

JOSHUA LUMINA v BENNIE MWIINGA (1991) S.J. (S.C.)

SUPREME COURT

SILUNGWE, C.J., GARDNER, A.J.S., SAKALA, CHAILA AND LAWRENCE, JJ.S.

ON JULY 4TH AND 11TH, 1991

S.C.Z. JUDGMENT NO 5 OF 1991

APPEAL NO. 15 OF 1990

Flynote

Constitutional Law - Article 71(2) of the Constitution of Zambia - Whether membership to the National Assembly is dependant upon party membership

Headnote

The appellants were elected as Members of Parliament under the one-party regime while they were members of the ruling United National Independence Party (UNIP). There was then a constitutional change which ushered in multi-party politics. The appellants then resigned from UNIP and joined the Movement for Multi-Party Democracy. They applied to the court for several declarations, one of which was that Article 71(2) of the Constitution should not apply to them in that they should be allowed to retain their parliamentary seats.

Held:

- (i) The Appellants were entitled to continue to sit in the National Assembly as independent members for the duration of the existing Parliament, notwithstanding their resignation from UNIP

For the appellants: L.P Mwanawasa, Mwanawasa and Co. and V.D. Malambo, Mhango and Co
For the respondents: M. Mukelabai, State Advocate and E. Sewenyana, State Advocate

Judgment

SILUNGWE, C.J.: delivered the Judgment of the Court.

This appeal arises out of a decision of the High Court wherein the appellants' joint petition under Article 29, of the Constitution was dismissed.

The background information of this case is that the first and second appellants (hereinafter referred to as the appellants) were duly elected as members of the National Assembly for Chikankata and Mazabuka Parliamentary Constituencies on November 27, 1988 under a One-Party system which was introduced in Zambia at the dawn of the Second Republic on December 20, 1972. Under Article 4 of the Second Republican Constitution, the only political party recognised in the country was the United National Independence Party (hereinafter referred to as UNIP)

The then Article 4 of the Constitution read as follows:

- "4(1). There shall be one and only one political party or organisation in Zambia, namely, the United National Independence Party (in the Constitution referred to as 'the Party')
- (2). Nothing construed in this Constitution shall be so construed as to entitle any person lawfully to form or attempt to form any political party or organisation other than the

Party, or to belong to, assemble or associate with, or express opinion or do any other thing to sympathy with, such political party or organisation.

(3)

And Article 13 is in these terms:

"13. It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to the limitations contained in Article 4 and this Part, to each and off of the following, namely:

- (a) Life, liberty, security of the person and protection of the law;
- (b) Freedom of conscience, expression, assembly and association, and
- (c) Protection for the liberty of home and other property and from deprivation of property without compensation;

And the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in Article 4 and in these provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

On December 17, 1990, Act No. 20 of that year was signed by the President, thereby ushering in constitutional changes one of which - in fact the most crucial - was the reintroduction, once again, of a multi-party system of Government. Under the said Act No. 20, the old Article 4 was repealed and a new Article 4A was introduced. This Article provides that:

"4A notwithstanding the repeal of Article 4:

- (a) The institutions and the organs of the Party recognised under this Constitution shall continue to exist until the next dissolution of Parliament; and
- (b) Any party formed as a consequence of the repeal of Article 4 shall only participate in an election to the National Assembly after the next dissolution of Parliament."

Following the repeal of Article 4, the appellants tendered their resignation from UNIP and became members of the movement for Multi-Party Democracy (MMD) - a new political party that was formed on December 20, 1990.

In an effort to forestall any possible action that might be taken to remove them from Parliament, having relinquished their membership of UNIP, the appellants petitioned the High Court and prayed for a declaration:

- (a) That the application to them of Article 71(2)(b) will contravene their fundamental human rights as recognised under Article 13, 22, 23 and 25 and that the said Article 71(2)(b) is, therefore, null and void;
- (b) That notwithstanding their resignation from UNIP, they will not be required to vacate their respective seats in the National Assembly; and
- (c) That the current holders of the office of the Prime Minister and those Cabinet Ministers and Ministers of State who are nominated members of Parliament ceased constitutionally to be members of the National Assembly and to hold their respective offices from 17th December, 1990 when the said Act came into force and that their

continued pretence to the said offices is unlawful.

In regard to (a) and (b) above, the High Court found that, as the Petitioners had been elected to the National Assembly by virtue of their membership of UNIP and were fully aware that the retention of their seats in the National Assembly was dependent upon their continued membership of UNIP, they cannot be heard to complain against discrimination under Article 13, 22, 23 and 25 of the Constitution as their resignation was an act of their own making. On this basis, the High Court held that the provisions of Articles 67(c) and 71(2)(b) do not contravene any of the fundamental rights recognised under Articles 13, 22, 23 and 25 of the Constitution and that the Petitioners had automatically vacated their seats in the National Assembly when they ceased to be members of UNIP on January 1, 1991.

The High Court then considered (c) above and came to the conclusion that, although the new Article 64 of the Constitution abolished the office of nominated member of the National Assembly, the position of existing nominated members was nonetheless preserved by Article 4A because they were members of the National Assembly which was one of the institutions and organs of the Party recognised under the Constitution and which was allowed to continue until the next dissolution of Parliament.

On appeal, Mr. Mwanawasa, learned Counsel for the appellants, has argued three grounds which we shall now consider.

In the first ground, it is contended that the learned trial judge misdirected himself in law by defining the expression "the Party" as meaning the United National Independence Party (UNIP) and that membership of UNIP is, therefore, a pre-requisite for membership of the National Assembly under the provisions of Articles 4A, 67(c) and 71(2)(b) of the Constitution.

Article 67 sets out the qualifications for a person to be elected to the National Assembly and provided, inter alia, under paragraph (c) that such a person must be a member of the Party. Article 71(2)(b) provides that a member shall vacate his seat if he ceases to be a member of the Party.

This ground will be discussed in two parts: the first and main part will relate to the interpretation of the expression "the Party" under Article 4A (a) of the Constitution; and the second to the interpretation of Article 4A (b).

According to Mr. Mwanawasa's submission, the expression "the Party" is not a reference to UNIP only but also to any other political party because, if the reference were to be attributed to UNIP alone, this would create confusion and conflict in that it would abolish the right of an individual who is not a member of UNIP to be elected to, or to remain a member of, the National Assembly in terms of Articles 67(c) and 71(2)(b) of the Constitution. It is argued, moreover, that the recognition of UNIP was removed when Article 4 was repealed.

It is not in dispute that the expression "the Party" under the repealed Article 4 meant UNIP. As previously stated, clause (1) of the Article recognised the establishment of "one and only one political party or organisation in Zambia, namely, the United National Independence Party (in the Constitution referred to as 'the Party')."

Mr. Mukelabai, learned State Advocate for the respondent, has rightly drawn attention to section 16 of the Interpretation and General Provisions Act, Cap. 2, which reads:

"16. When one written law amends another written law, the amending law shall, so far as it is consistent with the tenor thereof, be construed as one with the amended written law."

In a limited context, we agree that Article 4A is consistent with tenor of Article 4 and that, as such, the two provisions should be construed as one. Under Article 4, UNIP was referred to as "the Party", using a capital "P". And so did, and still do, other provisions of the Constitution, including the now Article 4A (a). Actually, Article 4A (a) states that:

"4A (a), The institutions and organs of the Party recognised under this Constitution shall continue to exist until the next dissolution of Parliament".

Firstly, the phraseology: "Shall continue to exist until..." can, and does, only refer to the institutions and organs of the only political party then existing, namely, UNIP, since only something that is already in existence can "continue to exist", while something that is non-existence can merely start to exist. This is elementary logic.

Secondly, Mr. Mwanawasa argues that organs and institutions of UNIP, such as the Central Committee, the National Council, and General Conference (now Congress) are referred to in other parts of the Constitution but that this reference is not a recognition of the Party, it is a recognition of its organs and institutions only. We are unable to accept this argument as a recognition of UNIP's organs and institutions is tantamount to a recognition of UNIP itself since its organs cannot exist in a vacuum. Indeed, reading the Constitution as a whole, any reference to the Party with a capital "P" is a reference to UNIP.

We are satisfied that the expression "the Party" in Article 4A (a) means UNIP and that the learned trial judge did not misdirect himself on this issue. This ground fails.

This brings us to the second part of the first ground, namely, the interpretation of Article 4A (b). As we have observed, clause (b) stipulates that:

"(b). Any party formed as a consequence of the repeal of Article 4 shall only participate in an election to the National Assembly after the next dissolution of Parliament."

The clause clearly purports to bar or exclude any political party (note here the use of a small "p" in the expression "any Party", that is) other than UNIP from participation in a by-election prior to the dissolution of the present Parliament. This prohibition applies peculiarly to political parties only (other than UNIP); it has no application to individuals as such. There is no prohibition against the participation of any independent candidate in an election to the National Assembly before (or after) the dissolution of the current Parliament. For this purpose, an independent candidate may be a member of Political Party who stands as an unofficial candidate of his Party; or a person who does not belong to any Political Party.

On this point , we would agree with Mr. Mwanawasa but it does not affect our finding above as to the meaning of the term "Party".

The second ground is that, since Articles 4A, 67(c) and 71(2)(b) are in conflict with the fundamental human rights recognised under Article 13, 22,23 and 25 of the Constitution, the latter should prevail over the former.

Articles 67(c) and 71(2)(b) provide that:

"67. Subject to the provisions of Article 68, a person shall be qualified to be elected or nominated as a member of the National Assembly if, and shall not be qualified to be so elected or nominated unless -----

(c) He is a member of the Party."

"71(2). Any member of the National Assembly shall vacate his seat in the Assembly
(b) If he ceases to be a member of the Party".

It is argued on behalf of the appellants that Articles 4A, 67(c) and 71(2)(b) are discriminatory in themselves and in their effect because, by depriving non-members of UNIP the right to contest Parliamentary elections and the right to remain members of the National Assembly, these provisions confer upon members of UNIP privileges and advantages which are denied to non-members of that Party. Further, it is argued that the said provisions subject non-UNIP members to disabilities or restrictions to which UNIP members are not made subject. Mr. Mwanawasa urges us to find that it could not have been the intention of Parliament to give the rights under Article 13, 22, 23 and 25, only to have them taken away by Articles 67(c) and 71(2)(b) are either null and void or ineffectual, and that it could not have been the intention of Parliament to give the rights under Articles 13, 22, 23 and 25, only to have them taken away by Articles 67(c) and 71(2)(b).

Like the first ground, this one will also be divided into two parts, that is, whether, in light of Article 4A, Articles 67(c) and 71(2)(b) are in conflict with Articles 13, 22, 23 and 25; and, if this is so, whether Articles 67(c) and 71(2)(b) are discriminatory either in themselves or in their effect.

In the first place, Articles 13, 22, 23 and 25 all fall under PART III of the Constitution which guarantees the protection of fundamental rights and freedoms of the individual. Article 13 relates to fundamental rights and freedoms; Article 22 to the protection of freedom of expression; Article 23 to the protection of freedom of assembly and association; and Article 25 to the protection from discrimination on the grounds of race, tribe, place of origin, political opinion, colour or creed. For the purpose of this case, it will suffice to set out clauses (1), (2) and (3) of Article 25:

"25(1). Subject to the provisions of clauses (6), (7) and (8), no law shall make any provision that is discriminatory either in itself or in its effect.

(2) Subject to the provisions of clauses (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any authority.

(3) In this Article, the expression "discrimination" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour of creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or disadvantages which are not accorded to persons of another such description."

There can be no doubt that Article 4 restricted the fundamental rights and freedoms of the individual as enshrined in Articles 13, 22, 23 and 25. But when Article 4 was repealed, those fundamental rights and freedoms were revived and given their full effect. Consequently, Article 67(c) and 71(2)(b) are now in conflict with those fundamental rights and freedoms guaranteed by Articles 13, 22, 23 and 25 and are, therefore, ineffective.

Secondly, and as the first question has been resolved in the affirmative, it is necessary to determine whether Articles 67(c) and 71(2)(b) are discriminatory. As Article 4 which imposed restrictions on Articles 13, 22, 23 and 25 has since been repealed., it is manifest that Articles 67(c) and 71(2)(b) have become discriminatory in themselves and in their effect, vi-a-vis the provisions of Article 26(1)m (2) and (3), in that they restrict the rights of individuals to sit in the National Assembly unless they are members of UNIP.

As the appellants' Petition prays for a declaration that they continue to remain as members of the National Assembly, despite their resignation from UNIP; and Article 71(2)(b) is discriminatory against them and, therefore, ineffective, now that Article 4 has been repealed, we accordingly grant the declaration sought. The Appellants will thus continue to sit in the National Assembly as independent members for the duration of the existing Parliament, notwithstanding their resignation from UNIP.

The third and final ground is that the learned trial judge erred in law in holding that the National Assembly was an institution or organ of UNIP recognised under the Constitution; and that as such, nominated members of the National Assembly, despite the amendment to Article 64.

By Act No. 20 of 1990, Article 64 of the Constitution was repealed and replaced. The repealed Article provided that:

"64: The National Assembly shall consist of :-----
(a) One hundred and twenty-five elected members; and
(b) Such nominated members as may be appointed under Article 66; and
(c) The Speaker of the National Assembly."

The new and present Article 64 reads:

"64. The National Assembly shall consist of :-----
(a) One hundred and fifty elected members; and
(b) The Speaker of the National Assembly."

The findings of the learned trial judge on this issue were that (a) by repealing Article 64, the intention of Parliament was to increase the number of elected members from one hundred and twenty-five to one hundred and fifty; (b) by omitting to include nominated members from being part of the National Assembly, the intention was to do away with nominated members; and (c) since the effected of the new Article 64 was to, and did expressly, abolish the position of nominated members, Article 65 which makes provision for the President to appoint up to a maximum of ten nominated members, was superfluous and contrary to the spirit of the new Article.

We accept these findings as having been properly made. As the old Article 64 established (inter alia) the office of nominated member, its repeal automatically abolished that office since the new Article 64 makes no provision for nominated members. Although Article 65 was not repealed, its provisions were rendered otiose as their efficacy was dependent on the repealed Article 64. The learned trial judge was, therefore, correct to hold that nominated members can no longer be appointed since December 17, 1990 when the of Article 64 was repealed.

However, it was a misdirection to hold that there was no need for nominated members to

vacate their seats as Article 4A (a) of the Constitution makes provision "for the continuation of existing institutions and organs of the Party until the next dissolution of Parliament".

It seems to us that there was a misunderstanding on the part of the learned trial judge with regard to the expressions "existing institutions and organs of the Party recognised under this Constitution", on one hand, and "institutions recognised under Article 63 of the Constitution", on the other. This would seem to be the position because, at page 49 of the record of appeal, the following extract from the judgment appears:

"The National Assembly is one of the institutions recognised under Article 63 of the Zambian Constitution".

Unquestionably, the National Assembly is not an institution or organ of the "Party"; it is one of the three important organs or pillars of Government, namely, the executive, the legislature and the judiciary.

As to whether or not the existing nominated members should continue to sit in the National Assembly, we are satisfied that, as they were properly appointed under the provisions of Article 66 and of the old Article 64, they do not automatically cease to be members of the National Assembly on repeal of the old Article 64 because the Constitution makes provision for the termination of their appointment by the President. In the circumstances, all current members of National Assembly, whether elected or nominated are entitled to continue to sit in the National Assembly until the dissolution of the current Parliament or, in the case of nominated members, their nomination is revoked by the President under the provisions of Article 71(2)(b) of the Constitution.

What the appellants seek here is a declaration that the current holders of the office of the Prime Minister and those Cabinet Ministers and Ministers of State who are nominated members of the National Assembly ceased constitutionally to be members of the National Assembly and to hold their respective offices from December 17, 1990 when Act No. 20 of 1990 came into force and that their continued pretence to the said offices is unlawful. However, on the basis of what we have said in relation to third ground, the declaration sought is refused.

Having regard to the fact that of the two issues raised in this appeal, the appellants are successful in one but unsuccessful in the other, we make no order as to costs.
