IN THE SUPREME COURT FOR ZAMBIA **NO. SCZ/8/EP/3/96**
HOLDEN AT LUSAKA **and NO.SCZ/8/EP/4/96**

IN THE MATTER of an Application under Article 41(2) of the Constitution of Zambia
and
IN THE MATTER of the eligibility of a candidate in respect of Article 34(3) of the Constitution of Zambia
and
IN THE MATTER of the Regulation 15 made pursuant to the Electoral Act, 1991
and
IN THE MATTER of the Presidential Election held in Zambia on the 18th day of November 1996
BETWEEN

AKASHAMBATWA MBIKUSITA LEWANIKA	1st PETITIONER
and	
EVARISTO HICUUNGA KAMBAILA	2nd PETITIONER
and	
DEAN NAMULYA MUNG'OMBA	3rd PETITIONER
and	
SEBASTIAN SAIZI ZULU	4th PETITIONER
and	
JENNIFER MWABA PHIRI	5th PETITIONER
and	
FREDERICK JACOB TITUS CHILUBA	RESPONDENT

RULING ON APPLICATION UNDER RSC ORDER 112

NGULUBE, CJ.

On 23rd and 24th June 1997 we heard submissions and arguments on the application made by the petitioners under RSC Order 112 which is grounded upon the Family Law Reform Act 1969 of the United Kingdom. The petitioners would like the court to make an order directing that the respondent and the witness Luka Chabala should each give a sample of blood or other bodily sample so that the samples may be subjected to scientific tests such as DNA testing to establish

whether or not the witness is the biological father of the respondent. The application is vigorously resisted on behalf of the respondent. Learned State Counsel . Mr. Lisulo led the submissions on behalf of the petitioners, pointing out that the witness Luka Chabala Kafupi has repeatedly and with gusto claimed to be the biological father of the respondent and had agreed to have his blood tested for the purpose of proving conclusively and scientifically that he sired the respondent. It was submitted that the petitioners had complied with the provisions of RSC Order 112 and that, having regard to the allegations in the petition and the evidence led in respect of the paternity of the respondent as the son of the witness Chabala or of a Mozambiquan called Jim Zharare Nkhonde or of some other person, the court should find ways and means of ascertaining the truth. Mr. Lisulo argued that the way to remove the contradictions in the evidence led was through blood tests or other genetic fingerprinting. The application was made under Section 20(1) of the family Law Reform Act 1969 which is in the following terms-

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> ***"20. Power of court to require use of blood tests. (1) In any civil proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for the taking, within a period to be specified in the direction, of blood samples from that person, the mother of that person and any party alleged to be the father of that person or from any, or any two, of those persons.***
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> ***A court may at any time revoke or vary a direction previously given by it under this section."***

Mr. Lisulo submitted that there was in these civil proceedings the necessary paternity issue. He acknowledged that in terms of S.21(1) of the same Act, no

blood or other bodily sample for DNA can be taken from an adult without his consent but argued that such a step would be a golden opportunity even for the respondent. He submitted that it was necessary in the first instance that the court should give a direction and that should the respondent then refuse to give a sample, the petitioners would invite the court to draw the appropriate inference from such refusal, as provided by Section 23 of the Act. Learned State Counsel also cited Sections 10 and 13 of the High Court Act, CAP.27 of the Laws of Zambia together with the English Law (Extent of Application) Act, CAP.11 which cumulatively support the adoption or adaptation of the law and practice in England in default of any provision in our own laws governing a given situation. He referred us to PHIPSON on Evidence, 14th Edition, paragraphs 15-21 to 15-26 which discuss the admissibility of the results of blood tests even at common law; the absence of any power to compel submission to the tests; the intervention of the Family Law Reform Act 1969 in Part III (SS.20-25) which now provides machinery for obtaining scientific tests and generally commend the desirability of ascertaining the truth concerning the paternity of a person when in issue. We were also referred to S-v-S; W-v- Official Solicitor (1970) 3 ALL ER 107; also reported as S -v- McC; W -v- W (1972) A.C. 24. Our attention was drawn to the speech of Lord Reid in the passage where he extolled the merits and reliability of a test carried out by a competent serologist. I notice that the children in the cases were both infants and the question was whether in proceedings regarding the paternity or legitimacy of a child a blood test of the child should be ordered. In S -v- S, the issue arose in divorce proceedings when the husband denied the paternity of the youngest of three children while in W -v- W, the husband wished to have the youngest child and himself tested to show that he could not have been the father. I mention the facts, rather briefly, only for completeness since the facts do not detract from the dictum of Lord Reid. Finally, Mr. Lisulo invited us to discount

the Affiliation and Maintenance of Children Act , CAP. 64, which, he submitted, only applies to children, that is to say, persons below 18 years and relates to their affiliation and maintenance which matters are irrelevant to the facts of the present petition. With regard to the making of an order affecting a non-party, Mr. Lisulo pointed out that the witness Mr. Chabala had volunteered and could be joined as a party under RSC Order 112 rule 4 for the limited purpose of this application.

Next we heard Prof. Mvunga who underlined the submissions made by Mr. Lisulo and pointed out that this was not an ordinary paternity case, but one arising under the Constitution (Article 34) which requires that both parents of a presidential candidate must be Zambians by birth or descent. The professor argued that there are broader interests conceived by Article 34 of the constitution transcending the interests of the respondent and that, in considering this application, the court's discretion should be guided by the desire to discover the truth. He compared the position under S.20 of the 1969 Act with the position before 1969 under the common law as exemplified by W -v W (1964) P.67. In that case, the parties were married on 7 October, 1961 and on 19 April, 1962, the wife gave birth to a child. The husband presented a petition for nullity on the ground that the wife was at the time of the marriage pregnant by some person other than himself. In order to determine the child's paternity, the husband applied for an order for tests to be made of his own blood and that of the wife and child. The trial judge dismissed the husband's application and on appeal to the court of Appeal, their Lordships unanimously dismissed the appeal, affirming that there was no inherent power to compel the making of blood tests and none could be inferred from previous practice nor from the then existing statutory authority or rules of court. The professor submitted that the common law finally leaned in favour of discovery of the truth and urges that the interests of the nation and the

advancement of our constitution requires that the court give precedence to the truth. He suggested that the constitutional requirements impose a duty on this court to resolve an issue required to be satisfied by the constitution. Advances in science, it was pointed out, make it possible to show with definite probability who is the father of a person. The professor acknowledged that there was much uncertainty from the evidence adduced so far from which it emerged, - without prejudice to the findings to be made by the court - that the petitioners have said the father is Mr. Luka Chabala Kafupi or Mr. Jim Zharare Nkhonde while the respondent's position has always been that his father was Mr. Nkonde. He argues that the truth should be known and that a direction should accordingly be made. The professor submitted that the giving of a direction should not be regarded as conditioned upon the consent of the other party in that it is only after a direction, followed by a refusal, that inferences can then be drawn. He supported some of the argument by citing - inappropriately it seems to me - R -v- SMITH (1985)81 Cr.APP.R.286, a criminal case.

Before turning to the reply by Mr. Silwamba, I should mention that my research led me to the case Re F(a minor)(1993) 3 ALL ER 596 which had, perhaps very superficially, a vaguely familiar ring to it. In that case, the appellant, B, who believed himself to be the natural father of a child applied under S20(1) of the 1969 Act in proceedings brought by him for a parental responsibility order and a contact order under the Children Act 1989 for blood tests to be taken to determine the paternity of the child. At the time of the child's conception, the mother was having sexual relations with both her husband and B. The relationship between the mother and B ended before the birth of the child and since birth the child had been brought up as a child of the family of the mother and her husband and had had no contact with B. The application was rejected on a number of

grounds including the child's interests which were found to be decisive. In the course of delivering the judgment of the Court of Appeal, Balcombe LJ was able to distill some principles from the speeches in the House of Lords in S -v- S; W -v- Official Solicitor and I summarize them as follows:--

(1) The presumption of legitimacy merely determines the onus of proof.

(2) Public policy no longer requires that special protection should be given by the law to the status of legitimacy.

(3) The interests of justice will normally require that available evidence be not suppressed and that the truth be ascertained whenever possible. In many cases the interests of the child are also best served if the truth is ascertained.

(4) However, the interests of justice may conflict with the interests of the child. In general the court ought to permit a blood test of a young child to be taken unless satisfied that that would be against the child's interests; it does not need first to be satisfied that the outcome of the test will be for the benefit of the child.

(5) '.....it is not really protecting the child to ban a blood test on some vague and shadowy conjecture that it may turn out to be to its disadvantage; it may equally well turn out to be for its advantage or at least to do it no harm'.

(6) A blood sample may not be taken from a person under the age of 16 years without the consent of the person having his or her care and control - see sub-ss(1) and (3) of S.21 of the Family Law Reform Act 1969. Without such consent it may not be proper for the court to order that a blood test of the child be taken.

I have taken the foregoing summary from page 599. In a while, I will return to the question of the principles to be derived from the authorities which generally tend to concern young children in proceedings properly constituted and in which the issue of paternity and/or legitimacy arises. It will be necessary to determine the general applicability or otherwise of these principles born out of the courts' parental and protective jurisdiction to this novel situation of a constitutional presidential election petition where the "child" is an adult of over fifty years old and the proceedings are not for the specific purpose of affiliation perse or some relief or remedy to be granted to a putative father. On the contrary, the proceedings are for the removal of the "child" from the presidency of the country if found to have been unqualified due to non-Zambian parentage. I now turn to deal with the response to the application.

In reply to the submissions made on behalf of the petitioners, Mr. Silwamba based his opposition, broadly speaking, on two alternative submissions. The first submission is that the English statute of 1969 and its Regulations is not a statute which can be said to apply to Zambia. He relied on The English Law (Extent of Application) Act, CAP. 11 as read with the British Acts Extension Act. CAP.10. CAP 11 consists of only two sections; section 1 is the short title and section 2 reads ---

"2. Subject to the provisions of the Constitution of Zambia and to any other written law—

(a) the common law; and

(b) the doctrines of equity; and

(c) the statutes which were in force in England on the 17th August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and

(d) any statues of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise;

shall be in force in the Republic."

CAP.10 mainly lists ten British Acts which were enacted after 17th August, 1911, and none of which are relevant to this matter. The argument was that the Family Law Reform Act 1969 being a post-August 1911 statute which is not listed under CAP.10 can not apply to Zambia. Mr. Silwamba quite properly in my view accepted that there are scattered here and there in our statutes provisions which stipulate that the law and practice for the time being observed in England can be adopted or adapted by the courts in Zambia by default if there is a lacuna in our own laws and rules. The Supreme Court of Zambia Act CAP. 25 , and the High Court Act, CAP 27 were given as examples of laws with such provisions. If there is no such default, it is not permissible to resort to any post-1911 British Act or any British rule of practice. In this regard, Mr. Silwamba cited our decision in KABWE TRANSPORT CO. LTD -v- PRESS TRANSPORT (1975)LTD (1984)ZR 43 in which this court affirmed that where we have our own Act there is no default and reversed a finding of the High Court in SIWINGWA -v- PHIRI (1979)ZR 145 which sought to apply the Civil Evidence Act 1968 of the United Kingdom (in relation to use of a criminal conviction in a civil case) when our own.

Evidence Act (now CAP.43) was in place and did not authorise the use of a criminal conviction in the related civil case. The holding in the KABWE TRANSPORT case is undoubtedly still valid law in Zambia. Mr. Silwamba submitted that there was no default and cited the Affiliation and Maintenance of Children Act, CAP.64, the Legitimacy Act, CAP.52 and the Adoption Act CAP. 54 as some of the laws of Zambia dealing with the subject.

The alternative submission was that should the 1969 Act be held to apply, we should still not regard this case as one involving the jurisdiction of the court in "divorce and matrimonial causes and matters" which would enable the court under the terms of Section 11 of the High Court Act, CAP.27, to exercise its jurisdiction in substantial conformity with the law and practice for the time being in force in England. In the further alternative, Mr. Silwamba submitted that as S. 20(1) of the 1969 Act only governs the parties to a case, it can not be made to apply to PW3, Mr. Chabala, who is a mere witness. It was argued that although RSC Order 112 rule 4 makes provision for joinder, PW3 can not be joined to a presidential election petition; he should commence his own action for paternity should he desire to claim his alleged child. Mr. Silwamba further argued that as consent of an adult is required to the taking of a sample (as affirmed in S -v- S; W -v- Official Solicitor) and since the court can not order an unwilling party to give blood, this court should refuse to entertain this application. He submitted that the court ought not to make an order giving directions since the order has to be properly made and it was his submission that consent is a condition precedent. He cited paragraph 686 of Halsbury's Laws of England, 4th Edition; vol. 1 which discusses consents required for the taking of blood samples.

In reply, Mr. Lisulo submitted to the effect that on a correct reading of the 1969 Act , the making of a direction precedes the question of consent so that consent can not be a condition precedent. While the respondent can certainly not

be forced to give a sample, the court would only be in a position to draw an inference under S.23 where there has been a refusal or failure to comply with a direction previously given. I pause to observe that where the 1969 Act properly applies, it is indeed correct to say that consent is not made a condition precedent: See for instance the same paragraph 686 of Halsbury's as well as paragraph 689 which specifically discusses the question of unreasonable failure to comply with a direction for use of blood tests, in which event the court may draw such inferences, if any, from that fact as appear proper in the circumstances. It is my considered view that the provisions in Section 23 for the drawing of inferences against a party or person who unreasonably fails to comply with a direction would be wholly otiose if consent were a condition precedent in duly constituted paternity proceedings. In further submission in reply, Mr. Lisulo contended that the British Acts Extension Act, CAP.10, was neither exhaustive nor exclusive so as to shut out the application of the Family Law Reform Act 1969. Similarly, it was his submission that the local Acts Mr. Silwamba cited as showing that there was no default were irrelevant to these proceedings since they were dealing with children only whereas the petition fits the description "any civil proceedings" mentioned in the 1969 Act. It was argued that there was no need for Mr. Chabala to commence his own proceedings since he is only a witness and that the reference in section 20(1) of the 1969 Act to the tests showing "that a party to the proceedings is or is not thereby excluded from being the father of that person" can be satisfied by making him a party not to the election petition but to the application for directions. Arising from this submission, I can see that it is necessary in due course to answer the question whether the proceedings in this petition having raised a paternity issue can also be considered to be duly constituted as paternity proceedings. In further reply to the submissions by Mr. Silwamba, Prof. Mvunga submitted that to require Mr. Chabala to go to another forum or to seek to separate the issues of the

petition and paternity was to split hairs since the issues were inseparable. With regard to the question whether or not CAPs 10 and 11 of our laws excluded the application of the Family Law Reform Act 1969, the Professor argued that the court would face a predicament if it threw away all the statutory aids which guide the court and so remaining with a vacuum. He pointed out that the domestic statutes did not help: The constitution under Article 41 contains no detailed procedure to guide the court; even the Electoral Act has no detailed procedure to assist in a presidential election petition. In the face of a lacuna of this magnitude - so the argument went - resort must be had to the English Law (Extent of Application) Act which enjoins the court to apply the common law and equity. The professor submitted that if there are inadequacies in the common law, the court has to advance such common law beyond W -v- W (1964)P.67. He submitted that in a situation of vacuum and default relating to procedures, this court has or should assume inherent jurisdiction which would then justify resort to comparable English statutes found not to have been specifically adopted by our statutes. He argued that under Article 41 of the constitution, the court should not be a passive arbiter but should be active in bringing in the means to help it determine this petition. He drew attention to the amendments of 1996 under which even the Returning Officer - who is the Chief Justice - could refer a question to the Supreme Court in which event, it was submitted, it would not mean that he was a petitioner with any burden of proof to discharge on a balance of probability. He ended by saying it has just become a constitutional duty to assume an inherent jurisdiction.

I have given very anxious consideration to the issues and to the submissions. I would like first of all to comment very briefly on the professor's concluding submissions about the court not having to be a passive arbiter and about the event of the Returning Officer being the one who referred a question to

the court. While, without a doubt, any trial court will be more than concerned and treat it as the highest priority to discover and to ascertain the truth so that a fair and just decision is reached, it is quite another matter in our adversarial system of justice for the court to either descend or to give the semblance of descending into the arena reserved for the parties especially if this is to the obvious advantage of one party and the disadvantage of the other. I hold the principle of impartiality and neutrality of the court to be sacrosanct. It follows therefore that if the Returning Officer were the complainant and as the person then perceived as interested in a particular outcome and in any non-impartial way, I would not expect him to sit in judgment over his own complaint. The full bench would then rationally and logically have to be constituted by the other judges of the court. It follows also that, in my opinion, if the Returning Officer referred a question which contains or amounts to an allegation which requires to be substantiated or established by facts or factual evidence, there would be on principle no proper reason why he would then not be called upon to discharge a burden of proof by way of supporting his case.

The first major issue is whether the 1969 Act applies to Zambia and if so whether it applies to any civil proceedings whatsoever involving an issue of parentage. Prior to the passage of this Act, the English Common Law which applies to Zambia made the results of blood tests admissible where relevant provided the parties submitted to them voluntarily. As W -v- W (No. 4)(1964)P.67 and S -v- McC; W -v- W (1972)AC 24 confirmed, the courts had no inherent power to compel an adult witness or party to submit to a blood test though a young child whose parents or guardians had consented could be compelled if the court thought it proper to order such a test. Even at common law, it seems that there was in fact jurisdiction to order that a blood test be taken of a person who is sui juris and a party to proceedings before the court, even if

there was no power to enforce the order physically without consent. In discussing the question whether the court had jurisdiction to order a blood test of an adult party, Lord MacDermott said in S -v- McC; W -v- W at p. 46 of (1972)A.C.----

> ***"But this lack of power on the part of the court to enforce its order physically without consent does not mean that the question under discussion must be answered in the negative; for much of the jurisdiction of the High Court can only be made effective by indirect means - such as a stay of proceedings, attachment or the treatment of a refusal to comply as evidence against the disobedient party. This is very much the case in one branch of jurisdiction of the High Court, namely, its inherent jurisdiction to make interlocutory orders for the purpose of promoting a fair and satisfactory trial. I do not think there is now any question about the existence of this jurisdiction, which I shall refer to as the "ancillary jurisdiction". It may be procedural in character, but it is much more than that. It is a jurisdiction which confers power, in the exercise of a judicial discretion, to prepare the way by suitable orders or directions for a just and proper trial of the issues joined between the parties."***

The authorities have, of course, mostly concerned children and the issue of paternity has arisen in divorce and matrimonial causes, in affiliation and maintenance cases, legitimacy cases and similar domestic situations. Some of the proceedings have been at the instance of natural fathers or alleged natural fathers, such as in Re F (a minor)(1993)3 ALL ER 596. The task of distilling any principles of general application from the cases under the common law is not made any easier by the absence of any reported cases comparable to the situation at hand where the parentage issue concerns persons who are over half-a century old. This brings me to the question whether the 1969 Act applies to Zambia . The first thing that strikes me is that the Family Law Reform Act 1969 in Part III made no changes in the substantive law. Its burden is procedural or adjectival and it provides machinery for obtaining blood test or other bodily sample evidence in any case where paternity is in issue. As its title suggests, the issue ordinarily arises in a "family law" context. In this respect, suppose the need for blood tests arose in

custody or maintenance proceedings in our High Court in exercise of the divorce jurisdiction or suppose the need has arisen in affiliation proceedings under our own statute, can it seriously be argued that there is no default in our procedures or that there is adequate comparable machinery in our laws? I very respectfully think not. Where the issue has arisen, in the example of the divorce proceedings, I would have no difficulty, under section 11 of our High Court Act, in resorting to the 1969 Act which is the law and practice for the time being in force in England. I find that there is default in our laws and as far as proceedings relating to children are concerned I would say the 1969 Act can apply. In other words, I would not say in absolute terms and categorically, that it can never apply. However, this is not the end of the matter. The next question is to what sort of proceedings can it apply? Is it to any civil proceedings whatsoever? The answer I believe is partly given by the terms of Section 20(1) itself. The legitimate object and purpose of ordering or directing a test is

> ***".....to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person....."***

If the 1987 amendments have come into force, the tests will be "to ascertain whether such tests show that a party.....is or is not the father or mother" of a person. I have not seen how the Act can be construed so as to enlarge its ambit and scope to embrace a non-party and to govern proceedings which, as constituted, can offer no relief or remedy to the non-party or as between the non-party and the adult "child" claimed. The witness is not a party to the proceedings since - to borrow from the language of Order XIV Rule 5 of our High Court Rules - he is not a person "who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be affected by the result" of the petition. I am constrained to come to the conclusion that the Family Law Reform

Act 1969 can apply to Zambia to supply a vacuum only in civil proceedings in which the parentage of a person is in issue and at the same time the parent concerned is a party.

In this petition, the issue of parentage is required to be determined not for the purpose of resolving or conferring rights, reliefs or remedies involving the parties and any progeny inter se as is ordinarily the case but obliquely to establish that the respondent's father was not a Zambian and he was therefore unqualified to stand for election. The evidence adduced so far has introduced not less than two inconsistent assertions of two different fathers and a scientific test is sought to either confirm or discount the claim of one of them. He is not a party and I can see no authorisation in the laguage of the 1969 Act or the Rules to join him in the proceedings for the suggested limited purpose. On this ground alone, I would refuse the application under consideration and hold that the 1969 Act can not conceivably apply to this constitutional presidentail election petition.

There is, of course, little point in resorting to the common law position where there can be no order without consent and it is obvious from the way the application was argued that the respondent will not consent so that the petitioners have to establish their own affirmative case without any help from the respondent. Whether this impedes ascertainment of the truth or not may be the natural consequence of our adversarial system of litigation where the general rule is Ei qui affirmat non ei qui negat incumbit probatio.

Delivered the .....day of.....1997

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M.M.S.W. NGULUBE

CHIEF JUSTICE