

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(ORIGINAL JURISDICTION)

2023/CCZ/002

IN THE MATTER OF: INTERPRETATION OF ARTICLES 34, 35(1), 36, 37(1)(a), (b),
(c) OF THE CONSTITUTION OF ZAMBIA

IN THE MATTER OF: WHETHER THE ORIGIN OF A PERSON'S NAME,
LANGUAGE AND TRIBE IS A PARTICULAR TO BE
ASCERTAINED WHEN ACQUIRING CITIZENSHIP
PURSUANT TO ARTICLES 34, 35(1), 36, 37(1)(a), (b), (c) OF
THE CONSTITUTION

AND

IN THE MATTER OF: WHETHER REGISTERING FOREIGN VILLAGES,
DISTRICTS AND COUNTRIES ON THE NATIONAL
REGISTRATION CARDS OF A ZAMBIAN CITIZEN BASED
ON THE ORIGIN OF THE CITIZEN'S NAME, LANGUAGE
AND TRIBE IS CONSISTENT WITH THE PROVISIONS OF
ARTICLES 34, 35(1), 36, 37(1)(a), (b), (c) OF THE
CONSTITUTION

BETWEEN:

HASTIE SIBANDA

AND

ATTORNEY-GENERAL



APPLICANT

RESPONDENT

Coram: Munalula PC, Mulenga and Mulongoti JJC on 13th February, 2024 and 30th
April, 2024

For the Applicant: In Person

For the Respondent: Mr. N. Mwiya, Principal State Advocate and Mr. K. Malikebo,
State Advocate— Attorney General's Chambers

J U D G M E N T

Mulenga, JC delivered the Judgment of the Court.

Cases cited:

1. Daniel Pule and Others v Attorney General 2017/CCZ/004
2. Milford Mambo and Others v The People (2017) 2 Z.R. 108
3. Maneka Gandhi v Union of India (1978) 1 SCC 248
4. Bernard Kanengo v Attorney General 2022/CCZ/0024
5. Jonas Zimba v The Attorney General 2022/CCZ/007
6. Christopher Shakafuswa and Isaac Mwanza v The Attorney General and Electoral Commission of Zambia 2018/CCZ/005
7. Isaac Mwanza v The Attorney General 2022/CCZ/009
8. Kabisa Ngwira v National Pension Scheme Authority 2019/CCZ/17
9. Steven Katuka and Law Association of Zambia v Attorney General and 64 others CCZ Selected Judgment No. 26 of 2016
10. Akashambatwa Lewanika and others v F.T.J. Chiluba and others SCZ Judgment No. 14 of 1998
11. Michael Mbuyu Mutwena v Attorney General 2021/CCZ/008

Legislation referred to:

1. The Constitution of Zambia Chapter 1 as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016
2. The Citizenship Act No. 33 of 2016
3. The National Registration Act Chapter 126 of the Laws of Zambia

Other materials referred to:

G.K. Verma 'An Introduction to Public International Law' (1998)

Introduction

[1] By Originating Summons filed on 7th February, 2023, the Applicant,

Hastie Sibanda, seeks the determination of the following two questions:

1. **Whether the origin of a person's name, language and tribe is a particular to be ascertained when acquiring citizenship pursuant to Articles 34, 35(1), 36 and 37(1)(a)(b)(c) or any other provision of the Constitution of the Republic of Zambia.**
2. **Whether registering foreign villages, districts and countries on the National Registration Cards of Zambian Citizens based on the origin of the citizen's name, language and tribe is consistent with the provisions of Articles 34, 35(1), 36 and 37(1)(a)(b)(c) or any other provision of the Constitution of the Republic of Zambia.**

Factual Basis

[2] The facts giving rise to the application are stated in the amended affidavit in support of Originating Summons sworn by the Applicant. The Applicant deposed that his brother, Noel Sibanda, was re-issued a National Registration Card (NRC) by the Passport and National Registration Offices which reflected Bulawayo as the Town and Zimbabwe as the District because his name, language and tribe was deemed to be of foreign origin. These details are different from his previous NRC which indicated the village as Maloma in Mazabuka, Zambia. The Applicant avers that Neal Sibanda was made to swear an

affidavit to change the details on his NRC because his name, language and tribe were deemed to be of foreign origin. This was to facilitate the renewal of his passport. That following this change, the Applicant wrote to the Chief Registrar, Permanent Secretary and Minister of Home Affairs to have Neal Sibanda's old details on the NRC reinstated but was in all instances verbally informed that the new details would be maintained because his name, language and tribe were of foreign origin.

- [3] The Applicant added that his failure to get a written response prompted him to commence this matter, in the public interest, for the Court to determine the two questions in relation to Articles 34 to 37 of the Constitution.

Applicant's Submissions

- [4] After outlining the Articles in issue, the Applicant argued, as regards the first question, that Articles 35 to 37 prescribe the categories and particulars to be ascertained in the registration of citizens and do not require particulars to do with origin of name, language and tribe for one to acquire an NRC as doing so would result in classism, a practice that goes against the diversity embraced by the people of Zambia and expressed in constitutional aspirations. That it further contravenes the

Constitution by attempting to supplement or override the constitutional provisions which exclude arbitrary and capricious discretion.

[5] The Applicant posited that the National Registration office is a public office exercising the President's executive authority provided for in Article 91(2) of the Constitution. Article 91(3) requires, in mandatory terms, that the executive authority should be exercised in the manner that upholds the rule of law. Further, that Articles 8(a) and 147(3)(a) require the adherence to principles of good governance, integrity and effective and coherent governance systems and institutions.

[6] It was the Applicant's contention that the reference to origin of name, language and tribe would lead the country into discriminatory practices which are not backed by any legislative provisions. The cases of **Daniel Pule and Others v Attorney General**¹ and **Milford Mambo and Others v The People**² were cited in support of the argument that the interpretation of Articles 34 to 37 should, in line with Article 267(1) of the Constitution, be in accordance with the Bill of Rights and in a manner that promotes the purposes, values and principles of the Constitution and contributes to good governance. Further, that the rule of law principle requires that people should be governed by law and not discretion and Article 23 of the Constitution proscribes discrimination.

The Indian case of **Maneka Gandhi v Union of India**³ was cited to the effect that unguided and unrestricted power without the accompanying policy or principle to guide the authority in the exercise of power leaves room for discrimination of similarly circumstanced people. That the influx of immigrants and refugees in the country does not mean that every person with a name, language or tribe deemed foreign is an immigrant or refugee.

- [7] As regards the second question, the Applicant submitted that an NRC should only capture the particulars set out in Articles 34 to 37 of the Constitution in which residence is a fundamental particular upon which one qualifies to be a citizen and that it does not include foreign villages, districts or countries. Further, that what was required was the origin of a person in terms of place of birth and not the origin of the tribe which in some cases would entail indication of the origin of Bantu migrations of various tribes. Hence, that to change or not record residence on the NRC is a nullification of the basis of acquiring citizenship. The case of **Bernard Kanengo v Attorney General**⁴ was relied on as holding that all statutes flow from the Constitution and all acts done thereunder should be anchored in law otherwise they would be unconstitutional.

Respondent's Submissions

- [8] The Respondent opposed the Originating Summons on two grounds; first, that the questions raised are outside this Court's jurisdiction and second, that the particulars in issue are procedural requirements in legislation and are thus not constitutional matters.
- [9] On the issue of jurisdiction, the Respondent argued that pursuant to Article 128(1)(a) and (b) of the Constitution, the jurisdiction of this Court does not extend to interpreting the Constitution in relation to individuals' rights as sought by the Applicant. That the Applicant's amended affidavit contains contentious and personalised issues surrounding Neal Sibanda contrary to what this Court stated in **Jonas Zimba v The Attorney General**⁵. The case of **Christopher Shakafuswa and Isaac Mwanza v The Attorney General and Electoral Commission of Zambia**⁶ were cited as stating that the questions for interpretation should relate to serious policy implications and are intended to provide clarity on the meaning of constitutional provisions so as to guide the efficient and legitimate enforcement of the provisions.
- [10] Further, that this Court is not the right forum to seek redress for discrimination but the High Court and that the mode of commencement is also wrong and ought to have been by petition. It was submitted that

Originating Summons require that the questions solely or exclusively relate to interpretation of the Constitution. The cases of **Isaac Mwanza v The Attorney General**⁷ and **Kabisa Ngwira v National Pension Scheme Authority**⁸ were cited as holding that the mode of commencement affects jurisdiction and this cannot be considered as a procedural technicality.

- [11] The above notwithstanding, the Respondent proceeded to address the substantive questions raised in the Originating Summons. It was proffered, as regards the first question, that the procedural and substantive law ought to be segmented. That in this matter, the procedures for acquiring citizenship are a preserve of substantive legislation because the constitutional provisions do not go in to the level of detail required. Hence, the details on name, language and tribe under the National Registration Act are relevant for ascertaining whether one is entitled to citizenship by birth, descent or registration. This is consistent with Article 4(1) and (3) of the Constitution which provide that Zambia is multi-ethnic, multi-racial and multi-cultural. That this is the reason why a Zambian who hails from another country as ascertained from a tribe that is not among the 73 tribes in Zambia is still recognised

and granted citizenship by registration and issued with a green NRC as opposed to the pink NRC for non-citizens.

[12] The Respondent contended that in interpreting Articles 34 to 37 of the Constitution, a literal interpretation or ordinary meaning of the words should be given in line with the case of **Steven Katuka and Law Association of Zambia v Attorney General and 64 others**⁹ and only resort to the purposive approach when the ordinary meaning leads to absurdity.

[13] It was argued that Articles 34, 35 and 36 of the Constitution provide for categories of citizenship and what amounts to citizenship by birth and descent, respectively. What is common regarding these two types of citizenship is the requirement that at least one of the parents must be a citizen at the time of birth of the concerned person. This is in line with the *jus sanguinis* principle on acquisition of nationality based on parents as expounded in the book by S.K. Verma entitled "An Introduction to Public International Law" at page 197 and not *jus solis* which is based on the territory where one is born. That the Supreme Court, in the case of **Akashambatwa Lewanika and others v F.T.J. Chiluba and others**¹⁰ considered the history of constitutional provisions on

citizenship, which history is applicable to the current constitutional provisions on citizenship by birth or descent.

[14] The Respondent posited that Article 37 provides for what is to be considered when a non-citizen applies to acquire the citizenship status in terms of age, place of birth, descent and the required continuing period of residency. What amounts to an ordinary resident and period of residency is provided in sections 2 and 22 of the Citizenship Act No. 33 of 2016, respectively. Consequently, the origin of name, language and tribe are particulars or categories to be ascertained when acquiring citizenship including citizenship by birth, descent and registration.

[15] With regard to the second question, the Respondent submitted that Article 42(b) entitles a person to an identification document. The Citizenship Act defines national identity document and NRC while the National Registration Act Chapter 126 of the Laws of Zambia prescribes the manner and form of the NRC issued under Section 8(1). Section 5(1) of the National Registration Act provides for information to be provided including such particulars as may be prescribed. Regulation 5 of the National Registration Regulations, in the second schedule, requires, among others, the details of the village, chief, town and district if one is born in Zambia and the town and country if one is born outside

Zambia. Thus, the registration of foreign villages, districts and countries on the NRCs based on the citizen's name, language and tribe is consistent with the provisions of the Constitution. Those particulars do not bar anyone from the acquisition of citizenship.

[16] In conclusion, it was submitted that the Applicant's arguments on discrimination are the preserve of the High Court under the Bill of Rights.

Applicant's Reply

[17] In response to the Respondent's submissions on the mode of commencement, the Applicant contended that the questions are not personalised and the factual basis in the affidavit in support of the Originating Summons was in line with Order VI rules 14 to 16 of the Constitutional Court Rules. The facts were to provide context to the questions and not to seek any relief. Further, that the questions were also not about the procedures on citizenship but whether the origin of name, tribe and language are particulars needed for acquiring citizenship.

Determination

[18] We have considered the arguments advanced by both parties on the two questions in the Originating Summons.

- [19] We shall first address the issue of jurisdiction that has been raised by the Respondent, namely that this matter has been wrongly commenced by way of Originating Summons instead of by way of Petition.
- [20] The core of the Respondent's argument is that this matter is premised on facts relating to the Applicant's brother as highlighted in the affidavit in support and are therefore personalised and contentious. That this is contrary to the decisions of this Court which provide guidance on the matters which ought to be commenced by Originating Summons and therefore warrants the dismissal of the Originating Summons. The Applicant, on the other hand, has argued that the mode of commencement by way of Originating Summons is the appropriate one and that the affidavit evidence merely lays out the factual basis needed for the determination of the questions and that accordingly no relief is being sought apart from the interpretation.
- [21] It is trite that the mode of commencement goes to jurisdiction. In the cases cited by the Respondent namely, **Isaac Mwanza v The Attorney General**⁷ and **Jonas Zimba v The Attorney General**⁵, we laid out the issues that have to be satisfied for matters commenced by Originating Summons pursuant to Order IV rule 2 of the Constitutional Court Rules

(CCR). In the **Isaac Mwanza**⁷ case, we succinctly outlined them as follows:

“First, the issues raised must relate solely or exclusively to interpretation of constitutional provisions. Secondly, the questions must be of a general nature avoiding personalisation. Thirdly, they should be prospective in their effect, thereby guiding future conduct or decision making. Fourthly, they should not contain contentious matters which necessitate a proper trial in order to settle the facts and/or the law. Finally, there must be a legitimate purpose to the interpretation.”

[22] When these factors are examined in light of the two questions framed in the Originating Summons, we are of the considered view that they fulfil the requirements, which are in contention, in that the questions are not contentious or personalised contrary to the assertion by the Respondent. The fact that the background facts and affidavit evidence relate to the Applicant's brother do not, in themselves make the questions personalised or contentious. Hence, in the case of **Jonas Zimba v The Attorney General**⁵ this Court proceeded to interpret only one question which met the threshold and did not consider the other offending questions which contained personalised or contentious issues.

[23] The two questions framed in the Originating Summons fulfil the requirements of being general in nature, avoiding personalisation and

do not contain contentious issues. The further issue to be considered, based on the other requirements outlined in the **Isaac Mwanza**⁷ case, is whether the questions raise constitutional issues fit for determination under Article 128(1)(a) of the Constitution. Article 128(1)(a) of the Constitution provides:

128 (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear –

(a) a matter relating to the interpretation of this Constitution;

[24] Thus, the issue for consideration is whether the questions raised relate solely or exclusively to the interpretation of constitutional provisions.

[25] In this matter, the Applicant has raised two questions. The first question is whether the origin of a person's name, language and tribe is a particular to be ascertained when acquiring citizenship pursuant to Articles 34, 35(1), 36, 37(1)(a)(b) and (c) of the Constitution. The second question is whether registering foreign villages, districts and countries on the NRC of a Zambian citizen based on the origin of the citizen's name, language and tribe is consistent with the provisions of Articles 34, 35(1), 36 and 37(1) of the Constitution.

[26] A constitutional question is one that is resolved by interpreting the Constitution and not statutes or regulations. In interpreting constitutional provisions under Originating Summons, we further stated in the case of

Michael Mbuyu Mutwena v The Attorney General¹¹ that there should be factual basis to questions seeking interpretation of constitutional provisions because this Court cannot interpret constitutional provisions in a vacuum or as an academic exercise. Therefore, the factual basis should be such that it activates the interpretation of a particular provision.

[27] In this matter, the factual basis and arguments by the Applicant do not speak to the constitutional provisions in issue. The basis provided for seeking the interpretation of Articles 34 to 37 of the Constitution are rooted in Acts of Parliament, being the Citizenship Act and the National Registration Act and not the cited constitutional provisions.

[28] Articles 34, 35(1), 36 and 37(1) of the Constitution on which this Originating Summons is anchored provide as follows:

34. Citizenship may be acquired by birth, descent, registration or adoption in accordance with this Part.

35. (1) A person born in Zambia is a citizen by birth if, at the date of that person's birth, at least one parent of that person is or was a citizen.

36. A person born outside Zambia is a citizen by descent if, at the date of that person's birth, at least one parent of that person is or was a citizen by birth or descent.

37. (1) Subject to clause (2), a person is entitled to apply to the Citizenship Board of Zambia to be registered as a citizen if that person has attained the age of eighteen years and –

(a) was born in Zambia and has been ordinarily resident in Zambia for a period of at least five years;

(b) was born outside Zambia, has or had an ancestor who is, or was, a citizen and has been ordinarily resident in Zambia for a period of at least five years; or

(c) has been ordinarily resident in Zambia for a continuous period of at least ten years;

Immediately preceding that person's application for registration, as prescribed.

[29] These provisions fall under Part IV of the Constitution on citizenship.

Article 34 outlines the four categories under which citizenship can be acquired, being birth, descent, registration and adoption. Articles 35 and 36 provide for the circumstances under which one can acquire citizenship by birth and descent, respectively. Article 37 outlines circumstances which entitle one to apply for citizenship by registration. The other articles in this Part provide for citizenship by adoption, dual citizenship and renunciation and deprivation of citizenship, among others.

[30] The constitutional provisions in issue lay out the broad requirements or eligibility for acquiring the various categories of citizenship. They serve to clarify circumstances under which one qualifies for each category. They do not speak to issues of origin of name, language or tribe advanced by the Applicant. The wording of the Articles in issue show that it is envisaged that there should be processes and procedures with all the relevant details and particulars for the grant of the citizenship as

shown by the phrases “may be acquired” in Article 34 and “as prescribed” in Article 37, among others. This also accords with Article 272 of the Constitution which requires Parliament to enact legislation to give effect to the relevant articles or provisions in the Constitution which: confer a function or jurisdiction on an institution; provides for a process or procedure to be followed; requires an action, measure or procedure to be followed; or deals with a specific or general subject matter that requires legislation to give effect to the Constitution, among others. Where there is an alleged contravention of the Constitution by legislation, Article 128 (1)(b) of the Constitution covers such instances.

[31] Further, Articles 34, 35(1), 36 and 37(1) of the Constitution do not mention NRCs or the particulars to be contained on NRCs that mirror the provisions in issue. We thus reiterate that the issue of particulars on the NRCs advanced by the Applicant in the Amended Affidavit has nothing to do with the interpretation of Articles 34 to 37 of the Constitution. They, however, relate to issues regarding NRCs which are mainly dealt with by the National Registration Act.

[32] The National Registration Act deals with documents of identification which flow from Article 42 on citizenship under the same Part IV of the Constitution. Article 42(b) provides that:

42. A citizen is entitled to –

(b) a document of identification issued by the State to citizens.

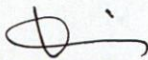
One document of identification that is provided for in the Citizenship Act and the National Registration Act is the NRC.

[33] It is thus apparent that there is no nexus between the constitutional provisions sought to be interpreted and the factual basis given to warrant this Court to exercise its interpretation function. Therefore, the questions in the Originating Summons do not meet the requirements that there should be a fitting factual basis that activates the constitutional provision for interpretation and that they should relate solely or exclusively to the interpretation of constitutional provisions and not the provisions of statutes or regulations. The application is accordingly dismissed.

[34] Each party is to bear their own costs of this action.



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M.M. Munalula (JSD)
PRESIDENT CONSTITUTIONAL COURT



.....
M.S. Mulenga
CONSTITUTIONAL COURT JUDGE



.....
J.Z. Mulongoti
CONSTITUTIONAL COURT JUDGE