

**IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)**

2016/CC/0028

IN THE MATTER OF:

**ORDER IV RULE 2(2) OF THE
CONSTITUTIONAL COURT RULES, 2016
OF THE LAWS OF ZAMBIA**

AND IN THE MATTER OF:

**AN APPLICATION FOR SUMMARY
INTERPRETATION OF ARTICLE 79 OF
THE CONSTITUTION OF ZAMBIA ACT,
CHAPTER 1 VOLUME 1 OF THE LAWS OF
ZAMBIA**

AND IN THE MATTER OF:

**THE DECISION OF THE PRESIDENT OF
THE REPUBLIC OF ZAMBIA CONTAINED
IN THE STATUTORY INSTRUMENT NO.
35 OF 2016**

AND IN THE MATTER OF:

**THE HOLDING OF A NATIONAL
REFERENDUM IN THE REPUBLIC OF
ZAMBIA IN 2016**

AND IN THE MATTER OF:

**PART III OF THE CONSTITUTION OF
ZAMBIA ACT, CHAPTER 1 VOLUME 1 OF
THE LAWS OF ZAMBIA**

AND IN THE MATTER OF:

**ALLEGED CONTRAVENTION OF ARTICLE
79(3) OF THE CONSTITUTION OF
ZAMBIA ACT, CHAPTER 1 VOLUME 1 OF
THE LAWS OF ZAMBIA**

AND IN THE MATTER OF:

**THE DECISION OF THE ELECTORAL
COMMISSION OF ZAMBIA (ECZ) TO
PROCEED WITH HOLDING OF THE 2016
NATIONAL REFERENDUM**

AND IN THE MATTER OF:

**THE REFERENDUM ACT CHAPTER 14 OF
THE LAWS OF ZAMBIA AND THE
REFERENDUM REGULATIONS MADE
THERE TO AND ALL ENABLING
LEGISLATION AS MAY BE CITED**

BETWEEN:

**FRESHER SIWALE (MALE)
AND
THE ATTORNEY-GENERAL
ELECTORAL COMMISSION OF ZAMBIA**

APPLICANT

**1ST RESPONDENT
2ND RESPONDENT**

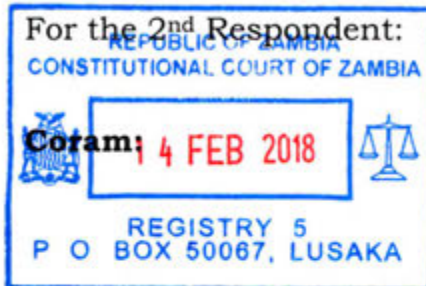


For the Applicant:

Mr. W. Muhanga and Mr. A. Kasolo of Messrs
AKM Legal Practitioners

For the 1st Respondent:

Major M.F. Chidakwa of Attorney General's
Chambers



Mr. E.M. Kamwi In-House Counsel of Electoral
Commission of Zambia

**Chibomba, PC, Sitali, Mulenga, Mulembe and
Mulonda JJC**

on 17th January, 2017 and on 14th February,
2018

JUDGMENT

Mulonda, JC, delivered the Judgment of the Court

Cases referred to:

1. **Godfrey Miyanda v Attorney-General (2009) Z.R. 76**
2. **Jennifer Nawa v Standard Chartered Bank PLC (2011) 1 Z.R. 1**
3. **Amber Louise Guest Milan Trbonic v Beatrice Mulako & Attorney-General 2010/HP/0344**
4. **Attorney-General and Movement for Multi-Party Democracy v Lewanika and Others SCZ Judgment No. 2 of 1994**
5. **Anderson Mazoka v Levy Mwanawasa (2005) Z.R. 138**
6. **Matilda Mutale v Emmanuel Munaile SCZ Judgment No. 1 of 2007**
7. **Godfrey Miyanda v Attorney-General 2016/CC/0006 Constitutional Court of Zambia**
8. **Milford Maambo, Ziwa Malilo Ziwa and Chanda Chabala v The People Selected Judgment No. 31 of 2017**
9. **Rabiu Ravia v S [1981] 2 N.C.L.R. 293**
10. **Ifezue v Mbagdugha and Another [1985] L.R.C (Const) 1141.**
11. **Crispus Karanja Njogu v attorney-General (Criminal Application 39 of 2000)**
12. **David Tinyefuza v The Attorney-General of Uganda, Constitutional Petition No. 1 of 1997**
13. **Julius Ishengoma, Francis Ndyanabo v Attorney-General (2001) 2 EA 485**
14. **Zambia Democratic Congress v Attorney-General SCZ Judgment No. 37 of 1999**

Legislation referred to:

1. **The Constitutional Court Rules Act, Statutory Instrument Number 37 of 2016**
2. **The Constitution of Zambia Chapter 1 of the Laws of Zambia**
3. **The Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order, 2016**
4. **The Referendum Act Chapter 14 of the Laws of Zambia**
5. **The Constitutional Court Act Number 8 of 2016**
6. **The Referendum Regulations Statutory Instrument Number 64 of 2016**
7. **The Referendum Regulations Statutory Instrument Number 97 of 1990**
8. **The Interpretation and General Provisions Act, Chapter 2 of the Laws of Zambia**
9. **The Electoral Process Act Number 35 of 2016.**

Works referred to:

1. **Black's Law Dictionary, Tenth Edition**
2. **Magna Carta of 1215**
3. **www.collinsdictionary.com**

By Originating Summons dated 8th August, 2016, filed pursuant to Order IV rule 2(2) of the Constitutional Court Rules (CCR), the Applicant, Fresher Siwale, sought the Court's interpretation of Article 79(3) of the Constitution of Zambia to determine whether it would be legal to proceed to hold the national referendum as planned. The Applicant sought the Court's determination of the following questions:-

- (i) **Whether the 2016 Referendum meant to alter Part III and Article 79 of the Constitution can in fact proceed to be held without a Bill to be voted on having been put to the said Referendum as required by Article 79(3) of the Constitution.**

- (ii) **Whether it will not be unconstitutional and illegal for the Referendum to proceed in the manner suggested without a Bill to be voted on having been put to the said Referendum as required by Article 79(3) of the Constitution;**
- (iii) **Why the Referendum should not be stopped from proceeding until the said Bill is put to the said Referendum as required by Article 79(3) of the Constitution before proceeding with it.**

Since the matter was filed on 8th August, 2016, it could not be heard and determined before the Referendum was held on 11th August, 2016 as Order IV rule 4(4) of the CCR required that the Respondent should respond within fourteen days of being served with the Originating Summons. To this effect, an application for an order for leave to amend process was made on the 17th August, 2016 in order to assist the Court determine issues raised before it with clarity and to remove issues that had become academic following the holding of the Referendum. An order granting leave to amend process was issued on 22nd August, 2016.

By amended Originating Summons filed on 31st August, 2016 the Applicant seeks the Court's determination of the following questions:

- (i) **Whether the holding of the 2016 National Referendum meant to alter Part III and Article 79 of the Constitution of Zambia had complied with the provisions of the Constitution, the national referendum having been held without a Bill to be voted on being put to the said referendum as required by Article 79(3) of the Constitution of Zambia;**

- (ii) **Whether it was not unconstitutional and illegal for the national referendum to have proceeded in the manner it was suggested without a Bill to be voted on having been put to the national referendum as required by Article 79(3) of the Constitution;**
- (iii) **Why the outcome of the national referendum should not be declared null and void or illegal due to the process not having complied with the provisions of the Constitution;**
- (iv) **That a Bill be put to a national referendum as required by Article 79(3) of the Constitution for the intended alteration of Part III and Article 79 of the Constitution; and**
- (v) **Whether the provisions of the Referendum Act, the Regulations thereto and the Electoral Process Act as subsidiary legislation to the Constitution were complied with in holding the national referendum, 2016.**

In support of the Originating Summons, Applicant, Fresher Siwale, deposed that he was a Zambian citizen fully entitled to vote in the national referendum held on 11th August, 2016. That by Statutory Instrument No. 35 of 2016, the President of the Republic of Zambia, His Excellency Mr. Edgar Chagwa Lungu, caused to be published the **Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order** pursuant to section 2 of the **Referendum Act** as amended. The Applicant stated that upon becoming aware of the Order addressed to all citizens, he did consult widely on its contents with other stakeholders to ascertain compliance with various laws including the Constitution of Zambia and the **Referendum Act** as amended.

That a critical perusal of Article 79(3) established that before a bill to amend Part III and Article 79 of the Constitution is presented to the National Assembly for first reading, the bill ought to be subjected to a referendum and citizens entitled to vote in such referendum ought to be availed the said bill. That the Applicant had not been availed any such bill. He further deposed that a critical perusal of Statutory Instrument No. 35 of 2016 did not state or even make reference to any such bill than to merely ask the referendum question. That a study of the question did not state or refer to any bill whatsoever. That the President in issuing Statutory Instrument No. 35 of 2016 did not comply with Article 79(3) which requires that a bill be put to those entitled to vote and that the Applicant was constitutionally entitled to know the contents of the bill to be voted on. That the decision as contained in Statutory Instrument No. 35 of 2016 was illegal, irrational and procedurally improper.

The 1st Respondent did not file any affidavit in opposition but orally submitted at the hearing. The 2nd Respondent in its affidavit in opposition deposed that on 23rd May, 2016 the **Constitution of Zambia (Amendment) Bill No. 37 of 2016** was issued to, among others, revise the Bill of Rights to include civil, political, economic,

social, cultural, environmental and other special rights. That the said Bill was also meant to entrench some of the Articles in the Constitution and revise the provisions relating to the amendment of the Constitution. Following the release of the Bill, the 2nd Respondent carried out nationwide voter education and publicized the Bill extensively to the electorate. That the 2nd Respondent did conduct a referendum on 11th August, 2016 on Part III and Article 79 of the Constitution in all the 156 constituencies in the country. That the referendum was conducted in accordance with the legal framework set out in Article 79 of the Constitution of Zambia, the **Referendum Act Chapter 14** of the Laws of Zambia as amended and the Referendum Regulations Statutory Instrument No. 97 of 1990 and the Referendum Regulations Statutory Instrument No. 64 of 2016. That the referendum was unsuccessful as the result did not meet the required constitutional threshold.

In reply, the Applicant deposed that the 2nd Respondent had not responded to the issues raised in the two affidavits in support of the originating summons. That the 2nd Respondent used symbols in the Referendum which were not set by law and that the 2nd Respondent had failed to adduce evidence that the **Constitution of Zambia**

(Amendment) Bill Number 37 of 2016 was issued. It was further deposed that the means used by the 2nd Respondent to disseminate the Bill did not amount to putting the Bill to the Referendum. Lastly, it was averred that the conduct of the Referendum was done without complying with the law.

The parties relied on affidavit evidence and skeleton arguments which they supplemented with oral arguments. In the filed skeleton arguments, Mr. Muhanga, counsel for the Applicant, submitted that Article 272 of the Constitution permits enactment of legislation to give effect to articles and provisions of the Constitution. In that respect, the Referendum Act was enacted to give effect to Article 79 of the Constitution. Counsel submitted that this Court is enjoined under Article 267 to interpret the Constitution in accordance with the Bill of Rights and in a manner that contributes to good governance.

Mr. Muhanga submitted that the application is brought to determine whether the processes leading to the holding of the referendum complied with the Constitution and other related laws. Counsel submitted that what is being questioned are the decisions contained

under Statutory Instrument Number 35 of 2016 to amend Part III and Article 79 of the Constitution.

Mr. Muhanga acknowledged the fact that the President is empowered under section 2 of the Referendum Act to direct that a referendum be held on any question or questions specified in a statutory order. Counsel, however, submitted that the issue for determination by this Court is whether **The Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order** did in fact put the Bill to the people as required under Article 79 of the Constitution. Counsel contended that the spirit of Article 79(3) requires that a bill is put to a referendum before being presented to the National Assembly for first reading and that citizens as voters are given notice of the bill in question. Counsel argued that a preview of the **Referendum Order of 2016** does not in any way suggest that a bill was put to the people as there was no reference to the bill and that this was in violation of Article 79(3) of the Constitution.

Counsel argued that the President was not insulated against answering to decisions made under Statutory Instrument Number 35

of 2016. In this respect, the case of **Godfrey Miyanda v Attorney-General**³ was cited in support where Mambilima J, stated that:

“Notwithstanding the immunity granted by Article 43 to a sitting President, there is nothing to stop a court from determining whether the President, in the discharge of his duties has acted within the law and granting any remedies found to be appropriate against Government. This is fortified by the State Proceedings Act, which has brought the President within the realm of public officer. Strictly speaking, the President is not above the law”

Counsel further submitted that the **Referendum Regulations, 2016** had not come into effect at the time the referendum was held and therefore did not replace the **Referendum Regulations, 1990** as the said Regulations only came into effect on 12th August, 2016 a day after the referendum was held. Counsel submitted that, as a result, the provisions of the **Referendum Regulations, 1990** requiring registration of voters and issuance of voters’ registration cards specifically for the referendum were not followed. It was further submitted that Statutory Instrument Number 64 of 2016 had no retrospective effect and therefore did not apply to the referendum held on the 11th August, 2016. The case of **Jennifer Nawa v standard Chartered Bank Zambia PLC**⁴ was cited where the Court stated that:

“It is trite law that unless expressly stated a law does not operate retrospectively.”

Mr. Muhanga quoted section 9 of the Interpretation and General Provisions Act to underscore the fact that a schedule to any written law is part of that law. This, counsel did, to buttress the argument that the symbols of the eye and ear which were used in the referendum were wrong as they were not provided for by the **Referendum Regulations, 1990**. Mr. Muhanga further submitted that sections 18 and 19 of the Interpretation and General Provisions Act are clear as to when a statutory instrument comes into effect. Counsel argued that Statutory Instrument Number 64 of 2016 came into effect after the referendum was held and that, as a result, the use of the eye and ear in the conduct of the 2016 national referendum was in breach of the law. Counsel argued that a statutory instrument cannot amend a provision of an Act of Parliament. The case of **Amber Louise Guest Milan Trbonic v Beatrice Mulako & Attorney-General**⁵ was cited where Matibini J, as he then was, stated that:

“A statutory instrument cannot amend an Act of Parliament. Any provision of a statutory instrument which is inconsistent with any provision of an Act shall be void to the extent of the inconsistency.”

In opposing the arguments by the Applicant, Major. Chidakwa, counsel for the 1st Respondent, in his oral submissions stated that

the matter hinged on the interpretation of Article 79 of the Constitution and whether it was complied with when the referendum was held. Counsel submitted that there was a Bill presented to the electorate in compliance with Article 79(3). That Bill, counsel contended, was the **Constitution of Zambia (Amendment) Bill Number 37 of 2016** which achieved the spirit and essence of Article 79(3) of the Constitution. Major. Chidakwa further submitted that there was a settled intention to have the Bill presented to the National Assembly after the referendum.

Major. Chidakwa argued that the legal question put to the electorate did in fact allude to and put forward the **Constitution of Zambia (Amendment) Bill Number 37 of 2016** as the only Bill that contained the specific amendments that were sought on Part III and Article 79 though not specifically referenced. Counsel argued that the essence of Statutory Instrument Number 35 of 2016 was not to republish all the contents that were already in the Constitutional Bill but merely to set out the legal question and timing. It was Major. Chidakwa's submission that the legal question in the Statutory Order referred to the **Constitution of Zambia (Amendment) Bill Number 37 of 2016**.

Major. Chidakwa submitted that the legal question satisfied all the requirements in facilitating what is provided for under Article 79. Counsel urged the Court to consider the purposeful interpretation of the Constitution as alluded to by the Supreme Court of Zambia in the case of **Attorney-General and Movement for Multi-Party Democracy v Lewanika and Others**.⁶ Counsel argued that a consideration of the above case will show that Article 79 of the Constitution was complied with and that the essence of holding a referendum was actually achieved.

Counsel further submitted that there was compliance with section 2 of the **Referendum Act** and the **Referendum Regulations, 1990**. Counsel conceded to the fact that there was non-compliance with the symbols under Regulation 13 of the **Referendum Regulations, 1990** but argued that the Applicant had not shown how the use of the new symbols prejudiced the referendum process. Counsel further urged the Court to consider the Supreme Court decision in the case of **Anderson Mazoka v Levy Mwanawasa**⁵ and hold that the change in the symbols did not in any way have a negative impact on the referendum or specifically affect the Applicant and the entire process.

Mr. Kamwi, counsel for the 2nd Respondent, in augmenting the 2nd Respondent's skeleton arguments in opposition submitted that the thrust of the Applicant's argument was that the process adopted in conducting the referendum did not comply with Article 79(3) of the Constitution, **Referendum Act** as amended and regulations made thereunder. Counsel submitted that Article 79(3) provides that a bill should be submitted to the electorate before the same is taken to the National Assembly for first reading.

Mr. Kamwi argued that whether a bill was submitted or not is a question of fact and depends on evidence adduced before court. He went on to state that the Respondent's affidavit contains facts demonstrating that the Bill was submitted. Counsel submitted that the natural and ordinary meaning of Article 79(3) is that the electorate should be informed about the contents of the bill being the subject of the referendum. Counsel argued that the exhibits to the affidavit had a hundred percent match with the contents of the **Constitution (Amendment) Bill Number 37 of 2016** confirming that the electorate knew what they were voting for in the referendum. Counsel further submitted that for those unable to read and write,

various activities were rolled out to address their needs and so were translations of the Bill done in all the 7 major local languages.

The Court was invited to adopt the literal rule of statutory interpretation as did the Supreme Court in the cases of **Anderson Mazoka v Levy Mwanawasa**⁵ and **Matilda Mutale v Emmanuel Munaile**⁶ where it was held that:

“If the words of a statute are precise and unambiguous, then no more can be necessary than to expand on those words in their ordinary and natural meaning and that it is only where there is ambiguity in the natural meaning of the words used that the court may resort to purposive interpretation of the statute”.

Counsel argued that in terms of Article 79(3) the electorate for purposes of a referendum are not registered voters but rather eligible voters. Counsel went on to further argue that in terms of the **Referendum Act** and the **Electoral Process Act**, an eligible voter is a person who is 18 years and above.

Counsel argued that the referendum process is outlined in the **Referendum Act** while the aspect of voter eligibility is provided for under Article 79 of the Constitution. Mr. Kamwi submitted that every Zambian aged 18 years and above was entitled to a referendum ballot and those who wished to vote voted. Counsel conceded that

the regulations in place at the time of the referendum on 11th August 2016 were the **Referendum Regulations, 1990**. Counsel, however, argued that for purposes of planning, the 2nd Respondent relied on Article 79 of the Constitution and the **Referendum Act** as amended by Act Number 5 of 2015.

Mr. Kamwi submitted that though the symbols used were those set out in the **Referendum Regulations, 2016** the Applicant had not demonstrated how the new symbols affected or prejudiced either the referendum process or the results. Counsel further submitted that the design of the ballot paper used, though meant for the proposed regulations, equally was not prejudicial as everyone voted on the same ballot paper and that in any case, the Electoral Commission of Zambia determines symbols to adopt for a referendum. Counsel argued that the procedure for challenging results of a referendum under the **Referendum Act** is different from that adopted by the Applicant in the matter.

In conclusion, Mr. Kamwi submitted that the 2nd Respondent complied in full with Article 79(3) of the Constitution and the **Referendum Act** as amended. Counsel further argued that the 2nd

Respondent substantially complied with the **Referendum Regulations, 1990** save for minor variations and urged the Court to adopt the position taken by the Supreme Court in the case of **Anderson Mazoka v Levy Mwanawasa**⁵ where the Court decided as follows:

“We accept that there were flaws, incompetency and dereliction of duty on the part of ECZ. This is exemplified by the late delivery of election materials and insufficient supply of Presidential ballot papers...which led to delays and extensions of the gazetted voting period. However, in our view, any negative impact arising out of these flaws...did not amount to a fraudulent exercise.”

In reply, Mr. Muhanga submitted that the 1st and 2nd Respondents in their responses seemed to downplay the importance of complying with the law. Counsel stated that the **Referendum (Amendment) Order, 1969** referred to by the Court was instructive on how the referendum question ought to have been framed. He argued that the 2nd Respondent had not placed before Court evidence to demonstrate that the Bill was put to the referendum as required by Article 79(3) of the Constitution. Mr. Muhanga while agreeing with the 2nd Respondent that a literal interpretation of Article 79(3) was correct as decided in the **Mazoka Case**, stated that this should also be the case when putting the Bill to the Referendum. It was counsel’s argument

that having regard to the question under Statutory Instrument Number 35 of 2016, no bill was put to a referendum.

Mr. Muhanga argued that Government Gazette Notice Number 372 of 2016 was for general information only and not for purposes of the referendum. Counsel contended that the Applicant's contention was not whether the Bill existed somewhere or not, but whether the Bill was put to a referendum. Mr. Muhanga submitted that the intent and will of the people as expressed in the Constitution in requiring the Bill to be put to the people was to ensure that the content upon which they exercised their right to vote was protected from manipulation. Counsel submitted that the eligibility requirement was not complied with when persons not registered as voters were allowed to vote in the referendum on account of holding a green National Registration Card. Counsel further argued that though the contents of the Bill need not be reproduced, the referendum question ought to have referenced the Bill. He stated that the question did not in any way indicate that one was voting for **Bill Number 37 of 2016**. Counsel further argued that the symbols in place at the time could not be put aside arbitrarily without observing the law. Counsel argued that the Constitution does not stand alone but is given

efficacy by legislation and regulations thereto and to disregard them amounts to disregarding the Constitution itself. Mr. Muhanga submitted that the **Referendum Regulations, 1990** and the **Electoral Process Act** were not complied with and that the non-compliance cannot be justified by the Supreme Court holding in the **Mazoka Case** as that was not the reasoning and intention in that case.

In supplementing Mr. Mubanga's arguments, co-counsel for the Applicant, Mr. Kasolo, submitted that a referendum is a special vote otherwise known as a plebiscite in other jurisdictions and to belittle the process, as attempted by the 1st and 2nd Respondents, is fatal to democracy. Counsel urged the Court to adopt a purposive interpretation of the law as enunciated in the case of **Attorney-General, Movement for Multi-Party Democracy v Akashambatwa Mbikusita-Lewanika, Fabian Kasonde Mwamba Mulwila and Others⁴**.

We have considered the affidavits in support of and in opposition to the amended originating summons and the reply. We have also considered the skeleton arguments filed by the Applicants in reply.

We have further considered the oral submissions by all parties including those of the 1st Respondent through its counsel, Major. Chidakwa.

This matter raises constitutional issues of public interest and affords this Court an opportunity to pronounce itself on them. The Applicant raises five issues for our consideration. In our considered view, the first and second issues are interrelated and as such will be addressed together. The third and fourth issues stand or become otiose based on whether or not the bill in question was put to the people and will be treated as such. The last issue, whether there was non-compliance with the **Referendum Act** and the regulations thereto in view of the use of the **Referendum Regulations of 2016** in the referendum of 11th August, 2016 will be addressed separately.

It is clear to us that what is at the core of these proceedings for interpretation of Article 79(3) of the Constitution of Zambia, is whether or not the **Constitution of Zambia (Amendment) Bill No. 37 of 2016** was put to the people at the Referendum within the contemplation of Article 79(3) and if not, the implications thereof.

As a starting point, we intend to keep in full view the provisions of Article 267(1) of the Constitution which provides that:

“This Constitution shall be interpreted in accordance with the Bill of Rights and in a manner that:

- (a) Promotes its purposes, values and principles;**
- (b) Permits the development of the law; and**
- (c) Contributes to good governance.”**

Further as a guide to interpreting Article 79 of the Constitution, we affirm our position in the case of **Godfrey Miyanda v Attorney-General**⁷ where we stated at page J39 that:

“We are of the firm view that the Constitution itself provides a guide in Article 79 to which alterations or amendments to the Constitution of the Republic of Zambia must conform. As long as the prescribed procedure is followed, the constitutionality of a Constitutional amendment cannot be called into question.”

Furthermore, we have also pronounced ourselves on constitutional interpretation in other matters. One such matter is that of **Milford Maambo, Ziwa Malilo Ziwa and Chanda Chabala v The People**⁸ where we stated as follows:

“In interpreting the Constitution, the primary principle of interpretation is that the meaning of the text should be derived from the plain meaning of the language used. Other principles of interpretation should only be resorted to where there is ambiguity or where a literal interpretation will lead to absurdity.”

We have also looked at authorities we consider persuasive on this subject from outside our jurisdiction. One often cited case is that of

Rabiu Raviu v S⁹ where Sir Udo Udoma of the Supreme Court of Nigeria stated at J326 as follows:

“It is the duty of this Court to bear constantly in mind the fact that the present Constitution has been proclaimed the Supreme law of the land; that it is a written, organic instrument meant to serve not only the present generation, but also several generations yet unborn ... that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve...”

In yet another case of **Ifezue v Mbagdugha and Another**¹⁰ decided three years later after the **Raviu Case**⁹, Bellow J.S.C. in his dissenting Judgment at page 1146 stated that:

“Since the decision of this Court in the celebrated case of Raviu v The State¹³..., the general principles for the interpretation of our Constitution have been laid down. The fundamental principle is that such interpretation as would serve the interest of the Constitution and would best carry out its object and purpose should be preferred. To achieve this goal, its relevant provisions must be read together and not dis-jointly; where the words of any section are clear and unambiguous, they must be given their ordinary meaning unless this would lead to absurdity or be in conflict with other provisions of the Constitution.”

While in **Crispus Karanja Njogu v Attorney-General**¹¹ a three judge bench of the Kenyan Supreme Court had this to say on constitutional interpretation:

“We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. It exists separately in our statutes. It is supreme...it is our considered view that, constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way. Constitutional provisions must be read to give values and aspirations of the people. The Court must

appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document.”

We are requested by the Applicant to determine whether the process of holding the national referendum in 2016 complied with the Constitution. Secondly, we are requested to determine whether the laws regulating the referendum process were complied with.

The matter before us is one that impacts upon the governance of our country and particularly in the event of future national referenda. We are, under the current circumstances, faced with a set of facts that require us to adopt a method of interpretation that secures an accurate understanding of the constitutional provision in question but before we proceed to do so, it is necessary to reproduce the provisions of Article 79 of the Constitution which reads as follows:

- “(1) Subject to the provisions of this Article, Parliament may alter this Constitution or the Constitution of Zambia Act.**
- (2) Subject to clause (3) a bill for the alteration of this Constitution or the Constitution of Zambia Act shall not be passed unless-**
 - (a) not less than thirty days before the first reading of the bill in the National Assembly the text of the bill is published in the Gazette; and**
 - (b) the bill is supported on second and third readings by the votes of not less than two thirds of all members of the Assembly.**

- (3) A bill for the alteration of Part III of this Constitution or of this Article shall not be passed unless before the first reading of the bill in the National Assembly it has been put to a National referendum with or without amendment by not less than fifty per cent of persons entitled to be registered as voters for the purposes of Presidential and parliamentary elections.
- (4) Any referendum conducted for the purposes of clause (3) shall be so conducted and supervised in such manner as may be prescribed by or under an Act of Parliament.
- (5) In this Article-

 - (a) references to this Constitution or the Constitution of Zambia Act, include reference to any law that amends or replaces any of the provisions of this Constitution or the Act; and
 - (b) references to the alteration of this Constitution or the Constitution of Zambia Act or any Part or Article include references to the amendment, modification or re-enactment with or without amendment or modification, of any provision for the time being contained in this Constitution, that Act, Part or Article, the suspension or repeal of any such provision and the making of different provision in lieu of such provision, and the addition of new provisions, to this Constitution, that Act, Part or Article.
- (6) Nothing in this Article shall be so construed as to require the publication of any amendment to any such bill as is referred to in the clause (2) proposed to be moved in the National Assembly.
- (7) A law made by Parliament shall not come into operation until it has been published in the Gazette, but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.
- (8) All laws made by Parliament shall be styled "Acts" and the words of enactment shall be "Enacted by the Parliament of Zambia."

In as much as this matter pivots on the interpretation of Article 79(3) of the Constitution and whether it was complied with when the referendum was held, our literal interpretation of the said Article is that a bill for the alteration of Part III or Article 79 should be submitted to the electorate before the same is taken to the National Assembly for first reading. The process of submitting it to the electorate is through a national referendum which ought to be conducted in accordance with the laws in place for that particular purpose. By way of definition, a referendum, which is at the center of this matter, is defined in **Black's Law Dictionary**¹, as:

“The process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote.”

As we stated above, constitutional provisions ought to be read together with other provisions. It is almost impossible to read Article 79(3) as if it were contained in a watertight compartment. It must be read alongside other clauses and when read in such a manner, it is clear that the Legislature of Zambia has powers, subject to certain conditions, to enact laws to give effect to Article 79(3) of the Constitution.

A consideration of the entire Article 79 of the Constitution reveals that there is no express provision made in that Article which requires that a bill ought to be referenced or specified as the bill being put to the people for a referendum. The same Article does however contain in Clause (4) guidance to help with the construction of the proper meaning of the phrase '*Putting the Bill to the people*'.

The issuing of the **Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order** by the President of the Republic was simply an exercise of power by the President provided for under section 2 of the **Referendum Act**, which power has its source in Article 79(4) of the Constitution.

To repeal and amend Article 79 and Part III of the Constitution, the law for that purpose must have been passed in the manner required by the entire Article 79.

The Supreme Court of Zambia in the case of **Zambia Democratic Congress v Attorney-General**¹⁴, in agreeing with the holding of the lower Court stated that:

"The learned trial judge was on firm ground when he held that the powers, jurisdiction and competence of Parliament to alter the

Constitution of Zambia are extensive provided that it adheres to the provisions of Article 79. The observation that Article 79 limits the powers of Parliament only in relation to Article 79 itself and to Chapter III of the Constitution of Zambia was also correct. Indeed, the constitutional history of Zambia has shown that the alteration of the Constitution has depended on who controls the majority in Parliament and in the population of eligible voters for Referendum. This means that the entrenched provisions can be altered."

In the same case, it was noted that all the issues in that case hinged on the construction or interpretation of Article 79 and the provisions under Chapter III of the 1991 Constitution. An examination of the whole of Article 79 at the time, revealed that it dealt with the alteration of the Constitution. It gave Parliament power, jurisdiction and competence to alter or amend the Constitution or the Constitution Act of 1991. It was also noted that the learned trial Judge found that the language of the Article needed no aid to its construction or interpretation of the words used.

We are alive to the special place a referendum occupies in any democracy. It is, in our view, the ultimate involvement of the people in the governance of their state affairs.

In the case before us, Counsel for the Applicant seems to suggest in his arguments that he was aware that it was not a requirement that the whole Bill should have been reproduced in putting the Bill to the

people. He further argued that the Bill ought to have been referenced so that the people knew what they were voting for. In the case of referencing the Bill, both the 1st and 2nd Respondents argued that there was a Bill that was submitted to the people, and that Bill was the **Constitution of Zambia (Amendment) Bill Number 37 of 2016**. The contents of the said Bill were brought to the attention of the electorate through the government gazette as required by Article 79 of the Constitution.

In the present case before us, a literal interpretation of the phrase "*Putting the Bill to the people*" would lead in our view to absurdity and as such we find it imperative to resort to a broad and liberal approach. As shown by the various authorities cited above, it is trite law that where a literal interpretation will lead to absurdity, other principles of interpretation should be resorted to. The Applicant's contention is that the bill should have been referenced in the **Referendum Order, 2016** in the same manner it was done in the **Referendum (Constitution Amendment) Order, 1969** in that the bill was cited. We indeed note that the **Referendum (Constitution Amendment) Order, 1969** cited the Bill in the referendum question and this is preferable as it clearly specifies the Bill. However, as we

have already stated, Article 79 only states that a bill should be put to a referendum. The issue then is what amounts to putting a bill to the people. A look at the **English Thesaurus (U.S)**³ shows that the term “*put*” is the same as to “*locate*”. Having this in mind, the question contained in the **Referendum Order, 2016** did aptly put the Bill to the people as is shown from the evidence on record that there was only one proposed Bill at the time. Had there been more than one proposed Bill at the time, then it would have been unavoidable for the question to specify which particular bill was being referred to or was being put to the referendum. Further, the contents of the Constitution of Zambia (Amendment) Bill Number 37 of 2016 were disseminated to the public in the period before the referendum was held on 11th August, 2016.

We, therefore, hold that the **Referendum (Question on the Amendment of the Constitution to Enhance the Bill of Rights and Repeal Article 79) Order** was within the contemplation of Article 79 of the Constitution as it hailed from the provisions of section 2 of the **Referendum Act**, which in turn is birthed from the provisions of Article 79(4) of the Constitution. It follows, therefore that issues (i) and (ii) have no merit and we dismiss them. We stated

above, regarding issues (iii) and (iv) that they stand or become otiose depending on the position we take on the first two issues. This means that issues (iii) and (iv) cannot stand and we dismiss them.

It was also the Applicant's argument that the conduct of the referendum was without compliance to the regulations that were in place, namely the regulations contained in **S.I. No. 97 of 1990**, which at the time of the referendum had not been amended. According to those Regulations, it was a requirement under **Regulation 10** that for a person to participate in the referendum, they ought to be registered and they ought to be given a voter's card. Also, **Regulation 13** prescribed what kind of ballot paper was to be used, in it, was the symbol of a raised index finger representing a "yes" and a symbol of a foot representing a "no". It was the Applicant's argument that the law that was relied on, being the **Referendum Regulations 2016**, was only brought into effect after the fact and that the ballot paper that was used by the 2nd Respondent under that law contained the symbol of an "ear" for No and the symbol of an "eye" for Yes.

It was the submission of the 2nd Respondent that in terms of **Article 79(3)** of the **Constitution**, the electorate of a referendum are not registered voters but rather eligible voters. The provision is also outlined in the **Referendum Act** as amended and in the **Electoral Process Act** which state that an eligible voter is a person who is 18 years and above. Further, it was argued that the aspect of who is eligible to vote in the referendum was not a question that was provided for in the regulations but rather in accordance with **Article 79** of the **Constitution**; it was every Zambian who was of or above the age of 18 years that was entitled to a referendum ballot.

We agree with the position of the 2nd Respondent that **Article 79(3)** and the **Referendum Act** as amended provide for eligible voters to vote in a referendum. Eligible voters include registered voters and non registered voters. Therefore, voting in a referendum is not restricted to only registered voters as argued by the Applicant.

In response to the issue of the ballot papers that were used and the symbols contained therein, the Respondents admitted in their submissions that at the time of the referendum on 11th August, 2016, the regulations that were in place were the **Referendum Regulations**

of 1990. They further admitted that the symbols that were used were based on the proposed regulations, which only came in effect after the referendum. However, they both argued that there was no prejudice at all in the process and in any event, the electorate were not voting for symbols but for the Bill, that is, whether they agreed with the Bill or not. The 2nd Respondent emphasized to us that the symbols were actually meant for the illiterate voters.

It is well settled that the concept of the rule of law has a deep historical lineage, being traced in some scholarly views to the concepts of justice and fairness. The concept has evolved all throughout history periodically culminating in land mark documents such as the **Magna Carta of 1215** amongst others which embodied the principle that government itself or the monarchy as it was in that day is bound by Law, and may not do certain things to ordinary citizens absent of a justification grounded and established by the Law of the land.

We find that indeed there was procedural irregularity in the use of the **Referendum Regulations, 2016** that had not yet come into effect at the time that the referendum was held.

We agree with counsel for the Applicant that **S.I. No. 64 of 2016** had no retrospective effect. The case of **Jennifer Nawa v Standard Chartered Bank Zambia PLC⁴** is instructive in this respect. It was held in that case that;

"It is trite law that unless expressly stated, a law does not operate retrospectively."

We however, find that the change in symbols or the use of ballot papers that had a different frame did not in any way have a significant negative impact on the referendum so as to render it irregular and unconstitutional. We are of the firm view that the said irregularities did not depart from the essence of the referendum.

The net result of this matter is that an interpretation of **Article 79(3)** of the **Constitution of Zambia** reveals that the provisions of the Constitution were complied with in the holding of the national referendum to the extent that the proposed Bill was put to the people. In terms of process, however, there were irregularities in the use of the **Referendum Regulations, 2016**, but that such irregularities did not negatively affect the result of the Referendum.

As this matter raised important constitutional issues, we order that each party bears own costs.



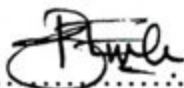
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H. Chibomba
PRESIDENT
CONSTITUTIONAL COURT



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A.M. Sitali
Judge
CONSTITUTIONAL COURT



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M.S. Mulenga
Judge
CONSTITUTIONAL COURT



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E. Mulembe
Judge
CONSTITUTIONAL COURT



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P. Mulonda
Judge
CONSTITUTIONAL COURT