

**IN THE HIGH COURT OF TANZANIA  
(MAIN REGISTRY)  
AT DAR ES SALAAM**

**(CORAM: FELESHI, J. MKASIMONGWA, J, & MWANDAMBO, J.)**

**MISCELLANEOUS CIVIL CAUSE NO. 30 OF 2015**

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC  
OF TANZANIA AS AMENDED [CAP. 2 R.E, 2002]

**AND**

IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, [CAP. 3  
R.E, 2002] 0767 925745

**AND**

IN THE MATTER OF A PETITION TO CHALLENGE THE CONSTITUTIONALITY OF  
THE PROVISIONS OF THE REFERENDUM ACT NO. 11 OF 2013

**RASHID SALUM ADIY ..... PETITIONER**

**VERSUS**

**1. MINISTER OF CONSTITUTION**

**AND LEGAL AFFAIRS ..... 1<sup>ST</sup> RESPONDENT**

**2. THE HON. ATTORNEY GENERAL OF**

**THE UNITED REPUBLIC OF TANZANIA ..... 2<sup>ND</sup> RESPONDENT**

Date of Last Oder: 18.11.2016

Date of Judgement: 03.02.2017

## **JUDGMENT**

### **FELESHI, J.:**

The Petitioner has moved this Court in terms of articles 13(1), (2), (3), (4) & (5), 21(2), 26, 29, and 30(3), (4) & (5) of the Constitution of the United Republic of Tanzania, 1977, [CAP. 2 R.E, 2002] ("the Constitution"), sections 4, 5 & 6 of the Basic Rights and Duties Enforcement Act, [CAP. 3 R.E, 2002] and Rule 4 of the Basic Rights and Duties (Practice and Procedure) Rules, 2004 Government Notice No.304 of 2014. Essentially, the Petitioner contends that *section 34(2) of the Referendum Act, No. 11/2013 ("the Act")* is unconstitutional and discriminatory for violating the right of equality before the law. At the end of it the Petitioner invites the court to grant an assortment of reliefs namely;

- (a) Declaration that section 34(2) of the Referendum Act, No. 11/2013 ("the Act") is unconstitutional and discriminatory for violating the right of equality before the law;*
- (b) declaration that the provisions of section 34(2) of the Act are unconstitutional for being discriminatory;*
- (c) declaration that the provisions of Section 34(2) of the Act are unconstitutional for violating the rights of citizens hailing from Zanzibar to participate in the governance of the United Republic of Tanzania including equal participation in fair and free elections;*
- (d) declaration that the provisions of Section 34(2) of the Act are null and void for being unconstitutional to the extent above stated;*
- (e) declaration that the provisions of Section 34(2) of the Act are bad in law and contrary to principles of good governance and rule of law;*

*(f) declaration that on a true and proper construction of section 34(2) (b) of the Act the following persons shall have the rights and are eligible to vote and their votes shall be considered as votes for Zanzibar for purposes of section 34(1)(b) of the Referendum Act:*

- i. A Tanzanian hailing from Tanzania Mainland who resides in Tanzania Mainland registered by the National Electoral Commission.*
- ii. A Tanzanian hailing from Tanzania Mainland who resides in Zanzibar registered by the National Electoral Commission.*
- iii. A Tanzanian hailing from Tanzania Zanzibar who resides in Tanzania Mainland registered by Zanzibar Electoral Commission.*
- iv. A Tanzanian hailing from Tanzania Zanzibar who resides in Zanzibar registered by the National Electoral Commission.*
- v. A Tanzanian hailing from Tanzania Zanzibar who resides in Zanzibar registered by the Zanzibar Electoral Commission.*

*(g) A declaration that section 34(2)(b) of the Act is unconstitutional for permitting the following to vote and determine matters relating to affairs and interest of Zanzibar while they don't have any legitimate interest on Zanzibar:*

- i. Tanzanians hailing from Tanzania Mainland who resides in Tanzania Mainland registered under the National Electoral Commission.*
- ii. A Tanzanian hailing from Tanzania Mainland who resides in Zanzibar registered by the Zanzibar Electoral Commission.*
- iii. A Tanzanian hailing from Tanzania Zanzibar who resides in Tanzania Mainland registered by the National Electoral Commission.*

*(h) A declaration that section 34(2) (b) of the Act is discriminatory to the wishes and aspirations of the Zanzibar to determine their nations aspirations on account of allowing and permitting voters from Tanzania Mainland who are outnumbering voters from Zanzibar to determine the affairs relating to Zanzibar.*

- (i) A declaration that the true intention of the Parliament in enacting a separate procedure for voting in Zanzibar was to let the people of Zanzibar residing in Zanzibar to determine their fate despite being a minority in Tanzania in comparison with Tanzania Mainland.*
- (j) Provisional measures restraining the National Electoral Commission from conducting the Referendum under the Act until when the Act shall be amended pursuant to orders of this Court.*
- (k) Any other relief(s) and / or order(s) the Court may deem just and equitable to be granted.”*

By and large, the grounds of upon which the petition is founded are; one, the Act discriminates against Tanzanians hailing from Zanzibar for allowing Tanzanians from the mainland Tanzania to vote on behalf of Zanzibaris during the referendum and not vice versa thereby giving them (the Main Land Tanzanians) an upper hand in deciding the fate of the union. It is contended that the effect of the impugned provisions is to legalise inequality and discrimination amongst Tanzanians by reason of their place of origin within the union contrary to article 13(1), (2), (4) and (6) of the Constitution. Two, the Petitioner contends further that section 34(2) of the Act is violative of the Constitution in that it curtails the right of Tanzanians to participate in the governance of their country guaranteed by article 21(2) of the Constitution. Finally the Petitioner attacks section 37 of the Act which vests powers on the National Electoral Commission to make special provisions for voters who, for various reasons are not able to cast their votes during the voting day is likely to be applied in contravention of article 29(5) of the Constitution.

The Respondents' reply is a total denial of each of the grounds of complaint in the petition.

Arising from the pleadings, the determination of the petition boils down to a single issue that is to say; *whether section 34(2) (b) of the Act is unconstitutional for violating the right to equality before the law and for being discriminatory by denying Zanzibaris to fairly and freely participate in the referendum process in the governance of the united Republic of Tanzania.*

Hearing of the Petition was conducted by way of written submissions in terms of the provisions of Rule 13(1) and (2) of the Rules. After the filing of the written submissions the Court saw it fit to conduct an oral hearing by way of clarifications on some of the pertinent issues in the petition during which Mr. Emmanuel Kavishe a Principal Legal Officer from the National Electoral Commission was invited to express his views on the issues before hand to the extent they relate to the Commission. Mr. Fulgence Masawe, learned Advocate from Kinondoni Legal Aid Clinic of Legal and Human Rights Centre represented the Petitioner whilst the Respondents were represented by Ms. Alecia Mbuya and Mr. Mark Eldad Mulwambo, learned Principal State Attorneys from the 2<sup>nd</sup> Respondent's Office. We are grateful to all Counsels including Mr. Kavishe for the energy and industry expended in canvassing the issues and for availing us with the necessary materials which have helped us immensely in determining this petition. We shall consider the substance of the arguments without necessarily dealing with each of the arguments presented in the respective written and oral submissions.

Before we deal with the substance of the petition we find it germane to deal with an issue raised by the Respondents in their written submissions in reply. That issue has a bearing on the jurisdiction of the Court to determine the petition. Ordinarily, an issue of that nature should have been raised in the Respondents' reply to the petition as required by Rule 7(1) of the Rules. The Respondents did not raise it but since it seeks to question our jurisdiction we shall determine it any way albeit belatedly.

The Respondents' contention is that the Petitioner has an alternative remedy pursuant to section 40 of the Act and thus he should have pursued that remedy before approaching the court by way of a petition. The learned Principal State Attorney argued that by virtue of section 8(2) of the Basic Rights and Duties Enforcement Act, the Court lacks jurisdiction to determine the petition. He cited the case of **Tanzania Cigarette Company Ltd v. The Fair Competition Commission & Attorney General**, Miscellaneous Civil Cause No. 31 of 2010 to that effect. In view of the above, the learned Principal Attorney invited the Court to make a finding that there are alternative remedies available to the Petitioner and if we uphold that point we should dismiss the petition.

Mr. Massawe had a different view submitting that section 40 of the Act does not provide any alternative remedy as contended by the Respondents and thus the court should reject the argument and the invitation to dismiss the petition.

There is no dispute that where the law provides an adequate remedy a person cannot invoke the jurisdiction of this court under the Basic Rights

and Duties Enforcement Act. Counsel for the parties share the same understanding except on the import of section 40 of the Act which provides:

**"Nothing in this Act shall be construed as preventing the commission from taking further administrative measures or issuing policy guidelines and regulations to ensure effective conduct of the referendum".**

In Tanzania **Cigarette Company Ltd v. The Fair Competition Commission & Attorney General** (supra) cited by the learned Principal State Attorney this very court held at page 20-22:

*"Apart from the principle of constitutionality of Acts of Parliament, we think, law in Tanzania is also settled on the principle that litigants should first exhaust other lawfully available remedies under statutory or case law, before they can seek remedies under the Basic Rights and Duties Enforcement Act...In our interpretation, subsection (2) of section 8 suggests that recourse to provisions of the Basic Rights and Duties Enforcement Act is not to be resorted to where there are other adequate means of redress available to a potential petitioner...Subsection (2) of section of the Basic Rights and Duties Enforcement Act provides that the jurisdiction of High Court is not to be exercised **if the High Court is satisfied that adequate means of redress are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious.** In fact, this interpretation of section 8 of the Basic Rights and Duties Enforcement Act gives effect to the presumption of constitutionality of statutory provisions. This means that the reliefs and remedies available under the Fair Competition Act, 2003 are as constitutional as reliefs and remedies that are available under the Basic Rights and Duties Enforcement Act."*[Emphasis supplied]

In view of the above decision and section 8(2) of the Basic Rights and Duties Enforcement Act (supra) the question tasking our mind is whether in view of the submissions made by Mr.Mlwambo, learned Principal State Attorney and later by Ms.Mbuya, learned Principal State Attorney, on one hand, and Mr. Emmanuel Kavishe, Principal Legal Officer from the Director of Elections, on the other hand, it is true that sections 40 and 50 of the Act have satisfied the Court that there are adequate means of redress for the complained of contravention.

Having examined the provisions of section 40 of the Act in the context of the facts in this petition, we are inclined to take a different view from the learned Principal State Attorney shared by Mr. Kavishe. It is clear to us that there is no enough evidential material to convince the Court that the provisions of the Zanzibar Elections Act (supra), the National Elections Act (supra) and the Local Government (Elections) Act, Cap.292 R.E.2002) can presently provide adequate administrative means of redress thereby mitigate the Petitioner's complaint against the impugned provision of the Act. Besides, we do not think section 40 of the Act provides any right to an individual like the present Petitioner or other Tanzanian to compel the National Electoral Commission to do what is envisaged under the section let alone the fact that there is no guarantee that the Commission may provide an adequate remedy within the meaning of section 8(2) of Cap. 3. Indeed, we have not been availed with any evidence as of the date of this judgment if the Commission had put in place policy guidelines and regulations envisaged under section 40 of the Act. Furthermore, we are unable to see anything under the Referendum Act which can



administratively resolve the complained of contravention in the Act and that in itself speaks loud that the Petitioner cannot be said to have adequate means of redressing the complaint.

In the circumstances, we do not think we can safely hold that the present complaint is frivolous or vexatious within the context of section 8(2) of the Basic Rights and Duties Enforcement Act (supra). In consequence, we find no merit in the issue raised by the Respondents in their submissions and dismiss it accordingly. That takes us to the central issue for our determination.

In his submission, the Petitioner's Advocate has argued that the ongoing Tanzania Constitutional Review vide the Act expressly requires the proposed new Constitution to be passed by majority votes of more than 50% in Tanzania Mainland and more than 50% in Tanzania Zanzibar. He has argued further that the 50% requirement from each side of the Union was purposely inserted to ensure people hailing from Tanzania Zanzibar who are the minority, are not swallowed by their fellow countrymen from Tanzania Mainland who constitute the majority of the population. In amplification, the learned Advocate submitted that section 34(2)(b) of the Act is to the effect that Tanzanians hailing from Tanzania Mainland who reside in Tanzania Mainland, Tanzanians hailing from Tanzania Mainland who reside in Zanzibar and Tanzanians hailing from Tanzania Zanzibar who reside in Tanzania Mainland though permitted to vote and determine matters relating to affairs and interests of Zanzibar, do not have any legitimate interest on Zanzibar, that is, Tanzanians from Tanzania Mainland

are allowed to vote on behalf of the Zanzibaris while disallowing Zanzibaris from voting on behalf of those hailing from Tanzania Mainland. The Petitioner's counsel argued that section 34(2)(b) of the Act is thus discriminatory and unconstitutional for violating the rights of Tanzanian citizens hailing from Tanzania Zanzibar to participate in the governance of the United Republic of Tanzania including equal participation in fair and free elections and therefore bad for contravening the principles of good governance. Additionally, the learned Advocate argued that a thorough reading of articles 12(1), 13(4) and 13(5) of the Constitution makes the intention of section 34(2) (b) of the Act irrelevant. He cited this Court's decision in **A.A. Sisya and 35 Others vs. the Principal Secretary Ministry of Finance & Another**, Civil Case No. 5 of 1994 (Unreported) where the Court observed that:-

*"...In the case at hand, it is irrelevant that the Government is arguing that the impugned law did not intend to discriminate against the affected group. What is relevant is the fact that the said law is discriminatory in effect (indirect discrimination). It is my finding that the said law is discriminatory of the affected group on account of their status of life, as the Republic has failed to show that the discrimination is on account of any other than on account of the status of life of the affected group..."*

Armed with the court's holding in the said decision, the learned Advocate submitted that section 34(2) of the Act contravenes article 13(2) of the Constitution which prohibits the Parliament from enacting any law that directly or by its implication is discriminatory thus infringing the right to equality before the law. On the other hand, he said, the impugned provision infringes the right to equality before the law in that it legalizes

inequality before the law by allowing anyone to vote for the referendum provided he is registered by the National Electoral Commission to vote for Zanzibar while the vice versa is not the same. Mr. Masawe cited sections 11 and 12(1) of the Zanzibar Elections Act, No. 11/1984 which provides:-

Section 11 Every Zanzibari who has attained the age of eighteen years shall, unless he is disqualified by this or any other Act, be entitled to be registered under and in accordance with the provisions of this Act as a voter”.

Section 12(1) No person shall be registered as a voter unless he:

(a).....

(b) Produce his Zanzibari identity Card issued under Act No. 7 of 2005”.

From the above, he argued, it is only Zanzibaris legally qualified to be registered under the Zanzibar Elections Act (supra) who have the right to vote for the Referendum. The learned Advocate submitted that allowing persons registered under the National Elections Act (supra) to vote for the Zanzibaris is tantamount to allowing persons who do not qualify to be Zanzibaris to vote for Zanzibar in the Referendum process something that injures the proportionality principle –a principle on fairness and justice in statutory interpretation processes between the two electoral laws in the two sides of Tanzania. To support his position, the learned counsel cited **Kukutia Ole Pumbun vs. Attorney General & Another**[1993] T.L.R 159 where the Court of Appeal of Tanzania underscored at page 166 that:-

*“....a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements; first, such a law must be lawful in the sense that it is not arbitrary. It*

*should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principal of proportionality..."*

Whilst acknowledging that fundamental rights are not illimitable as stated by the Court of Appeal of Tanzania in **Julius Ishengoma Ndyanabo vs. Attorney General** [2004] T.L.R 14, Mr.Masawe submitted that the impugned provision fails to meet the test against arbitrariness, unreasonableness and disproportionality to any claim of state interest.

The learned counsel further submitted that the impugned provision infringes article 21(2) of the Constitution which states that every citizen has a right to fully participate in matters affecting him. He cited **Rev. Christopher Mtikila vs. Attorney General** [1995] TLR 31 at page 58 in which this Court stated that:-

*"...The right and freedom to participate fully in public affairs has been amplified in South Africa Court in the case of Doctors for Life International v. Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11, 2006 (12) BCLR 1399 (CC), 2006 (6) SA 416 (CC) (17 August, 2006).The Court demonstrated precisely nature and scope of the international law right to participate in the conduct of public affairs. Under article 25 of the ICCPR, states are to establish powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 21 in national constitutions and other laws. As the Human Rights Committee has explained, it is for the legal and constitutional system of the state party to provide for the modalities*

*of such participation backed up by the Marshall v. Canada No. 205/1986, UN Doc. CCPR/C/43/D/205/19 (1991)... ”.*

The learned counsel thus argued that by allowing any person who is not registered under the Zanzibar Elections Act through the Zanzibar Electoral Commission and who is not even a Zanzibari amounts to denial of the Zanzibaris' right of self-determination. It was from the above the Petitioner prayed for the sought reliefs.

In reply, Mr. Mulwambo learned Principal State Attorney prefaced his submissions by the obvious. He submitted that the long title to the Act suggests that the Act was enacted to put in place an institutional framework for the conduct of a Referendum to allow the citizenry to decide whether or not to accept the proposed Constitution. It was thus the learned Principal State Attorney's submission that the provisions of section 34(2) of the Act are clear in that those entitled to vote include people registered in Tanzania Zanzibar by the Zanzibar Electoral Commission and in the Tanzania Mainland registered by the National Electoral Commission. The said section he said, extends mandate to both the National Electoral Commission and Zanzibar Electoral Commission vide section 37 of the Act to make special provisions for voting rights to persons who for various reasons including economic, social and health related reasons to participate in public affairs under article 21 of the Constitution.

Besides, he argued that by virtue of the Union between Tanganyika and Zanzibar, Tanzanians from both Mainland and Zanzibar agreed to equal rights of their citizens and there is no citizenship of either Tanzania

Mainland and/ or Tanzania Zanzibar, rather, only that of the United Republic of Tanzania. Moreover, the learned Principal State Attorney submitted, there is no border limit from the two sides of the Union as to movement and/ or residence by virtue of the Constitution of the United Republic of Tanzania. It was thus the contention by the learned Principal State Attorney that in a Union such as ours, a person may therefore choose to live and work in either part of the Union and such right goes hand in hand with the right to participate in public affairs which include electing and being elected in election and participating in the referendum in particular, for, anything restrictive would amount to discrimination as to persons' place of origin. He added that since Tanzanians of both sides of the Union are mixed up in terms of trade, religion, culture and intermarriages, thus, categorization of voters as between Tanzania Zanzibar and Tanzania Mainland amounts to inviting discrimination based on origin, social status and/ or tribe. It was argued thus that a person who has his origin in Zanzibar but resides in the Mainland and vice versa is allowed to participate in the election or the referendum provided they are registered by the Zanzibar Electoral Commission or National Electoral Commission.

According to the learned Principal State Attorney's understanding, section 34 (2) (a) of the Act is to the effect that a Tanzanian may either vote in Tanzania Mainland or Tanzania Zanzibar provided that he is registered under the National Electoral Commission or Zanzibar Electoral Commission with section 34(2) (b) of the Act enabling Tanzanians of either side of the Union to participate in the Referendum process without

discrimination. He added that reading together the impugned provision with section 12(1) (b) of the Zanzibar Elections Act (supra) it is revealed that regardless of being registered by the National Electoral Commission or the Zanzibar Electoral Commission as a voter, a person must produce a valid Zanzibari Identification Card because: **one**, it is to ensure that only those who are affected or have direct interest in the day to day affairs of Tanzania Zanzibar vote for the Referendum; and **two**, to ensure that those people of Zanzibar origin and holding Zanzibar Identification Card are eligible to voice their opinion despite living in Tanzania Mainland.

Mr.Mlwambo distinguished the present case from **A.A. Sisya and 35 Others vs. the Principal Secretary Ministry of Finance & Another** (supra) cited by the Petitioner in which the law had specifically imposed a surtax aiming and applying at specific types of vehicles such as public corporations, co-operative associations and political parties which allegedly infringed two fundamental principles which are; the right to work and the right to protection against discrimination. The learned Principal State Attorney submitted that section 34(2)(b) of the Act is nowhere closer to the Motor Vehicle Surtax Act, 1994 declared to be unconstitutional for being discriminatory in A.A Sisya's case.

In view of the above, Mr. Mulwambo argued that, it should be noted that even going by the international standards, not every difference in treatment amounts to inequality or discrimination provided there is a reasonable objective. According to him, the complaint at hand is unfounded because the Section complained of is in compliance with article

13(2) of the Constitution. In that regard a right to vote by all citizens in both sides of the Union is guaranteed and it is immaterial whether a person votes in Tanzania Mainland or Tanzania Zanzibar.

With regard to the complaint on the alleged infringement of the right to equality by legalizing inequality before the law where anyone registered under the National Electoral Commission can vote for Zanzibar in the referendum while the vice versa is not the same in terms of sections 11 and 12(1) of the Zanzibar Election Act, No.11 of 1984, Mr.Mlwambo reasoned that there is no law in Zanzibar that prohibits a person hailing from Tanzania Mainland from being registered in Zanzibar as a Zanzibar resident and voter provided he adheres to the prescribed procedure and vice versa. His further reasoning is contained at page 10 of his submission that:

*"Secondly, there is a very good reason for the provisions, which is to ensure only those who have direct interest in the day to day affairs of Zanzibar or the Mainland participate in the election. Thirdly, it should be noted that the provision applies for election of local representatives in the local governments and House of Representatives. The Referendum Act applies on both sides of the Union. Section 2 of the Referendum Act explicitly states that the Act shall apply in Mainland Tanzania and Tanzania Zanzibar in relation to a referendum for approval of the proposed constitution. This being a Union matter, whether a person votes in Zanzibar or the Mainland becomes irrelevant, provided the right of a person to participate in the referendum is guaranteed."*



The learned Principal State Attorney's further reasoning was that a unison reading of sections 3, 10 and 12 of the National Elections Act (supra) goes hand in hand with the provisions of the Zanzibar Elections Act (supra) regarding Union matters, in this case, the Referendum and thus the Act passed all the necessary tests in the proportionality principle. In the circumstances, the learned Principal State Attorney argued that the Act does not contravene the provisions of Article 21(2) of the Constitution as it provides for every citizen to participate in the referendum which is a matter that affects them and their well-being.

In relation to the question of self-determination, the learned Principal State Attorney submitted that the issue does not arise as the country's future was charted in 1964 when the people of Tanzania exercised the right to self-determination by freely deciding to be one Nation. After all, he added, the Act is not an Act for self-determination or the existence of the Union as it does not restrict participation in public affairs but, it is instead, an Act to provide a forum allowing people to participate in the promulgation of the proposed constitution.

With the foregoing submissions the learned Principal State Attorney invited the Court to dismiss the Petition with costs.

Mr. Masawe's brief rejoinder to the Respondents' submission during the oral hearing was to the effect that section 50 of the Act cannot salvage the impugned legislative glitch because in making the regulations the Commission cannot make regulations outside the areas provided by section 50(2)(a)-(n) of the Act.

From the written and oral submissions it is clear that counsels share same views on several aspects. First, both parties share and agree that the object of the Act discerned from the long title is to cater for legal and institutional framework for the conduct of a referendum with a view to making decision by the people on the proposed Constitution and for other related matters. Two, in conducting the said referendum sections 34(1) (b) and 35(1) of the Act require a ratification of the proposed Constitution to be made by more than 50% of valid votes cast by each side of the Union. Three, it is also a common ground by parties that any State or non state entity is obliged to respect Human Rights as made clear under the Constitution and various International Instruments and International Customary Law where obligations of states and non state actors in International Law include implementing, guaranteeing and respecting Human Rights. In **Nahlik vs. Austria**, No. 608 of 1995 the Human Rights Commission stated the following at paragraph 8.2 in terms of the International Covenant on Civil and Political Rights:-

*"Under articles 2 and 26 of the Covenant the State party is under an obligation to ensure that all individuals within its territory and subject to its jurisdiction are free from discrimination, and consequently the courts of the States parties are under an obligation to protect individuals against discrimination, whether this occurs within the public sphere or among private parties ..."*

Besides, it is agreeable that the principal clause on non discrimination by the International Covenant on Civil and Political Rights is article 26 which provides:-

***"All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"*(emphasis added)**

In the light of the above the parties submitted that the decisions in **A.A. Sisya and 35 Others v. the Principal Secretary Ministry of Finance & Another** (supra), **Julius Ishengoma Ndyabo vs. Attorney General** (supra) and **Danning v. the Netherlands, Communication** [1990] 9 T.R.L.J 259 make it clear that a failure by the authority to prove that a complained of discriminatory law did not intend to discriminate against the affected group renders that law discriminatory in effect (indirect discrimination); and that, the right to equality before the law and to equal protection of the law without any discrimination does not take all differences of treatment, discriminatory because a differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26 of the International Covenant on Civil and Political Rights, 1996. We are, with respect in agreement with those principles as reflective of the correct position applicable in our jurisdiction.

Fourthly, both parties share common position that the object and spirit of section 34(2) (b) of the Act on getting the more than 50% of cast votes for Tanzania Zanzibar is not to allow one side of the Union to

swallow the other side. Supporting this view, the Petitioner's counsel submitted the following at page 2 of his written submission the position he reiterated in Court on 5/7/2016:

*"In setting out this elaborate and protective provision, the intention of the parliament was to ensure that people hailing from Zanzibar (especially those who have Zanzibar origin and thus beneficial interest in its affair) are not swallowed by their brethren from the Tanzania Mainland who constitute a larger percentage of the population. The impugn Sections 34(2) and 37 of the Act is meant to make sure that more than fifty percent is obtained in Zanzibar and in construing to make sure the intended spirit is reached."*

The respondents' position on the aspect is found at page pp.7-8 of Respondents joint reply to written submission where they submitted that:

*"Our understanding of the provisions of Section 34 is that a person may either vote in the Mainland or in Zanzibar provided they are registered by NEC or ZEC therefore discrimination does not arise. The provisions of Section 34(b)(sic) have been put in place to ensure that, those persons who reside in Tanzania Zanzibar or Tanzania Mainland but registered by NEC are able to vote and participate in the decision making process with regards to the referendum. **The intention of this provision is to aim the people who have Zanzibar origin but reside in the Mainland to be able to participate in the voting process. This provision read together with the provisions of Section 12(1) (b) of the Zanzibar Election Act reveal that, regardless of being registered as a voter by NEC or ZEC, a person must produce a valid Zanzibar identification card to vote. The reason as we shall reiterate elsewhere is to ensure that only those who are affected or have direct interest in the day to day affairs of Zanzibar vote in the***

***referendum. It also ensures that, those of Zanzibar origin and with Zanzibar identification cards voice their opinion despite living in the Mainland.” [Emphasis supplied]***

On our part, we once more subscribe to that view as we think it accords with the law, logic and common sense in the context of the issue for our determination.

In the matter under scrutiny, the Petitioner complains against section 34(2)(b) of the Act arguing that it gives room to other Tanzanians not of Zanzibar origin who do not have direct interest in the day to day affairs of Zanzibar to vote in the referendum in a manner that will affect the more than 50% of casted votes for Zanzibar which has minority population compared to Tanzania Mainland thus raising serious issues of self-determination of the Tanzania Zanzibar minority rights in meeting their wishes and aspirations.

Section 34 of the Act provide:-

*"34 (1) The Commission shall, on receipt of the results of the Referendum from all constituencies and within seventy two hours from the close of the final polling in the referendum –*

- (a) Announce to the public the total number of valid votes cast supporting or opposing the referendum question,*
- (b) Declare whether or not the subject matter of the referendum has been ratified by more than fifty percent of the valid votes cast for Mainland Tanzania and Zanzibar,*
- (c) Publish a Notice in the Gazette indicating the results of the referendum in each constituency, and*
- (d) Publish in the Gazette a certificate declaring the results of the referendum and confirming whether or not the matter to be decided has been ratified in accordance with the provisions of the Act.*

- (2) *For the purposes of subsection (1)(b), the votes to be counted for Zanzibar shall include:*
  - (a) *Votes of persons registered in the Zanzibar Electoral Commission register, and*
  - (b) ***Votes of persons residing in Zanzibar or Tanzania Mainland and Registered under the National Electoral Commission register.***
- (3) *For all purposes of the referendum, the results published in the Gazette, shall be the official results of the referendum". [emphasis supplied]*

Admittedly, a reading of the section is not without difficulty but we think that that difficulty can be resolved by adopting universally accepted canons of statutory construction one of which being, that a statute must be read as whole to ascertain the intention of the legislature in enacting the statute (see: **Powdrill V Watson** [1995] 2 All ER 65 at p 79(HL)). There is a fairly extensive discussion on the canons of statutory interpretation in a book titled: **Principles of Statutory Interpretation** by Justice G.P. Singh (former Chief Justice, M.P High Court,) 8<sup>th</sup> edition, 2001, Wadhwa & Company Nagpur, India. We take the liberty to reproduce a few extracts from that book from page 39 reflecting the position with regard to ascertainment of the Legislature's intention:

*"It is the most natural and genuine exposition of a statute", laid down by LORD COKE "to construe one part of a statute by another part of the same statute, for that best expressed the meaning of the makers."*<sup>33</sup> *To ascertain the meaning of a clause in a statute the court must look at the whole statute, at what precedes and at what succeeds and not merely at the clause itself,*<sup>34</sup> *and, "the method of construing statutes that I prefer" said LORD GREENE, M.R. "is to read the statute as a whole and ask one- self the question. 'In this state, in this context, relating to this subject-matter, what is the true meaning*

of that word?"<sup>35</sup> As stated by SINHA, C.J. "The court must ascertain the intention of the Legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law, and the setting in which the clause to be interpreted occurs."

In **Rosali V. v. Taico Bank & Ors** [2007] INSC 66 (23 January 2007) the Indian Supreme Court quoted with approval its earlier decision in **Lalit Mohan Pandey v. Pooran Singh and Ors.** [(2004) 6 SCC 626], in which it was stated:

*"A statute must be construed having regard to the legislative intent. It has to be meaningful. A construction which leads to manifest absurdity must not be preferred to a construction which would fulfill the object and purport of the legislative intent." [See also State of Himachal Pradesh and Ors. v. Surinder Singh Banolta, 2006 (12) SCALE 571] It is the duty of the court to accept a construction which promotes the object of legislation'.*

Guided by the foregoing, it is our respectful opinion that the intention of the legislature in ensuring that the required threshold of 50% of the votes cast during the referendum is that the voice of people who are affected or have direct interest in the day to day affairs of Zanzibar must be heard.

Therefore, upon reading the Act as a whole it becomes easy to discern the intention of the parliament in enacting section 34(2)(b) of the Act to ensure voters with Zanzibar origin and with Zanzibar identification cards voice their opinion despite living in the Mainland. The learned Principal State Attorneys see no difficulty in the section and if any, they hold that, it can be resolved by making reference to sections 36, 40 and 50 of the same

Act. Guided by the foregoing authorities and the impugned provision, we are inclined to take a different view.

Now that the said section 34(2) (b) was drafted to read, and reads **“Votes of persons residing in Zanzibar or Tanzania Mainland and registered under the National Electoral Commission register,”** we can unmistakably hold that that phraseology of the provision does not present the intended provision of the law. The question, which we raised earlier, albeit in a different formation, is whether the non-inclusion of the word **“Zanzibaris”** in the impugned provision in the place of the word “persons” is curable under sections 36, 40 and 50 of the Act. These provisions read:

Section 36 of the Act:

*"The procedure for conducting the General Elections under the National Elections Act, the Zanzibar Elections Act, and the Local Authorities (Elections) Act shall, **with necessary modifications, apply to the conduct of a referendum under this Act**".*

Section 40 of the Act:

*"Nothing in this Act shall be construed as preventing the commission from taking further administrative measures or issuing policy guidelines and regulations to ensure effective conduct of the referendum".*

Section 50 of the Act:

*"50 (1) the Commission may make Regulations providing for the better carrying out of the provisions of this Act.*



- (2) Without prejudice to the generality of subsection (1), the Commission may make regulations providing for the following matters;
- (a) the establishment of polling stations;
  - (b) the manner and procedure of voting at a referendum;
  - (c) the manner of ascertaining the identity of persons wishing to vote at a referendum, and whether such persons are qualified to vote;
  - (d) the manner in which persons with disability may vote at a referendum;
  - (e) voting by persons employed on duties on the day of a referendum;
  - (f) the maintenance of secrecy at a referendum;
  - (g) the postponement and extension of time for a poll in case of riot or violence at a referendum;
  - (h) the administering of oaths or affirmations by officers in respect of such matters as may be prescribed;
  - (i) **the procedure to be followed at the conclusion of a poll in a referendum;**
  - (j) **the procedure for counting and addition of votes in a referendum, for Mainland Tanzanian and for Tanzania Zanzibar, and the circumstances in which votes in a referendum may be rejected by a returning officer as invalid;**
  - (k) **the declaration, notification and publication of the results of a referendum;**
  - (l) the custody and disposal of ballot papers, records, documents or other things relating to the conduct of a referendum;
  - (m) the forms and records to be used for any of the purpose of this Act; or
  - (n) **any other thing which the Commissioner may deem necessary for the purposes of this Act.**

**(3) The Regulations under this Act shall be published in the Gazette."**

Our reading of the sections reproduced above in the light of section 34(2) (b) the way it was drafted that is to say; "Votes of persons residing in Zanzibar or Tanzania Mainland and registered under the National Electoral Commission register," does not appear to address the Petitioner's complaint.

With due respect to the Respondents' Attorneys, we do not think that the provisions quoted in extenso above can in any way cure the complained of legislative deficiency. We do not see how the missing word **"Zanzibaris"** can be taken care of by making necessary modifications to the National Elections Act (supra), the Zanzibar Elections Act (supra) and the Local Government (Elections) Act (supra) or by taking further administrative measures or issuing policy guidelines and regulations through the aforementioned provisions of law. As until the day of further hearing on 5/7/2016 no regulations were Gazetted as mandatorily required by section 52(3) of the Act, we take it that the Commissioner has not realized that the non-inclusion of the word **"Zanzibaris"** in the impugned provision has rendered the provision ambiguous as to who exactly should be registered in the National Electoral Commission Register.

Now that nothing in sections 36, 40 and 50 of the Act is capable of redressing the aforesaid legislative anomaly, we are therefore with all due respect to the Respondents' Attorneys, unable to agree with part of their submission and prayer that the Petition should be dismissed with costs. We are settled in our minds that leaving the impugned provision reading **"Votes of persons residing in Zanzibar or Tanzania Mainland and**

**registered under the National Electoral Commission register”** makes it too broad without making a demarcation as to who exactly should be registered in the National Electoral Commission Register hence defeating the object and spirit of the Act and the formula intended to govern the voting and counting of votes in getting the more than 50% of cast votes for ratifying the proposed Constitution from Tanzania Zanzibar.

We thus respectfully agree with the Petitioner’s counsel that the vagueness obtaining to the impugned Section 34(2) (b) of the Act, leaves it open for a Tanzanian hailing from Tanzania Mainland who resides in Tanzania Mainland registered by the National Electoral Commission and a Tanzanian hailing from Tanzania Mainland who resides in Zanzibar registered under the National Electoral Commission Register to vote for the Referendum and have their votes considered as votes for Tanzania Zanzibar which is against the object and spirit of the Act.

In the circumstances, we are inclined to hold that prayers (f) i & ii and (g) i in the originating summons are thus meritorious. We do not however, agree with the Petitioner with regards to their arguments in support of prayers (f) iii, iv & v and (g) ii & iii. We do not see how the other persons hailing from Zanzibar registered under the National Electoral Commission can violate the right to equality before the law or cause discrimination against their fellow Zanzibaris.

We wish to emphasize that the intention of the Legislature as aforesaid, was to put in place a mechanism for Zanzibaris who are

otherwise not registered under the Zanzibar Electoral Commission Register to be registered under the National Electoral Commission Register.

In the light of that vivid position, we further find the Petitioner's argument in support of prayer (i) which is for a declaration that the true intention of the Parliament in enacting a separate procedure for voting in Zanzibar was to let the people of Zanzibar residing in Zanzibar to determine their fate despite being a minority in Tanzania in comparison with Tanzania Mainland has no merit as we have already held that Zanzibaris residing outside Tanzania Zanzibar be enjoined to enjoy the right to vote for the referendum. As prayer (d) is vague, we make no finding on it.

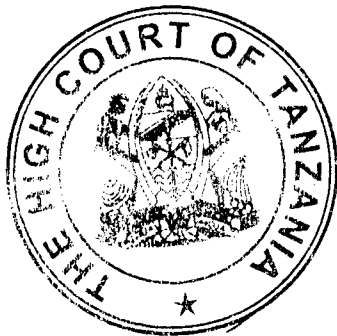
In the final analysis and to the extent explained above, we accordingly find merit in Petitioner's arguments in support of prayers (f) i and ii and (g) i and other prayers except prayers (f) iii, iv & v and (g) ii & iii of the Petition. Therefore, we hold that Section 34(2) (b) of the Act is bad in law and is unconstitutional to that extent.

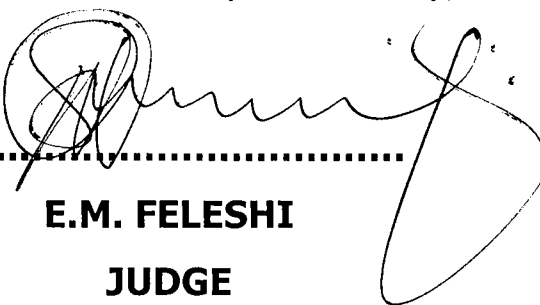
In consequence, exercising the powers vested in the Court under section 13(2) of the Basic Rights and Duties Enforcement Act (supra), we accordingly direct the Government through the Attorney General, within one year from the date of this judgment to make the necessary amendment by the Parliament with a view to ensuring that section 34(2) (b) of the Act read "**(b) votes of Zanzibaris registered under the National Electoral Commission**".

Considering the nature of the case and the remedy sought, we allow the petition to the extent stated above, with no order as to costs.

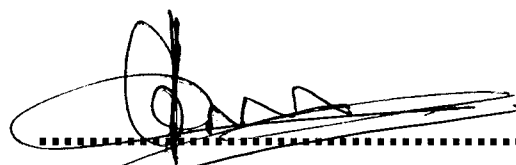
It is so ordered.

DATED at Dar es Salaam this 3<sup>rd</sup> day of February, 2017



  
.....  
**E.M. FELESHI**  
**JUDGE**

  
.....  
**E.J. MKASIMONGWA**  
**JUDGE**

  
.....  
**L.J.S. MWANDAMBO**  
**JUDGE**