LUMINA AND MWIINGA v THE ATTORNEY-GENERAL (1990 - 1992) Z.R. 47 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER, SAKALA, CHAILA AND LAWRENCE, JJ.S
4TH AND 11TH JULY, 1991
(S.C.Z. JUDGMENT NO. 5 OF 1991)

Flynote

Parliament - Members of - Requirement that member be member of United National Independence Party in terms of Second Republic Constitution - Amendment of Constitution to provide for multi-party government - Members of party resigning entitled to stay Member of Parliament.
Parliament - Members of - Nominated members - Provision for nominated members abolished - Such members remain Member of Parliament until properly removed or Parliament dissolved.

Headnote

The appellants had been Members of Parliament and of the United National Independence Party (UNIP) under the Second Republic Constitution. In terms of art. 4 of the Constifution only the UNIP was permitted to exist as a political party. Subsequent to the passing of Act. 20 of 1990, which re-introduced a multi-party system of govemment, the appellants resigned from the UNIP. They applied for a declaration, *inter alia*, that their resignation from the UNIP would not require them to vacate their seats in the National Assembly, as arts. 67(c) and 71(2)(b), which required members of the National Assembly to be members of the UNIP, were discriminatory and either null and void or ineffective. In addition they sought an order declaring that the nominated Members of Parliament, including the Prime Minister and certain Cabinet Ministers, had ceased to be members of the National Assembly with the amendments to the Constitution.

Held:

(1) That art. 4 had restricted fundamental rights and freedoms of the individual as enshrined in the Constitution. Consequently, arts. 67(c) and 71(2)(b)were in conflict with those fundamental rights and freedoms and were, therefore, ineffective.
(2) Accordingly, that the appellants were entitled to remain as members of the National Assembly.
(3) Further, that the nominated Members of Parliament had been properly appointed in terms of the Constitution before its amendment. They did not automatically cease to be members of the National Assembly because of the amendments to the Constitution which abolished the provision for nominated members, as the Constitution made provision for the termination of their appointments by the President. In the circumstances all current Members, whether elected or nominated, were entitled to continue to sit in the National Assembly until the dissolution of the current Parliament or their nomination was revoked by the President.

For the appellants: L.P. Mwanawasa, Mwanawasa and Co, and V. B. Malambo, Mhango and Co.
For the respondent: M. Mukelabai, State Advocate, and E. Sewanyana, State Advocate.

Judgment

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

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This appeal arises out of a decision of the High Court wherein the appellant's joint petition under art. 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 27th November, 1988, under a one-party system which was introduced in Zambia at the dawn of the Second Republic on 20th December, 1972. Under art. 4 of the Second Republic Constitution, the only political party recognised in the country was the United National Independence Party (hereinafter referred to as ''UNIP'').

The then art. 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 to do any other thing in sympathy with, such political party or organisation.
(3) . . . .''

And art. 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 art. 4 and in this Part, to each and all 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 art. 4 and in those 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 for the public interest.''

On 17th December, 1990, Act. 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. 20, the old art. 4 was repealed and a new art. 4A was introduced. This article provides that:

''4A. Notwithstanding the repeal of art. 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 art. 4 shall only participate in an election to the National Assembly after the next dissolution of Parliament.''

Following the repeal of art. 4, the appellants tendered their resignation from UNIP and became members of the Movement for Multi-Party

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Democracy (MMD) - a new political party that was formed on 20th December, 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 art. 71(2)(b) will contravene their fundamental human rights as recognised under arts. 13, 22, 23 and 25 and that the said art. 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 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 arts. 13, 22 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 arts. 67(c) and 71(2)(b) do not contravene any of the fundamental rights recognised under arts. 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 1st January, 1991.

The High Court then considered (c) above and came to the conclusion that, although the new art. 54 of the Constitution abolished the office of nominated member of the National Assembly, the position of existing nominated members was nonetheless preserved by art. 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 arts. 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 art. 4A(a) of the Constitution; and the second to the interpretation of art. 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 arts. 67(c) and 71(2)(b) of the Constitution. It is argued, moreover, that the recognition of UNIP was removed when art. 4 was repealed.

It is not in dispute that the expression ''the Party'' under the repealed art. 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 Independence Party (in the Constitution referred to as "the Party'').

Mr *Mukelabai*, learned State Advocate for the respondent, has rightly drawn attention to s. 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 art. 4A is consistent with the tenor of art. 4 and that, as such, the two provisions should be construed as one. Under art. 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 art. 4A(a). Actually, art. 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-existent 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 the 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 art. 4A(a) means UNIP and that the learned trial judge did not misdirect himself on this issue. This ground falls.

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

> ''(b) Any party formed as a consequence of the repeal of art. 4 shall only
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> 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'') 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 a 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 arts. 4A, 67(c) and 71(2)(b) are in conflict with the fundamental human rights recognised under arts. 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 the art. 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:
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> (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 arts. 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 arts 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 arts. 13, 22, 23 and 25, only to have them taken away by arts. 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 art. 4A, arts. 67(c) and 71(2)(b) are in conflict with arts. 13, 22, 23 and 25; and, if this is so, whether arts. 67(c) and 71(2)(b) are discriminatory either in themselvesor in their effect.

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

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''25 (1) Subject to the provisions of clauses (4), (5) and (7), 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 or 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 for disadvantages which are not accorded to persons of another such description.''

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

Secondly, and as the first question has been resolved in the affirmative, it is necessary to determine whether arts. 67(c) and 71(2)(b) are discriminatory. As art. 4 which imposed restrictions on arts. 13, 22, 23 and 25, has since been repealed, it is manifest that arts. 67(c) and 71(2)(b) have become discriminatory in themselves and in their effect, vis-à-vis the provisions of art. 25(1), (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 art. 71(2)(b) is discriminatory against them and, therefore, ineffective, now that art. 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 were entitled to continue to be members of the National Assembly, despite the amendment to art. 54. By Act. 20 of 1990, art.

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 art. 56; and
> (c) The Speaker of the National Assembly.''

The new and present art. 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 art. 64, the intention of Parliament was to increase the number of

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> 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 effect of the new art. 64 was to, and did expressly, abolish the position of nominated members, art. 66, 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 art. 64 established (*inter alia*) the office of nominated member, its repeal automatically abolished that office since the new art. 64 makes no provision for nominated members. Although art. 65 was not repealed, its provisions were rendered otiose as their efficacy was dependent on the repealed art. 64. The learned trial judge was, therefore, correct to hold that nominated members can no longer be appointed since 17th December, 1990 when the old art. 64 was repealed.

However, it was a misdirection to hold that there was no need for nominated members to vacate their seats as art. 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 art. 68 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 art.68 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 art. 66 and of the old art. 64, they do not automatically cease to be members of the National Assembly on repeal of the old art. 64 because the Constitution makes provision for the termination of their appointment by the President. In the circumstances, all current members of the 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 art. 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 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 17th December, 1990, when Act. 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 the third ground, the declaration sought is refused.

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

Appeal allowed in part.

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