SAIPAR Case Review

Volume 5
Issue 3 *November 2022*

Article 5

11-2022

Bizwayo Newton Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia 2019/CCZ/005 (1 March 2021)

O'Brien Kaaba
University of Zambia

Follow this and additional works at: https://scholarship.law.cornell.edu/scr

 Part of the African Studies Commons, Constitutional Law Commons, and the Election Law Commons

Recommended Citation

Kaaba, O'Brien (2022) "Bizwayo Newton Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia 2019/CCZ/005 (1 March 2021)," *SAIPAR Case Review*: Vol. 5: Iss. 3, Article 5.
Available at: https://scholarship.law.cornell.edu/scr/vol5/iss3/5

This Case Commentary is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in SAIPAR Case Review by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Bizwayo Newton Nkunika v Lawrence Nyirenda and Electoral Commission of Zambia 2019/CCZ/005 (1 March 2021)

O'Brien Kaaba[1]

Facts

The Petitioner and Frist Respondent stood as parliamentary candidates for Lundazi constituency in August 2016 in which the Respondent emerged victorious. The petitioner challenged the election, alleging that the Respondent did not meet the minimum academic qualifications prescribed under article 70(1)(d) of the Zambian Constitution. Article 70(1)(d) reads: 'Subject to clause (2), a person is eligible to be elected as a Member of Parliament, if that person—(d) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent.'

The Respondent, on the other hand, insisted that he had the requisite qualifications because at the time of the election he held a grade 12 General Certificate of Education (GCE); Zambia National Service military training certificate; computer course certificates; music certificate; and theological tutors' certificate.

Without a definition of 'a grade 12 certificate or its equivalent' in the Constitution, the Court subpoenaed two expert witnesses, from Examinations Council of Zambia (ECZ) and the Zambia Qualifications Authority, for purposes of clarifying what constitutes a grade 12 certificate or its equivalent. The Court relied heavily on the witness from ECZ, Michael Chilala, who drew a difference between School Certificate and General Certificate of Education (note that these are not the terms used in the Constitution). The ECZ witness indicated that School Certificate can be obtained in one of the two ways: a) obtaining a pass in at least six subjects, including English, one of which must be a credit or better; or b) pass in at least 5 subjects, including English, two of which should be credit or better.

According to the expert witness, one gets a General Certificate of Education (which the First Respondent had) if one gets grade one to eight in at least one subject if the candidate: a) entered and wrote the exams but did not satisfy the requirements for School Certificate; or b) entered and wrote GCE as an external candidate. It was the witness' view that the Respondent's GCE did not amount to a school certificate as it only had four instead of five subjects. The witness indicated that there was no qualification issued as a grade 12 certificate in the country, but strangely concluded that grade 12 certificate and School certificate were one and the same thing. Interestingly, he asserted that GCE is on the same level as School Certificate but that it only becomes equivalent to the School Certificate if the number of subjects required for School Certificate are met.

The Court also resorted to the drafting history of article 70(1)(d). According to the Court, the rationale for the clause is to be found at page 374 of the Final Report of the Technical Committee on Drafting the Zambian Constitution 2013 where it is stated that the purpose is '… to guide political parties and other stakeholders to nominate people who would be able to debate effectively and make meaningful contributions in parliament.'

---

[1] LLB (London), LLM (UNZA), LLD(UNISA), Certificate in Constitution Building in Africa (Central European University), Advanced Certificate in Legislative Drafting (University of Cape Town), Certificate in Decentralisation in Africa (University of Western Cape and University of Addis Ababa).

Holding

Based on the foregoing, the Court concluded that the GCE held by the First Respondent did not amount to a grade 12 certificate. The court asserted:

> It is clear that by introducing the minimum academic qualification, the intention of the legislature was to set a scholarly accomplishment condition or eligibility by a person who completed a secondary school education programme and was awarded a school certificate so as to ensure that persons elected into parliament debate effectively and make meaningful contributions on behalf of the people they represent.

The natural consequence of this should have been that the Respondents violated the Constitution, and, therefore, the election of the First Respondent, should have been a nullity. Not for the Constitutional Court. It summersaulted and refused to make this order. Instead, it held that its decision '...cannot apply to the first respondent retrospectively' because there was a binding High Court decision upon which the respondents acted on to file his nomination papers as a candidate. This, according to the Court, is because the '...the decisions of this Court are not intended to turn the justice delivery system on its head.' Having reached this end, the majority of the Court (Judges Sitali, Mulenga and Musaluke) dismissed the petition in its entirety. However, two judges (Chibomba and Mulonda) dissented on the narrow point of the consequence of the finding that the GCE was not a grade 12 certificate. These two would have invalidated the election of the first Respondent and ordered him to vacate office.

Significance

This was the first major case that presented the Constitutional Court with an opportunity to interpret the import of article 70(1)(d) of the constitution which lists possession of a grade 12 certificate or its equivalent as a requisite qualification for one to run as a parliamentary candidate. In this article, I argue that both the interpretive approach by the Court, leading to the conclusion that the GCE does not amount to a grade 12 certificate, and the conclusion that a violation of the Constitution cannot be redressed retroactively, are defective and not founded on any sound legal analysis and defy basics of constitutional adjudication.

The Constitutional Court, in arriving at the conclusion that the GCE did not amount to a grade 12 certificate did not in any way engage with the interpretation of the constitutional text. Instead, the judges simply abdicated their judicial role by summoning an expert witness and assenting to the views of the witness. The effect of this interpretive approach is to both defy article 267 which dictates that the Constitution should be interpreted purposively, and article 1(1) which establishes the supremacy of the constitution. The Court did not proceed from the constitutional text to inform the provisions of subordinate laws and practices by public institutions like ECZ, but instead, uncritically used the current ECZ practice to populate a constitutional provision. In consequence, the Constitutional Court subordinated the Constitution to ECZ practice. This is a wrong approach to constitutional interpretation. Interpretation does not mean describing a phenomenon, as the Constitutional Court decision seems to suggest. Interpretation entails 'getting under the skin' of the constitution in order to determine its point or purpose.[2] Constitutional interpretation is about looking for the best that the constitution means in securing the interests of the people and the establishment and disciplining of government.[3] This approach sees provisions in the constitution not as ends in

[2] Stephen Guest et al (2004). *Jurisprudence and Legal Theory*. London: University of London Press; 176.
[3] Sotirios Barber and James Fleming (2007). *Constitutional interpretation: The Basic Question*. Oxford: Oxford University Press; 189.

themselves, but as having an instrumental value, that is, the constitution is an instrument for the realization of the values underpinning it.

Ronald Dworkin developed an excellent parable or mental exercise explaining this approach to interpretation. It is about a father who tells his children that he expected them not to treat others unfairly:

> I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my "meaning" was limited to those examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of the later; in that I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.[4]

The use of the terms *concep*t and *conceptions* by Dworkin in this mental exercise is significant. Concepts, like values, endure, while conceptions manifesting underlying concepts may change over time. Interpretation, therefore, involves giving expression to concepts (which endure) through the medium of concepts that are appropriate to the times and reflect the best available realization of the concepts.

How can this be related to article 70(1)(d)? The clause does not use the term School Certificate (contrary to the conflation by the expert witness and as accepted by the Constitutional Court) but it deliberately uses 'a grade 12 certificate.' There is no indication that the drafters did not mean what they drafted. What can correctly be assumed is that the constitution refers to a qualification one obtains on completing the scheduled 12 years of education. As the expert witness stated, one could either get a GCE or School Certificate upon completion of the 12 years of schooling provided they entered and sat the requisite examinations. There is nowhere the Constitution shows any preference for either of the qualifications. In the Dworkinian sense, it can be argued that the constitutional grade 12 certificate is the *concept* while the GCE and School Certificate are both *conceptions* of the same underlying *concept* of the grade 12 certificate. If that be the case, then there was no constitutional basis for the holding that the possession of a GCE did not meet the requirements of article 70(1)(d). The assumption that the School Certificate equipped one with better skills to debate and participate meaningfully in the in parliament more than a GCE holder is spurious and not based on any understanding of what makes legislatures more effective.

This approach is also supported by the careful reading of the wording of the provision. The provision deliberately uses 'a' which is an indefinite article, as opposed to 'the', a definite article. This is something the Court did not address itself to. The use of an indefinite article as opposed to a definite article has an impact on the meaning of the term modified by the article. As Andrew Burger has indicated, a definite article refers to something specific and known to the persons concerned, while an indefinite article is used to refer to any member of a group or set.[5] Since article 70(1)(d) uses an indefinite article, and as the expert witness testified, there were currently two possible qualifications one could get upon exiting the 12th year of schooling, possession of any of the two could satisfy the constitutional requirement. This is a conclusion dictated by the wording of the provision itself. The judges had a duty to engage

[4] As cited in Sotirios Barber and James Fleming (2007). *Constitutional Interpretation: The Basic Question*. Oxford: Oxford University Press; 28.

[5] Andrew J Burger, *A Guide to Legislative Drafting in Africa*(Juta, 2015) 30.

with the text of the provision and draw meaning from it instead of surrendering to the views of the witness. As Justice Michael Kirby has argued, '[t]he text is the anchor for the judicial task…'[6]

This approach also makes sense because the nature and constitutive elements of qualifications students get on completing grade 12 have not been static but change in line with evolving education policies and laws. To tie the meaning of the constitutional provision to a current practice, is to freeze the constitutional meaning of a text. As Pierre de Vos correctly observed, constitutional interpretation should reject a fictitious reading of the constitution that assumes that the 'political community is founded at a single magic moment that freezes its meaning forever.'[7] Otherwise what would happen if ECZ in future changed the constitutive elements of a School Certificate?

The second shortcoming is the decision by the majority of the Court to decline to nullify the election of the First Respondent on the ground that the decisions of the Court should not apply retroactively. In reaching this decision, the Court articulated no known constitutional doctrine but simply relied on the gut feelings or personal inclinations of judges. No comparative research was done to help the judges make an informed decision. The decision is clearly wrong and at variance with the express provisions of the Constitution (which the judges deliberately avoided citing). Article 1(1) of the Constitution declares the supremacy of the constitution and article 1(2) proclaims in mandatory terms: 'An act or omission that contravenes this Constitution is illegal.' Since the Court was unanimous that the First Respondent did not have the requisite constitutional qualifications to run as a Member of Parliament (a conclusion I do not agree with, as discussed above), it was mandatory for the Court to nullify the election. It is not a matter of choice or discretion. It is an obligatory constitutional mandate. As Henry Campbell Black has asserted:

> This supremacy of the constitution means, first, that it must endure and be respected as the paramount law, at all times and under all circumstances, and in every one of its provisions until it is amended in the mode which itself points out or is destroyed by revolution.[8]

This approach is better demonstrated in the Nigerian case of *Amaechi vs. Independent National Electoral Commission and Others,*[9] involving a state governorship election. The Nigerian Constitution and electoral laws required parties to have primary elections for selecting candidates. Those who won primaries were the legally recognized political party candidates. The petitioner stood as a candidate for a governorship primary and won the election and was therefore, by law, supposed to be the concerned party's candidate in the election. His political party, however, declined to adopt him and gave the adoption certificate to another person who was not selected through primaries. This new person stood as a state governor and won the election. In the ensuing legal battle, the Nigerian Supreme Court held that the person who was declared winner of the state governorship position was in fact not the rightful winner and therefore annulled his election and declared the petitioner as the legitimate governor. The Nigeria Supreme Court reasoned that the replacement of the petitioner was illegal and a nullity as his candidature was in violation of the Constitution and the law. Consequently, in the eyes

[6] The Hon Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning,' (2011) 35 Melbourne University Law Review, 128.
[7] Pierre de Vos, 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution,' (2001) 17 *South Africa Journal on Human Rights*, 32.
[8] Henry Campbell Black, Handbook of American Constitutional Law (Third Edition, West Publishing Company, 1910).
[9] (2008) JELR 56286 (SC).

of the law, the petitioner was the one who was adopted as a candidate, and therefore, the rightful governor.

The approach taken by the Nigerian Supreme Court is the more legally and procedurally correct one because no act that violates constitutional provisions must be given validity. This derives from and gives effect to the doctrine of the supremacy of the Constitution. To hold otherwise is to desecrate the Constitution and dubiously honour those who violate it.

This, however, is not to argue that orders of invalidity cannot be disruptive. They can and there is well developed comparative jurisprudence on how judges can tailor orders of invalidity to specific contexts to contain the consequences of invalidity.[10] Had this been a deserving case, for example, the Court might have explored the well-established doctrine of prospective annulment, which makes a distinction between the violation of the constitution and the consequences of that finding. Such an approach could allow the Court to always defend the constitution against violation but tailor remedies in a manner that is not disruptive of constitutional order. This, however, is not what the Constitutional Court did in this case. It failed to both vindicate the constitution and to redress the violation.

[10] For a detailed discussion of constitutional remedies, see chapter 11 of Pierre De Vos, *South African Constitutional Law in Context* (Oxford University Press 2014)