want into office. This power is protected by the law; it constitutes a crime for anybody to try to remove it except as stated by the law.

In contraposition with legitimate power is coercive power. The latter has to do with the ability to control others by inflicting the fear of punishment or the loss of valued outcomes in them. During elections, this kind of power manifests in violence, taking such extreme forms as killings or less extreme forms as forcing people to vote against their choice. Those who exercise this kind of power only thrive in a society that gives too little attention to issues of rule of law. This kind of power becomes very threatening to the success of electoral democracy when it is perpetrated by the ruling elite.

In some elections, those who lack expert, legitimate or referent power to make people recognise their leadership abilities could resort to the use of reward power. This has to do with inducing followers with unmerited favours such as money, contracts and public offices. Those who are so induced eventually lose their legitimate power as they are now controlled by the person exercising reward power on them.

² Talcott Parsons, "The Concept of Political Power". The American Philosophical Society Vol. 107, No. 3 (1963), 232-262.

The ultimate expectation of an election is that those who get voted into office will use the legitimate power given to them to develop their society. Where this is not done, political incumbents themselves become the source of future election disputes.

2.2.2 THE ELECTORAL SYSTEM AS A CAUSE OF DISPUTE

The type of electoral system or model employed can have a bearing on electoral disputes. For instance, the First-Past-The-Post (FPTP) employed in Zambia, where the winner takes it all, is more likely to breed conflicts than the Proportional Representation (PR) system used in countries such as South Africa. According to Jeff Fischer, “representation conflict can occur when elections are organized as a “zero sum” game and “losers” are left out of participation in governance.”³ The insightful question of Matlosa is instructive in this regard: “what are direct and indirect linkages between electoral systems and conflicts in the region?”⁴ Perhaps a possible answer could be derived from the case of Lesotho.

Following the 1998 electoral dispute, Lesotho underwent a major reform of its electoral model away from the “first-past-the-post” system and adopted the new mixed member proportional system, which was used for the first time in the country’s 2002 general elections. Since the adoption of this electoral model, violent conflicts have been redressed and today peace, stability and national harmony prevail in the mountain kingdom of Lesotho.⁵

³ Jeff Fischer, “Electoral Conflicts and Violence: A Strategy for Study and Prevention” IFES White Paper,(2002),3.

⁴ Khabele Matlosa, “Electoral Systems, Constitutionalism, and Conflict Management in Southern Africa” African Journal on Conflict Resolution, volume 4, Number 4 (2004), 40.

⁵ Khabele Matlosa, “Electoral Systems, Constitutionalism, and Conflict Management in Southern Africa” African Journal on Conflict Resolution, Volume 4, Number 4 (2004), 49.

2.2.3 INADEQUACY OF THE ELECTORAL LEGAL FRAMEWORK

Electoral laws particularly the constitution and other laws specifically govern elections in a given country. The constitution forms a firm foundation for elections as a fair and legitimate method of selecting and replacing government. Electoral laws dictate the environment that governs the electoral process. The manner in which the stakeholders in the electoral process perceive the environment can be a potential source of electoral disputes. If stakeholders believe that the electoral laws are skewed in favor of say the ruling party, as I usually alleged, they are less likely to respect the outcome of the electoral process. For example, it is widely perceived that the Constitution of Zambia as amended by Act No. 18 of 1996 (herein referred to as the Constitution) was targeted at barring the former President Dr. Kenneth Kaunda through the parentage clause under Article 34(3) (b) of the Constitution.⁶

Referring to this clause, Richard Sakala stated that:

In a meeting with ambassadors of the commonwealth countries to Zambia as well as with the ambassadors of the European Union in Zambia, a unanimous view emerged that the third-generation and the two-term clauses were basically unfair and that these clauses could be a harbinger of conflicts and could undermine peace and security.⁷

Indeed, this later became a source of conflict and the opposition United Independence Party (UNIP) boycotted the elections. The above position is summed in the following words:

Any credible electoral process is dependent upon a sound political and constitutional dispensation that natures the electoral regime and its supporting institutions. Thus constitutional

⁶ Chapter 1 of the Laws of Zambia

⁷ Richard Sakala, "Beyond Political Rhetoric: Balancing Political and Economic Reform". (Lusaka: ZPC Publications, 1998), 140.

and legal frame works are the cardinal documents that inform the context within elections are conducted.⁸

2.2.4 IMPARTIALITY OF ELECTION MANAGEMENT BODIES

One of the major causes of electoral disputes is the perceived failure by the institutions given the mandate to superintend over the electoral process. Electoral management bodies play a fundamental role in any election. They are referees in the electoral process and should ensure that all the players adhere to rules laid down through the constitution and other electoral laws. Election management bodies should not only be impartial, credible and independent, they should actually be seen to be such by all stakeholders in the electoral process. However, there are usually strong suspicious that ruling parties have an unbridled propensity to manipulate the electoral process using the very institutions set up to superintend such elections in total disregard of the “independent and autonomy provisions.” This suspicion invariably undermines the confidence principle stakeholders have in the electoral process thereby predisposing it to electoral disputes. In the recent 2015 presidential by-elections for example, Hakainde Hichilema the president of the opposition UPND alleged that the ECZ had manipulated results to benefit the ruling party.⁹ In response to this, ECZ advised him to petition the election in the courts of law.¹⁰ This clearly shows a dispute resulting from the perceived impartiality of the EMB.

⁸ Peter Tendaiwo Maregere and Brenda Mofya, “Electoral Reforms: Managing Electoral Conflicts in Zambia” *Conflicts Trends*. (2002), 29

⁹ http://www.elections.org.zm/news/press_release%253A_meeting_with_upnd_100129.php accessed on 2nd February 2015

¹⁰ http://www.elections.org.zm/news/press_release%253A_meeting_with_upnd_100129.php accessed on 2nd February 2015

2.2.5 ABUSE OF PUBLIC RESOURCES

Whilst it appears that there is an agreement that political leadership is about service to the people, the reality is that most individuals are propelled into politics by possibilities of personal gains. They invest their valuable resources in order to ascend to a political office with a view to “reaping on their investment.” With this attitude, politicians are inclined to violate clearly laid down regulations, if that would make attain their set out mission. This is ultimately manifested in vices such as electoral corruption and abuse of government resources that may trigger electoral disputes. It is amazing, well perhaps interesting, that in the case of *Mazoka and Others v Mwanawasa and Others*¹¹, the Supreme Court appears to have given a stamp of approval to the abuse of public resources when it stated that 7(k) of the Electoral Code of Conduct¹² did not place any restriction on the President or the Vice President as to whom he can carry or not carry his campaign trips.

The above scenario is epitomized in the candid words of Lise Rakner: “three consecutive elections in Zambia have been skewed in favor of the incumbent through the governing party’s blatant misuse of state funds for election campaigning.”¹³ Referring to the Zimbabwean situation, Matlosa stated thus: “opposition parties constantly complain of an uneven political playing field during campaigns due in part to the automatic advantage enjoyed by the incumbent parties.”¹⁴

¹¹ SCZ/EP/01/02/03/2002

¹² SI No. 179 of 1996

¹³ Lise Rakner, “Stuck in Transition: Electoral Process in Zambia 1991-2001”, (2002), 11.

¹⁴ Khabele Matlosa, “Democratization at Crossroads for the SADC Principles and Guidelines Governing Democratic Elections”, ISS Paper 118 (October 2005), 14.

2.2.6 UNFAIR PUBLIC MEDIA COVERAGE

The media has also been a source of contention during elections. The media plays an important role in any elections.¹⁵ It helps candidates communicate their message to the voters. In most countries, as is the case in Zambia, most of the media is owned and controlled by government. During elections, the public media is owned and controlled by government.

It is thus perceived to have biased coverage towards the ruling party candidate. Some countries have attempted to mitigate this through legislation. After observing that the media played a significant role during elections, the Electoral Reform Technical Committee appointed to review the Electoral System in Zambia recommended thus: “the media should, during the period of an election campaign, provide fair and balanced coverage of campaigns, rallies, meetings and press conference, to all political parties and candidates participating in an election.”¹⁶

2.3 MANIFESTATION OF ELECTORAL DISPUTES

Electoral disputes can be expressed in various ways. It all depends on the stakeholders and the kind of society in which electoral democracy is being practiced. The channels for expressing the problems include the following: Apathy, writing of Petitions, complaints through press conferences, peaceful protests, boycott and violent protests.

¹⁵ “Zambia’s Media Wars: A Critical Analysis of media Coverage of the 2008 Presidential By-Election in Zambia”. sockom.helsinki.fi/polcom/Zambia's%20Media%20Wars.doc

¹⁶ Government of the Republic of Zambia, Report of the Electoral Reform Technical Committee, appointed to review the Electoral System in Zambia, (August, 2005), 68.

2.3.1 APATHY

Some people could become apathetic to issues of election owing to their belief that their society lacks the capacity to hold a free, fair and violence-free election or due to their dissatisfaction with how past election disputes were poorly managed.¹⁷

In the Zambian case, at 32.36 percent, the 2015 presidential by-election voter turnout was the lowest in Zambia's history. Recent by-elections have seen a sharp drop in voter turnout with some areas recording as low as 20 percent of registered voters in a particular constituency. In accordance to the figures tabulated by the International Institute for Democracy and Electoral Assistance (IDEA), turnout has been steadily declining over the years in Zambia.¹⁸ This clearly shows a display of the lack of confidence there is in the electoral process in the land.

2.3.2 PETITIONS

An election petition is the process through which one challenges election results through the courts of law. In Zambia, the forum for commencing Presidential Election Petitions is the Supreme Court and the legal basis for this is Article 41 (2) of the Constitution. This Article is supplemented by Rule 72A of Statutory Instrument No 1 of 2002.

Parliamentary election petitions are heard by the High for Zambia. This action is pursuant to Section 93 (1) of the Electoral Act no 12 of 2006. Section 93 (2) provides for grounds on which the election of a candidate as a member of the National Assembly shall be void if proved to the satisfaction of the High Court upon the trial of an election petition. Section 94 of the Act regulates the presentation of parliamentary election petitions to the High Court.

¹⁷ Professor Isaac Olawale Albert, "Election Dispute Management Guide for West Africa: Peace and conflict Studies Programme" Institute of African Studies: University of Ibadan: Nigeria 2009, 275.

¹⁸ <http://www.liberationnews.org/2015-elections-zambia/> accessed on 6th March 2015.

Petitions to Elections of Councilor are brought pursuant to section 18 of the Local Government Elections Act Chapter 282 of the Laws of Zambia before the High Court.

When a petition is lodged against an election return in Presidential, Parliamentary or Local Government, there are four possible outcomes; first, the election may be declared void and a direction is issued for a new election. Furthermore, the election may be held to have been undue. In such a case, the original return is quashed, and another candidate is declared to have been elected. Third, the election may be upheld in some instances and if so, the member returned is found to have been duly elected and lastly the petition may also be withdrawn. This may occur when the petitioner fails to attend a hearing, or when Parliament is dissolved before the petition process is complete.

As a manifestation of disputes, election petitions are the most legally effective ways of seeking redress before the courts of law in the case that one is aggrieved with the outcome of any election. Whether justice will done depends wholly on the judiciary in their dispensation of their duties. The table below shows statics obtained from National Assembly of the number of election petitions resulting from the 2011 general and parliamentary elections. These statistics categorically show; Election petitions pending Judgment before the Supreme Court, Petitions discontinued, Petitions dismissed for want of prosecution, Parliamentary seats nullified by the High Court and Petitions upheld by the Courts as of 3rd October, 2014.

General and Parliamentary Election Petition Statistics 2011				
			No of	
			Petitio	Tot
Status			ns	al
Petition Awaiting High Court Judgment	Pending Judgment??		1	1
Petitions discontinued/withdrawn	Withdrawn		11	11
Petitions Dismissed for Want of Prosecution	Dismissed		2	2
Petition Set Aside For Non Compliance to The rules	Discontinued		3	3
Petitions Dismissed	Dismissed		47	47
Petition Upheld	Upheld-Election Nullified		11	11
Petitions Pending Supreme Court Judgment	Pending Judgment		5	5
Total Petitions Lodged				80

The table shows statistics of election petitions resulting from the 2011 General and Parliamentary elections. There was a total of Eighty (80) petitions lodged with; eleven (11) upheld, forty-seven (47) dismissed, eleven (11) withdrawn, two (2) dismissed for want of persecution, three (3) set aside for non-compliance to the rules, one (1) pending high court judgment and five (5) pending supreme court judgment.¹⁹

This is clear evidence that petitions are a means through which electoral disputes manifest. Also the statistics show the how need for a more efficient judicial settlement of election petitions.

¹⁹ "Election Petition Statistics" (National Assembly Library. Accessed on 3/10/14).

2.3.3 PRESS CONFERENCE

A press conference could be called by the aggrieved party to express its misgiving about certain aspects of the elections. Threats could be made on the possibility of resorting to self-help strategies if the situation was not redressed. Where a press conference is called, the main objective is to educate the generality of the people on the nature of the problem and by so doing get their support in redressing it.²⁰

2.3.6 VIOLENT PROTEST

This happens when the people do not trust either the EMB or the judicial system in finding solutions to the problem. A violent clash is usually aimed at punishing political opponents or their agents for doing what they did before, during or after the elections. The demonstration could also be towards the goal of ensuring that the election does not hold or if held for the outcomes to lack relevant legitimacy.²¹

2.4 THE EFFECT OF ELECTORAL DISPUTES

Electoral disputes have the potential of plunging the country into a spiral of conflict and violence that inevitably brings about untold misery onto the citizenry. Electoral disputes and the attendant conflicts detract the government's efforts to pursue the noble course of economic development.

With the emergence of competitive politics in 1991, Zambia witnessed electoral disputes at both parliamentary and presidential elections. The most notable ones are the presidential elections held in 1996, 2001, 2006, 2008, 2011 and indeed the very recent presidential elections held on

²⁰ Denis Petit, "Resolving election disputes in the OSCE Area: Towards a standard election dispute monitoring system", (Warsaw: Office of Democratic Institutions and Human Rights, 2000), 5.

²¹ Denis Petit, "Resolving election disputes in the OSCE Area: Towards a standard election dispute monitoring system", (Warsaw: Office of Democratic Institutions and Human Rights, 2000), 7.

20th January, 2015 following the death of the President. The 2001 swearing in ceremony was heavily guarded by paramilitary and regular police who blocked the way to the Supreme Court premises where it was taking place. This was a result of spontaneous protests by some members of the public and opposition party cadres against the swearing in of the President Elect who they accused of having been elected through fraudulent elections.²² Similar violence characterized the post 2006 elections in Zambia.

In Kenya, the 2007 electoral dispute left 1,300 persons killed, 300,000 persons displaced²³ and the country's hitherto vibrant tourism sector virtually brought to a halt. In Sri Lanka, the 2001 elections left sixty-one (61) people dead and hundred (100) wounded in election violence.²⁴

Following the 1998 elections in Lesotho, the country was plunged into political instability as a post-election violent conflict erupted. In 2000, thirty-two (32) people were killed in electoral violence in Zimbabwe by the so-called "war veterans" associated with President Mugabe's ZANU-PF party.²⁵

Matlosa aptly observes thus: with the benefit of hindsight, it is abundantly evident that elections in the SADC region have triggered various types of conflicts thus undermining in the process constitutionalism and constitutional rule.²⁶ The devastating effect of conflicts, admittedly most of which is caused by electoral disputes, has been clearly stated as follows:

No single internal factor has contributed more to the present social-economical problems on the continent than the scourge of conflicts within and between our countries. They have brought about death and human suffering, engendered hate and divided nations and

²² "Zambia's 2001 Tripartite Elections Report", Foundation for Democratic Process, (2001), 51.

²³ Julian Rotich "Report on Post-Election Violence in Kenya" OHCHR Fact-Finding Mission to Kenya, 2008,14-15

²⁴ "Election Violence in Sri Lanka", Associated Press, December 5, 2001.

²⁵ Swan, Craig, BBC News, "Mugabe sued for election violence," (2001), 20.

²⁶ Khabele Matlosa, "Electoral Systems, Constitutionalism, and Conflict Management in Southern Africa", African Journal on Conflict Resolution, Volume 4, (Number 4 2004), 11.

families. Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope.²⁷

This means that the world can no longer afford to ignore electoral disputes positing that they were merely expressions of disgruntled politicians whose ego can be too demanding to accept the verdict of the people.

2.5 CONCLUSION

This chapter has outlined and discussed the major causes of electoral disputes, listing among others, the media and political environment. The chapter has further explored the manifestation of these dispute, that is, how these disputes really represent themselves in society highlighting petitions and violent protests as some of them. Lastly, the effect of these disputes on society has been discussed. The next Chapter analyses the different mechanisms that are available in Zambia for the settlement of electoral disputes. This is important in order to understand the role and position of the judiciary in the resolution of electoral disputes.

²⁷ Kithure Kindiki, "The Increasing Role of African Intergovernmental Organisation in issues of Regional Peace, Security and the Protection of Human Rights", *Zambian Law Journal* Volume 35, (2003), 83.

CHAPTER THREE

MECHANISMS OF ELECTORAL DISPUTE RESOLUTION IN ZAMBIA

3.1 INTRODUCTION

This chapter looks at the different types of Electoral Dispute Resolution (EDR) mechanisms that are available in Zambia. Primarily among them is the Judiciary. This chapter aims at establishing the judiciary as the primary mechanism for the settlement of electoral disputes even in the presence of other mechanisms that are available in Zambia. This is important in order to emphasize the need for efficiency in the settlement of these disputes within the judicial system.

3.2 THE ORDINARY COURTS (JUDICIARY) OF ZAMBIA

In Zambia, the ordinary courts have an exclusive jurisdiction on petitions arising from elections. This means that other systems of resolving electoral disputes can only be used before the declaration of results, in effect, they can be said to be pre-declaration mechanisms.

Section 93(1) of the Electoral Act¹ provides that “No election of a candidate as a member of a National Assembly shall be questioned except by an election petition presented under this part (Part IX).” Furthermore, section 102(1) of the Electoral Act provides that, “An Election petition shall be tried and determined by the High Court in an Open Court, within one hundred and eighty days of the presentation of the election petition.”

Meanwhile, Article 41 (2) provides thus:

Any question which may arise as to whether any provision of the constitution or any law relating to elections of a president has been complied with or any person has been legally

¹ Chapter 13 of the Laws of Zambia

elected as president under Article 34 shall be referred to and determination by the full bench of Supreme Court.

Section 21 (3) of the Electoral Act contains a similar provision. The question is, how effective have the courts been in resolving Electoral Disputes referred to them as stipulated by both the Constitution and the Electoral Act?

Disposal of petitions, particularly presidential petitions takes too long. The 1996 Presidential petition, *Akashambatwa Mbikusita Lewanika and four others v Frederick J.T Chiluba*² took one and a half years before the judgement was finally delivered. Meanwhile, the 2001 Presidential petition, *Mazoka and Others v Mwanawasa and Others*³, dragged from January 2002 to 16th February 2005 when the Supreme Court finally delivered the judgement. This translates to a period of three years and one month, a period more than half the Presidential term of office. Parliamentary elections have not been spared from these delays notwithstanding the provision to the effect that such disputes should be disposed within a period of one hundred and eighty days (Section 21 (3) of the Electoral Act). Referring to the delays in disposing cases on electoral petitions, the Zambia Daily Mail observed thus:

Zambia's term of office for the Republican President or member of Parliament is only five years and if an elected representative facing an election petition is allowed to sit in Parliament among honourables and the seat only nullified three years later, the electorates have a lot to lose.⁴

This statement was made after the Supreme Court of Zambia on 9th of February 2015, upheld the High Court decision to nullify the Masaiti parliamentary seat which resulted from the 2011 general elections. The Supreme Court decision came at a time when there was less than seventeen months remaining before another general election in 2016. Also commenting on the

² (1998) ZR 49 (SC)

³ SCZ/EP/011/02/03/2002

⁴ <http://zambiadailynation.com/2015/02/10/election-petitions/> accessed on 21/02/2015

delays in disposing cases on electoral petitions, the Deputy Minister in the Office of the Vice President stated that;

Delays in settlement of these petitions cause anxiety amongst the stakeholders, consequently causing instability in political parties as it affects party participation of the petitioned. For the period, they are a resource drain on both parties due to litigation costs and the petitioned loses concentration and focus on his/her job to represent the people and instead focuses on gathering resources to help his/her case. Further, this delay may cause a shift in political mileage depending on who gains the peoples sympathy during the court process between the two parties, that is, the petitioner or the petitioned.⁵

This observation raises the concern of speedy adjudication in the settlement of electoral disputes. The credibility of the Court as the final arbiter of electoral disputes is also in question. This was manifested following the 2006 presidential elections where the opposition Patriotic Front disputed the results of the presidential elections. However, the party stated that it could not seek redress from the Courts of Law, as this would simply be an academic exercise that could only serve to legitimize an illegitimate regime.

Furthermore, principal stakeholders perceive the court system as not being independent. This view has been prominent in presidential petitions. It is strongly believed that the sitting President controls the Judiciary and it would therefore take an exceptionally brave judiciary to come up with a ruling against the incumbent president. Two issues give credence to the proposition that the court is under the control of the sitting president and therefore not independent.

Firstly, the events that led to the eventual resignation of the then Chief Justice Mathew Ngulube is an affirmation of the extent to which the judiciary had lost its independence. The Chief Justice received favors in the form of funds from the sitting President, Dr. F.T. Chiluba. This

⁵ Interview: Hon. Lazarous C. Bwalya, 6th March, 2015.

unfortunate incidence only served to confirm fears that executive uses its unbridled powers and unfettered access to national resources to systematically influence the judiciary.

Secondly, according to Article 41 (1) of the *Zambian Constitution*⁶, the Chief Justice is the returning officer for the purpose of elections to the office of President, meanwhile, as stipulated under Article 41 (2) of the constitution⁷, presidential petitions are to be brought before full bench of the Supreme Court and the Chief Justice presides over the same. One then wonders how the Chief Justice can reconcile his role as a returning officer and adjudicator over the same elections in which he declares one candidate “duly elected as President” as provided for under Article 34 (8) of the constitution.⁸

Whilst Parliamentary Petitions clearly stipulate the relief that may be claimed in an election petition, this is not the case with the presidential petitions. Without clear provisions, one may tend to appreciate why the court has been reluctant to nullify presidential elections, as such a decision would be devoid of an enforcement mechanism. In the 2001 Petition, the court acknowledged that there were malpractices, but they could not do more than that.⁹

Electoral petitions in the courts are inherently expensive. Therefore, some individuals may opt not to petition on grounds that they cannot afford the cost associated with such petitions. For instance, the petitioner may need to procure services of a lawyer due to the technicalities and procedures inherent in the High Court and Supreme Court. In a country such as Zambia, where

⁶ Chapter 1 of the Laws of Zambia

⁷ Chapter 1 of the Laws of Zambia

⁸ Chapter 1 of the Laws of Zambia

⁹ *Mazoka and Others v Mwanawasa and Others* SCZ/EP/011/02/03/2002, 26.

poverty levels are high, such costs can clearly prohibit a number of citizens from seeking redress on electoral disputes through the courts of law.

3.3 ADMINISTRATIVE SYSTEM OF DISPUTE RESOLUTION

Election management bodies superintend administrative systems. The election management body in Zambia is the Electoral Commission of Zambia (ECZ). The commission is established under article 76 of the constitution.¹⁰ Section 111 of the Electoral Act provides for the composition of the Conflict Management Committees (CMCS) by the ECZ to resolve electoral disputes. The ECZ has since established the National CMC as well as 74 district-level CMCs with membership by registered political parties and selected civil society organizations as an alternative dispute resolution mechanism to deal with election-related conflicts. The commission can also resolve electoral disputes through conciliation or mediation. This is provided for under section 110 (1).

Although mediation or conciliation may be highly attractive in a commercial environment due to factors such as confidentiality, low costs and the need to maintain a sound relationship between parties to the dispute, it is less appealing in a political environment, particularly in Zambia due to the problem of enforceability. Whereas commercial enterprises are more likely to respect the decisions arising from the mediation process, this is less likely with political parties particularly in Zambia. Firstly, the committee does not have powers to compel parties to the conflict to appear before it. In the event that a party to the dispute decides not to appear before the committee, the committee cannot institute any action against such an ailing party. Secondly, even where it is proved that a party has grossly undermined the provisions of the electoral laws such as the Electoral Code of Conduct Regulations, the committee cannot impose sanctions such as

¹⁰ Chapter 1 of the Laws of Zambia

disqualifying the party from participating in the elections. Thirdly, even when parties to dispute sign a document outlining what had been resolved, the committees do not have powers to compel parties to the agreement to abide by their own agreement.¹¹

3.4 THE POLITICAL SYSTEM OF DISPUTE RESOLUTION

Political systems are efforts spearheaded by political parties themselves aimed at enhancing inter-party communication and serve as a platform for resolving disputes. The political system provides a more flexible dispute resolution mechanism. It is inherently able to detect disputes at an early stage and therefore resolve them before they get out of proportion. The Zambia Center for Inter-party Dialogue (ZCID) is one such entity in Zambia.

The ZCID is registered as a trustee and governed by a trustee deed. Membership is voluntary and open to all registered political parties. The supreme body of the ZCID is the summit of presidents, which comprise of presidents of various political parties that are members of the ZCID. There is also a board of trustees that comprises of Secretary Generals or equivalent of the political parties that are members of the ZCID. The Chairperson of the board is an independent person.

ZCID provides a platform for dialogue. Dialogue is essential in the detection of potential disputes as well as resolution of disputes where they arise. Members of the ZCID can bring complaints to the secretariat of the ZCID. ZCID can then convene a meeting of the Board of trustees. In this respect, ZCID provides a platform to resolve any disputes between and amongst political parties including disputes that are related to the electoral process. The secretariat may;

¹¹ http://www.elections.org.zm/conflict_management.php accessed on 21/02/2015

on its own volition, convene a meeting of the Board of trustees where, in its opinion, there is need to resolve a certain political impasse in the country.

As a dispute resolution system, the ZCID has a number of shortcomings. Firstly, membership is voluntary. In most cases the major political players join and leave the ZCID as and when it is expedient to do so. Secondly, observance of the decisions of the ZCID is entirely dependent on the good will of the parties to the dispute. The matter concerning the Constitutional making process is instructive in this regard. The summit of presidents, that included the president of the Patriotic Front agreed to proceed with the constitutional making process in line with what later became the National Constitutional Conference (NCC). However, the Patriotic Front later changed its position and categorically indicted that it was not going to support any constitutional making process in the framework of the NCC. The party even attempted to expel its members of parliament that decided to participate in the NCC as provided for in the National Constitutional Conference Act¹²

3.5 CONCLUSION

This chapter has outlined the different mechanisms of resolving electoral disputes that are available under the Zambian framework. Among all the systems, it has been evident that the judiciary is the main system for settlement of these disputes both pre and post elections. Therefore, it is of importance that while the other mechanisms strive to efficiently carry out their mandate, it is of paramount importance that the judiciary to even more as they are the primary system. The next Chapter will evaluate the effectiveness of the judiciary in the settlement of electoral disputes.

¹² Act No. 19 of 2007 of the Laws of Zambia

CHAPTER FOUR

THE EFFECTIVENESS OF THE JUDICIARY IN RESOLVING ELECTORAL DISPUTES

4.1 INTRODUCTION

The Zambian Judiciary has been an organ of much criticism. In the area of electoral dispute resolution, the judiciary has sparked a number of debates over the past years questioning its independence and effectiveness in settlement of such disputes. Many have cried for speedy adjudication of these matters basing their cry on among other reasons the adage; ‘Justice delayed is justice denied.’ This Chapter will discuss the judiciary’s effectiveness by reference to some of the many electoral disputes that have come before it as well as a comparative analysis with other jurisdictions after which a conclusion will be drawn.

In Zambia, since the emergence of competitive politics in 1991, there has been a number of election results that have been contested by way of petition, these being both presidential and parliamentary. These petitions have been made out in the courts of law pursuant to the provisions discussed in Chapter Three of this paper among which are Constitutional provisions and Electoral Act provisions.

4.2 THE ZAMBIAN JUDICIARY (SETTLEMENT OF ELECTORAL DISPUTES)

There is no better place to settle electoral disputes than the courts of law. But so far, the courts cannot be said to have been a good place for settling election disputes in Zambia, especially those involving the election of the president.

The inordinate delays in settling presidential election petitions have rendered the courts of law irrelevant in the settlement of electoral disputes involving the election of the president. These delays have made presidential election petitions an academic exercise in Zambia.¹

The system itself makes this a challenge as the President is sworn in immediately after being announced winner by the Electoral Commission of Zambia. This puts the petitioner in a very disadvantaged legal position trying to undo what has already been done and trying to challenge someone who now, in some way, controls the appointments, promotions and payment of judges. Experience has also shown that by the time the matter is disposed of, the president whose election is being challenged may be way into his third or fourth year of the five-year term of office.

The 1996 Presidential Petition² took one and a half years before the judgment was finally delivered. Also, the 2001 Presidential Petition³ went on from January 2002 to February 2005 when the Supreme Court finally delivered the judgment. For the purpose of good governance, it is desirable that electoral disputes are settled expediently. It is however clear that the courts have had a consistent trend in delaying the settlement of electoral disputes.⁴ This has consequently caused the loss of confidence in the courts as the final arbiter of such disputes. This lack of confidence in the court system fuels the temptation to pursue unlawful means to settle such disputes by the parties concerned.

¹ Sikaaba Malavu, "Electoral Disputes: An Evaluation of the Electoral Dispute Resolution Systems in Zambia" (LLB Obligatory Essay, University of Zambia, 2009), 35.

² *Akashambatwa Mbikusita Lewanika and Four Others v Fredrick J.T Chiluba* (1998)ZR 49 (SC)

³ *Mazoka and Others v Mwanawasa and Others* SCZ/EP/011/02/03/2002

⁴ Rachel Jackson, "Creating Avenues to Resolve Election Disputes: Conflict Management Committees in Zambia, 2001-2011", ISS, Princeton University, (2014), 14.

Also, there has been the growing concern of the autonomy of the judiciary in deciding such disputes, this view was clearly demonstrated by the then opposition Patriotic Front in the 2006 when they completely ruled out going to court even when they did not agree with the election results. They argued that experience showed that going to court was a waste of time and that it was just an academic exercise that only served legitimate and illegitimate regime. This inadvertently presents the problem of the resolution of such disputes in society.

In 2001, the Presidential election Petition almost saw the emergence of uncontrolled violence by supporters of the opposition who if not restrained threatened taking the law into their own hands. This resulted from the lack of expediency and efficiency in the manner that the petition was handled by the courts of law. It was alleged that the 2001 elections were manipulated. This came out in the testimonies of some of the witnesses.⁵ Despite the testimonies and evidence, the Court dismissed the Petition. This added to the outrage of the petitioner's supporters and loss of confidence by various stakeholders in the Court system on Presidential election Petitions in Zambia.⁶

Many parliamentary seats resulting from the recent 2011 elections have also been petitioned. Among these are Mulobezi, Petauke, Masaiti and Malambo which have had a number of complexities with each case having its unique share. Mulobezi, Petauke and Malambo have had no parliamentary representation for over one year as their seats are mired in legal complexities after the ruling party went to court to bar the incumbents from re-contesting their seats on account that the seats were nullified due to corrupt practices. Commenting on the delay in the settlement of these cases, the President during the swearing in of the Chief Justice announced

⁵ Mazoka and Others v Mwanawasa and Others SCZ/EP/011/02/03/2002

⁶ "Policy Brief on the Causes of Violence Conflicts in Zambia and Recommendations on how to Stop it", SACCORD (2010), 12.

that he would want the cases concluded to ensure that the constituents of the three seats have representation.⁷

The former Chief Justice also called on the judiciary to deal expeditiously with election-related cases to protect its integrity and its relevance to the public. This was when he spoke at an Electoral Commission of Zambia (ECZ) seminar for judges which was under the theme, "continuing legal education as an effective tool for enhancing expeditious delivery of justice", he added that stakeholders placed immense trust in the Courts and their expectations are high.

Truly, the Chief Justice was right when he said at the same event that;

At the centre of these unfolding events will be our institution, the judiciary, whose integrity we have to protect if the legitimacy of our decisions is to be preserved and preserved it must be; if we are to remain relevant to the public that we serve.⁸

This means that the judiciary is a very important institution of the state that should never be allowed to sink low because it endangers the political, social and economic stability, it threatens all the gains made as a nation, politically and otherwise.

4.3 COMPARING WITH MALAWI AND KENYA

The Malawian Judiciary has been commended by many institutions and stakeholders for expeditiously determining petitions that come before it as a way of complaints from stakeholders in the electoral process. An example is the landmark decision in the Malawi High that compelled Malawi Electoral Commission (MEC) to announce election results in accordance with the provisions of the Malawian Constitution and the expeditious interpretation of the Constitution by

⁷ www.pridemagazineng.com/zambia-election-boss-appointed-chief-justice accessed on 4th March 2015.

⁸ Report on the ECZ seminar 2015

the Court.⁹ This should serve as an example to the Zambian judiciary that is struggling to deal with electoral petitions within the reasonable timeframe.

It is clear how the Malawian judiciary has gained respect due to such expediency and efficiency, this is evidence by the confidence that the citizenry of Malawi has placed in its impartiality by believing that Malawian Judges dispense justice devoid of joining political battles among electoral stakeholders. The Malawian judiciary has also earned recognition on the international scene resulting from the same, this was evidenced by the appointment of a Malawian Judge to preside over the tribunal of three senior judges by the President of Zambia.

The Zambian people and politicians have less faith in the Zambian Judiciary because of delays by Judges to dispose electoral matters that come before it. While it only took one week for the Malawian Judiciary to dispose the controversial interpretation of the Malawian law on elections, it has taken months for the Zambian courts to deal with similar interpretation of electoral laws as is the case with the case involving Dora Siliya and two others. The Zambian Courts have contributed towards the disregard of the Zambian law that demands that once seats are nullified, an election must be held within 90-days.

It is because of such factors that the Governance Advisor of the Young African Leaders initiative (YALI) urged the Zambian Judges to emulate the Malawian Judiciary when determining petitions from elections if the Zambian Judiciary is to regain the confidence of the public and stakeholders.¹⁰

⁹ Kumachenga v Majoni and Electoral Commission Civil Cause No. 18 of 2004

¹⁰ 2nd interview with Isaac Mwanza 3rd March 2015

In Kenya, at the time of the 2007 elections, the judiciary was perceived as too politicized in favor of the President to objectively adjudicate on electoral or political disputes. One reason for this politicization was the way the judiciary was constituted. For example, before the December 2007 elections, the then President unilaterally appointed High Court judges, ignoring a political pact for consultation.¹¹ This seriously compromised the court's independence and public confidence. Without an independent and capable judiciary to act as arbiter, Kenyans resorted to violence as a means of dispute resolution.

With a new political and constitutional order concluded in 2010, after three years of negotiations that followed the violence of 2007, a sweeping reconstruction of the judiciary as mandated by the new Constitution was undertaken. A new Judicial Service Commission was established, and a more transparent and inclusive process for the appointment of judges that involved a vetting process by a mixed panel of local and international experts was set up. Further, the judiciary's autonomy was guaranteed through the establishment of a judiciary fund wholly controlled by the body itself. These practical reforms in the design of the new judicial architecture resulted in a number of key developments that gave it a favorable boost in the eyes of many.¹²

These reforms have restored confidence in the Kenyan judiciary among stakeholders in the electoral process. Zambia could learn from such reforms to enhance the settlement of electoral disputes and prevent a situation as that which occurred in Kenya post the 2007 elections.

¹¹ Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, "Judicial Independence", Commonwealth Law Conference (2007), 10.

¹² <http://www.laibuta.com/blog/electoral-dispute-resolution-kenyas-jump-from-street-justice-to-judicialinstitutions> accessed on 10th March 2015

4.4 CONCLUSION

It is clear thus far that the Zambian Judiciary falls below standard in the resolution of electoral disputes both within its own context and comparatively. In its own context, it takes too long to settle a dispute, causing the abrogation of its own laws such as that of holding elections within 90 days of nullification of a parliamentary seat.¹³ Consequently leaving constituents of affected constituencies with no representation for very long periods of time, thus, hindering development. Comparatively, it falls below standard as other countries like Malawi and Kenya are more efficient and expedient in their settlement of electoral disputes thereby commanding confidence by stakeholders because they are seen to be impartial and having the aim of delivering justice expediently. Based on the foregoing, the next Chapter will conclude the paper and give recommendations for improvement in the efficiency of settlement of electoral disputes by the Zambian Judiciary

¹³ Banda v Siliya (Appeal no. 95 2012) [2013] ZMSC 20 is an example.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

This Chapter will conclude the paper and give recommendations for improvement in the effective resolution of electoral disputes by the Judiciary in Zambia.

5.2 CONCLUSION

Electoral disputes are inevitable in every democratic settings even in their smallest forms. It is the very theory of democracy that allows for these disputes to be fueled as people or groups of people are allowed to express their dissatisfaction at any stage of the electoral process. They can be said to be inherent in the presence of competitive politics such as is the case in Zambia. These disputes are caused by many factors in the electoral process and manifest in different ways which among them are petitions of election results. It is therefore important to pay attention to the manner in which such disputes are settled as they tend to have adverse effects on the social and economic welfare of a country if not transparently and expeditiously settled.

In Zambia, the Courts have jurisdiction to settle any kind of electoral dispute. This makes them a center pillar of electoral dispute resolution. It is also recognized that there are administrative and political bodies that are set up to resolve such disputes, however, these bodies are only effective, optionally, before the declaration of election results thereafter leaving exclusive jurisdiction to the judiciary to settle any disputes arising. Naturally, the administrative and political systems are perceived as being not as effective as they are alleged to be susceptible to corruption easily

causing bias in the settlement of the dispute, thus leaving the judiciary as a better and legitimate option for aggrieved parties.

Meanwhile, the judiciary's court system in Zambia has been characterized with delays in the settlement of electoral disputes. In particular, presidential petitions have dragged for as much as three years before their determination. These delays have invariably reduced the confidence bestowed in the judiciary as an avenue for resolving electoral disputes leaving stakeholders with nowhere to go for redress which may force them to take the law in their own hands. This may lead to adverse effects on the country. Furthermore, principle stakeholders believe that the judiciary was not impartial and was heavily controlled by the executive and would therefore not make a ruling against the incumbent president. Indeed, in a country like Zambia, where the powers of the executive are overwhelming and overbearing, it would require extraordinary courage for Judges to decide against an individual who has already been given such executive powers.

Further, parliamentary petitions have also been seen to take almost a full term of office to be determined and fully settled. Causing in some cases constituents to be left with no representation in parliament thereby hindering development in the area. Furthermore, due to the court systems expensive nature, it is a cost both the petitioner and the petitioned as well as the government resources as money will be used to pay all court officials including the Judges all through the process.

5.3 RECOMMENDATIONS

In view of the above shortcomings that hinder the effective delivery of electoral dispute resolution by the Zambian judiciary, the following recommendations are made that may be explored to enhance its effectiveness in this regard.

5.3.1 INTRODUCTION OF ELECTORAL TRIBUNALS

Presidential and parliamentary electoral tribunals should be set up to specifically and expeditiously settle presidential and parliamentary election petitions. These tribunals should be constituted of experts on such matters. It would permit the speedy determination of disputes arising out of presidential elections and its decisions are final. Alternatively, the Constitutional Court as established under Article 156 of the Draft Constitution¹ can be given exclusive jurisdiction to deal with these petitions expeditiously.

5.3.2 TIMEFRAMES FOR SETTLEMENT OF DISPUTES

The need for a predetermined transparent timeframe within which petitions are to be settled cannot be over emphasized. In this sense, Article 72(2) (e) of the Draft constitution is instructive by requiring timely resolution of electoral disputes. This will help the Judiciary to efficiently determine electoral disputes.

5.3.3 TRAINING AND VETTING OF JUDGES

There should be a more transparent and inclusive process for the appointment of judges that will involve a vetting process by a mixed panel of local and international experts at the start of the reform. The vetting of the current judges should take place as was done in Africa by Kenya and

¹ Draft Constitution of Zambia 2014 Technical Committee

Bosnia- Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe. Vetting would achieve the same goal as renewal: judges with problematic records would not be able to remain on the bench. However, it would be less disruptive than a process requiring all judicial positions to be filled anew. Every judge would be given an opportunity to resign (with appropriate benefits). Those that remained in office would be ‘vetted’ by an independent commission (the Interim Judicial Service Commission). The main aim of the process would be to ensure that any serious complaints against sitting judges were properly considered. Further, the judiciary’s autonomy should be guaranteed through the establishment of a judiciary fund which is to be wholly controlled by the body itself. These practical reforms in the design of the new judicial architecture would result in a number of key developments that will give it a favorable boost in the eyes of many.

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