

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

2023/CCZ/0026

IN THE MATTER OF ARTICLES 2, 91 (3) (a), (d), and (f) AND
92(1) OF THE CONSTITUTION OF ZAMBIA,
CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF ARTICLES 128 (1) (b) and (c), AND 173 (1)
(a) OF THE CONSTITUTION OF ZAMBIA,
CHAPTER 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF ALLEGED USE OF INSULTING LANGUAGE
IN PUBLIC BY PRESIDENT HAKAINDE
HICHILEMA THROUGH THE UTTERANCE
OF THE BEMBA WORD 'UKUPONOKA'
DURING THE COMMISSIONING OF
KASAMA AIRPORT IN THE KASAMA
DISTRICT OF THE NORTHERN PROVINCE
OF ZAMBIA ON FRIDAY, 24TH NOVEMBER,
2023

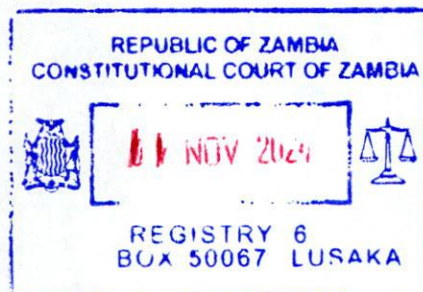
Coram: Shilimi, DPC, Mulonda, Musaluke, Mwandenga and Mulife
JJC. On 10th September, 2024 and 11th November, 2024.

BETWEEN:

SEAN TEMBO

v

THE ATTORNEY GENERAL



PETITIONER

RESPONDENT

For the Petitioner:

In-person

For the Respondent:

Mr. M. D. Kabesha, SC, Attorney General; Ms. N. K. Chongo, Principal State Advocate; Mrs. C. L. Kasonde-Mwanza, Principal State Advocate and Ms. A. Chisanga, Principal State Advocate

JUDGMENT

Musaluke, JC, delivered the Judgment of the Court

Case referred to:

1. Godfrey Miyanda v The Attorney General (No.1) (1985) Z.L.R. 185
2. Bizwayo Newton Nkunika v Lawrence Nyirenda and the Electoral Commission of Zambia 2019/CCZ/005

Legislation referred to:

1. The Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016.

Other works referred to:

1. White Father's Bemba English Dictionary published by the Northern Rhodesia and Nyasaland Joint Publications Bureau in 1954.

1.0 When we heard this matter, we sat with our brother Hon. Mr. Justice Mulonda who has since left the Court. This is therefore, the judgment of the majority.

2.0 Petitioner's case

2.1 On 30th November, 2023, the Petitioner issued out of this Court a petition pursuant to Article 128 (1) (b) and (c) of the Constitution of Zambia as amended by Act No. 2 of 2016 (the Constitution). The petition is support by an affidavit verifying facts, skeleton arguments and oral submissions.

2.2 The Petitioner alleges that, the President of the Republic of Zambia Mr. Hakainde Hichilema's utterance of the Bemba word "*ukoponoka*" contravenes Articles 91 (3) (a) and (d) and 91 (3) (f), 92 (1) and 173 (1) (a) of the Constitution.

- 2.3 The Petitioner particularly alleges that on or about Friday, 24th November, 2023 while commissioning the Kasama Airport in the Northern Province, President Hichilema used the insulting Bemba word *ukuponoka* which according to the Petitioner is commonly understood to mean “*pulling the foreskin of the manhood backwards*”.
- 2.4 That President Hichilema’s utterances were aired live and uncensored across the nation on the national broadcaster, the Zambia National Broadcasting Corporation (ZNBC) television during prime-time main news at 19:00hrs, whose audience includes minors. Further, the audience to which the President is alleged to have uttered these words included distinguished religious and traditional leaders including the Mwine Lubemba Paramount Chief Chitimukulu of the Bemba speaking people.
- 2.5 The Petitioner has stated that as a result of President Hichilema’s remarks, various citizens have expressed displeasure and registered offense at the President’s lack of respect for the People of Zambia.
- 2.6 The Petitioner therefore, alleges that President Hichilema’s utterance of the said Bemba word *ukuponoka* violates the values and principles

of Zambia as a Christian Nation and contravenes Articles 2 of the Constitution.

2.7 Additionally, that President Hichilema's utterance of the said Bemba Word *ukuponoka* lacks decency, respect for the people of Zambia, respect for the diversity of different communities and contravenes Articles 91 (3) (a), (d) and (f) of the Constitution.

2.8 Furthermore, that President Hakainde Hichilema's utterance of the said Bemba word *ukuponoka* lacks dignity, leadership and integrity and contravenes Article 92 (1) of the Constitution.

2.9 Lastly, that President Hichilema's utterance of the said Bemba word *ukuponoka* is of low standard, violates professional ethics and integrity and contravenes Article 173 (1)(a) of the Constitution.

2.10 In the skeleton arguments in support of the petition, the Petitioner seeks to demonstrate how the words uttered by President Hichilema violate the various provisions of the Constitution cited in his petition. In this regard, the Petitioner relies on the White Father's Bemba English Dictionary published by the Northern Rhodesia and Nyasaland Joint Publications Bureau in 1954, for the definition of the phrase '*Ponoka*'.

According to the said dictionary, phrase 'ukuponoka' has been defined as an instructive verb that means:

"To draw the foreskin of the manhood" and further describes it as an obscene word used only in reviling man..."

2.11 It is from this definition given by the White Father's Bemba English Dictionary that the Petitioner believes the words uttered by President Hichilema were insulting, uncouth, disrespectful and lacked dignity and thereby contravened the provisions of the Constitution aforementioned.

2.12 As a result of these alleged constitutional contraventions, the Petitioner now seeks the following remedies:

2.12.1 A declaration that President Hakainde Hichilema's utterance of the Bemba Word "ukuponoka" which means "pulling of the foreskin of the manhood backwards" when translated into English, is an insult, violates the values and principles of Zambia as a Christian Nation and contravenes Article 2 of the Constitution of Zambia

2.12.2 A declaration that President Hakainde Hichilema's utterances of the Bemba Word "ukuponoka" which means "pulling the foreskin of the manhood backwards" when translated into English, lacks decency, lacks respect for the people of Zambia, lacks respect for the diversity of different communities including the Bemba speaking people of Northern Province and

contravenes Article 91 (3) (a), (d) and (f) of the Constitution of Zambia;

2.12.3 A declaration that President Hakainde Hichilema's utterances of the Bemba Word ukuponoka which means "pulling the foreskin of the manhood backwards" when translated into English, lacks dignity, leadership and integrity and contravenes Article 92(1) of the Constitution of Zambia;

2.12.4 A declaration that President Hakainde Hichilema's utterance of the Bemba word "ukuponoka" which means "pulling the foreskin of the manhood backwards" when translated into English, is of low standard, violates professional ethics and integrity and contravenes Article 173(1)(a) of the Constitution of Zambia;

2.12.5 An Order that costs for this petition be borne by the Respondent to this cause;

2.12.6 Any other reliefs that the court may deem fit.

3.0 Respondent's Answer

3.1 In response to the petition, the Respondent filed his answer, affidavit in support of the answer and skeleton arguments in opposition. It is the Respondent's arguments in the main that, the petition herein neither discloses a cause of action nor raises any constitutional issues that fall within the jurisdiction of this Court. Further, that the petition herein is frivolous and vexatious.

3.2 In strengthening these arguments, the Respondent argues that in order to successfully ground a cause of action, there must be an underlying

legal wrong whereby an act complained of must constitute a violation of the Constitution. The Respondent posits that in order to competently approach this Court for relief, a party must set out the manner in which the action complained of contravenes the Constitution.

3.3 The Respondent argues that a perusal of the petition before Court shows that the act complained of does not constitute a violation of the Constitution and as such, there is no basis for this Court to determine this matter.

3.4 The Respondent also submits that even the nature of the remedies sought by the Petitioner in this matter are reflective of the fact that the petition has not disclosed a cause of action. That the Petitioner has sought declarations which serve no useful purpose. In support of this assertion, reference is made to the case of **Godfrey Miyanda v The Attorney General**¹ wherein it was held that a declaration is a discretionary remedy that can only be made on proper principles and considerations and that it will not be made when *inter alia* no useful purpose can be served.

3.5 In sum, the Respondent argues that this Court does not have the jurisdiction to hear and determine the petition before it as it raises no

constitutional issue. That as a result, the petition herein is frivolous and vexatious and that the Petitioner is not entitled to any of the reliefs sought.

4.0 Hearing

4.1 At the hearing of the petition on 10th September, 2024 the parties in their oral submissions restated the contents of their written submissions which we have already detailed above.

5.0 Determination

5.1 We have considered the petition with its accompanying affidavit verifying facts, the Respondent's answer and affidavit in opposition. We have also given due consideration to the oral and written arguments advanced by the parties in respect to this action.

5.2 What we gather from the petition and the answer respectively, is that the question that begs determination is as follows:

Whether or not President Hichilema's use of the Bemba word "*ukuponoka*", when commissioning Kasama Airport constitutes an insult and thereby contravenes Articles 2, 91(3) (a), (d) and (f), 92 (1) and 173 (1) (a) of the Constitution.

- 5.3 This petition is anchored on the alleged President Hichilema's utterance of a Bemba phrase *ukuponoka* which the Petitioner thinks is uncouth, lacks dignity and integrity and thereby allegedly contravenes Articles 2, 91(3) (a), (d), (f), 92 (1) and 173(1)(a) of the Constitution.
- 5.4 As the petition specifically cites Articles 2, 91(3) (a), (d), (f), 92 (1) and 173 (1) (a) of the Constitution to have been allegedly contravened, we are of the considered view that the petition engages this Court's jurisdiction in line with Article 128 (1) (b) of the Constitution. We are further fortified by our holding in the case of **Bizwayo Newton Nkunika v Lawrence Nyirenda and The Electoral Commission of Zambia**² where we guided that any allegations of the contravention of the Constitution brought before this Court must be fully interrogated.
- 5.5 We will therefore, examine whether or not the Bemba word uttered constitutes constitutional breaches as alleged. To do so, we need to look at it in relation to the constitutional provisions alleged to have been contravened as quoted hereunder:
- 5.6 Article 91(3) (a) (d) (f) of the Constitution provides as follows:
- The President shall, in exercise of the executive authority of the State-
- (a) respect, uphold and safeguard this Constitution;
- (d) respect the diversity of the different communities of Zambia;

(f) uphold the rule of law.

5.7 Article 92 (1) of the Constitution provides as follows:

The President shall perform, with dignity, leadership and integrity, the acts that are necessary and expedient for, or reasonably incidental to, the exercise of the executive authority.

5.8 Further, Article 173 (1) (a) of the Constitution provides as follows:

The guiding values and principles of the public service include the following –
(a) maintenance and promotion of the highest standards of professional ethics and integrity.

5.9 A reading of the above constitutional provisions particularly, Articles 91 (3) and 92(1) reveal that the provisions provide for the Presidency and the vesting of executive authority as well as the executive functions of the President.

5.10 The question that needs to be answered is, did President Hichilema when uttering the word complained of fail to respect, uphold and safeguard the Constitution? Further, did President Hichilema fail to respect the diversity of the different communities in Zambia and fail to uphold the rule of law, thereby contravening Articles 91(3) (a) (d) and (f) of the Constitution?

5.11 The answer to the above question in our view, lies in the Petitioner adducing cogent evidence proving that the President indeed breached Article 91(3) (a), (d) and (f) of the Constitution when he uttered the Bemba word *ukuponoka*. The Petitioner averred in his petition that he would adduce evidence at trial to prove breach of the alleged constitutional provisions. That evidence was indeed presented in form of audios recorded on a flash disc which the Petitioner attached to his petition. The Petitioner however, did not speak to this piece of evidence at trial.

5.12 As the Petitioner did not adduce evidence as in what context the word was uttered, in the interest of justice, we took time to listen to the audio evidence presented by the Petitioner in reference to the utterance by the President, on 24th November, 2023 at the commissioning of the Kasama Airport under exhibit "SET1". Having listened to this piece of evidence, we find that the Petitioner has conveniently failed or neglected to explain or quote the entire sentence where the word *ukuponoka* was used by the President. From the audio evidence, we hear the President's utterance as follows:

*"Imwe mwaleponoka mu town lyonse, nganaisa kuno lyonse
kuponoka"*

- 5.13 We have taken judicial notice of the fact that the word *ukuponoka* in Bemba language can be assigned two meanings. The first meaning refers to an act of pulling a man's penis fore skin. The second meaning associated with this word is an argot or an everyday street slang to mean beating someone with fists, slaps etc. The context in which this word is used can therefore, give clarity on its intended meaning at any particular time.
- 5.14 We have carefully considered the nature of the event that President Hichilema was officiating and the audience to whom the remarks were made. We therefore, need to put context to words spoken by the President when he stated as follows: "*Imwe mwaleponoka mu town lyonse, nganaisa kuno lyonse kuponoka*". As a Court, we can confidently say that we have a fair understanding of the Bemba language and what we deduce from this, is that, the President was telling his audience that: *in the past, they used to get beaten every time he visited them which was no longer the case*. What we deduce from this utterance is that, the President was using Bemba colloquial speech to talk about how in the past his audience used to be beaten whenever he visited them. We are therefore, fortified that the context in which the Bemba word *ukuponoka* was used by President Hichilema is the street

slang which means beating someone and not the act of pulling a man's penis fore skin.

5.15 Reliance on the meaning ascribed to the word *ukuponoka* by the White Father's Bemba - English Dictionary, does not help the Petitioner as the meaning of the word in this case is entirely dependent on the context in which it was used as we have shown.

5.16 Considering what we have just said, we have come to inescapable conclusion that President Hichilema did not breach Article 91(3) (a) (d) and (f) of the Constitution which prescribe for respect, to uphold and safeguard the Constitution, for respect for the diversity of the different communities of Zambia and to uphold the rule of law.

5.17 As regards the alleged breach of Articles 2, 92 (1) and 173 (1)(a) of the Constitution, equally, there is no evidence that was led to suggest that President Hichilema in uttering the word *ukuponoka* and attributing it to the context we have given it, failed to perform his executive functions with dignity, leadership or integrity and/or failed not take into account the national values and principles of the public service. It is our conclusion therefore, that there was no breach of Articles 2, 92 (1) and 173 (1)(a) of the Constitution.

5.18 Consequently, we find no merit in this petition and dismiss it.

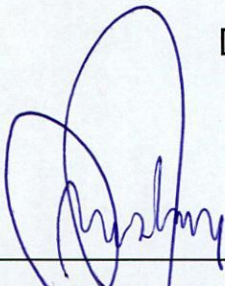
5.19 As we conclude, we view this petition to be frivolous and vexatious as we are of the opinion that the Petitioner knows or ought to have known the milieu in which the word complained of was used and that it was not meant to amount to an insult as alleged.

5.20 The petition having been dismissed for want of merit, being frivolous and vexatious, we find that this is an appropriate case in which to condemn the Petitioner in costs. We consequently, order the Petitioner to pay costs to the Respondent.



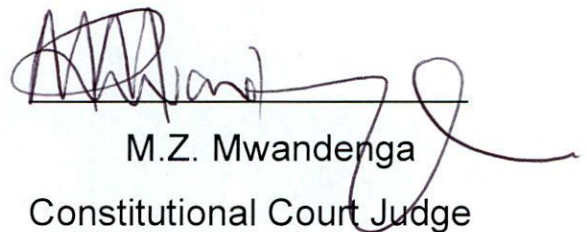
A.M. Shilimi

Deputy President – Constitutional Court




M. Musaluke

Constitutional Court Judge



M.Z. Mwandenga

Constitutional Court Judge



K. Mulife

Constitutional Court Judge