THE ATTORNEY GENERAL, THE MOVEMENT FOR MULTIPARTY DEMOCRACY v AKASHAMBATWA MBIKUSITA LEWANIKA, FABIAN KASONDE, JOHN MUBANGA MULWILA, CHILUFYA CHILESHE KAPWEPWE, KATONGO MULENGA MAINE (1994) S.J. (S.C.)

SUPREME COURT
BWEUPE, ACJ., SAKALA, CHAILA, CHIRWA AND MUZYAMBA,JJ.S.
20TH AND JANUARY AND 10TH FEBRUARY, 1994
S.C.Z. JUDGMENT NO. 2 OF 1994
APPEAL NO. 67 OF 1993

Flynote

Article 71(2)(c) of the Constitution of Zambia - Literal interpretation of - Members of parliament elected on a particular party's tickets - Resignation of said MPs from said party

Headnote

The four respondents were members of the Movement for Multiparty Democracy (MMD). On 31st October 1991 they stood for elections on the tickets of the Movement for Multiparty Democracy (MMD). The won the elections and took their seats in the National Assembly but later resigned from the ruling MMD. Consequently, the National Secretary for the MMD wrote to the Speaker of the National Assembly informing him that the respondents were no longer members of the Party. Later , in consequence of that official notification by the National Secretary for the MMD, the Speaker wrote to the respondents that in terms of Article 71(2)(c) of the Constitution of the Republic of Zambia they ceased to be members of Parliament with effect from 13th August, 1993 a date when the National Secretary gave the notification to the Speaker. The respondents then petitioned the Attorney General contending that although they had resigned from the Party on whose tickets they won the elections, they were still members of Parliament and, asked the court to declare the Speaker's decision that their seats were vacant, null and void

Held:

(i) Article 71(2) (c) is discriminatory in itself against an independent member who joins any party and against a member who resigns from one party and joins another party. It is discriminatory and, therefore, unreasonable and unfair and it is the duty of the court to make it reasonable as it offends against Article 23 of the Republican Constitution. Gardner J S: delivered the judgement of the court

p7

Cases referred to:

1. R. v Kuntawala (1940) Vol. II L.R.N.R. 79
2. An introduction to the Law of Zambia UNZA School for Law 1974
3. Muhammad Nawaz Shartz President of Pakistan and others the all Pakistan legal decisions. (constitutional) petition No. 8 of 1993 P. 481 at P. 615.
4. Seaford court estate Ltd v Asher (1949) 2 K.B. 431
5. Kammins v Zenith Investment Ltd (1971) A.C. 850 AT.
6. Nothman v Barnett Council (1979) 1 H.L.R. 220.
7. Stock v Frank Tomes (tipton) Ltd (1978) 1 W.L.R 231

8. Attorney General v Marcus K Achiume (1983) Z.R. 1
9. D.P.P. v Ngandu and Others (1975) Z.R. 253
10. Barrel (Pauper) v Fordree (191932) A.C. 675 AT 682
11. Becke v Smith (1835) 2M and W. 191 at p.195
12. R. v Tombridge Overseas (1884) 13 Q.B.D. at p. 342
13. Bernes v Marvis (1953) W.L.R. 669 (D.C.)
14. Northern v Barnett Affirmed by the House of Lords in 1979 1 ALL E.R 142

For the appellants: Mr A Kinariwala, Principal State Advocate
Mr E Mwansa, Legal Secretary for the Movement for Multiparty Democracy
For the respondents: Mr E J Shamwana Sc. of Shamwana and Company
Mr S Sikota and S Nkonde

Judgment

BWEUPE, A.C.J.: delivered the judgement of the court.

This is an appeal from the decision of the High Court (Mambilima J) by the appellants against that portion of the judgement which applied the literal interpretation to the provisions of Article 71(2) (c) of the 1991 Zambian Constitution. The respondents too have cross appealed against a that part of the judgement which made a finding that they also signed a Declaration of Liberty and that they had joined a National Party by their Association.

Briefly, the facts which gave rise to these appeal, as they appear on the evidence on record were these: The four respondents were members of the Movement for Multiparty Democracy (MMD). On 31st October 1991 they stood for elections on the tickets of the Movement for Multiparty Democracy. The won the elections and took their seats in the National Assembly. On the 12th of August, 1993 there was a Press Conference at Pamodzi Hotel at which all the respondents, except Katongo Mulenga Maine, attended and announced their resignation from the Movement for Multiparty Democracy. On the 13th of August, 1993 the National Secretary for the Movement for Multiparty Democracy wrote to the Speaker of the National Assembly informing him that the respondents were no longer members of the Party. On 27th August, 1993, in consequence of that official notification by the National Secretary for the Movement for Multiparty Democracy, the Speaker wrote to the respondents that in terms of Article

71(2)(c) of the Constitution of the Republic of Zambia they ceased to be members of Parliament with effect from 13th August, 1993 a date when the National Secretary gave the notification to the Speaker. The respondents then petitioned the Attorney General contending that although they had resigned from the Party on whose tickets they won the elections, they were still members of Parliament and, asked the court to declare the Speaker’s decision that their seats were vacant, null and void.

The Petitioners gave evidence on their own behalf. The first Respondent, Fabian Kasonde testified that he was elected to the National Assembly on the MMD ticket as Member of Parliament for Mufulira Constituency. He resigned at the Press Conference of 12th August, 1993. He said a week after resigning from the MMD, he was attending a meeting of the National Assembly Public Accounts Committee at the National Assembly Building when the Sergeant at Arms asked him to go and see a clerk Assistant by the name of Mr. Chibomba at the National Assembly . He told the Court that Mr.Chibomba advised him to stay away from the meeting of the Accounts Committee pending the determination his status as a Member of the Assembly. He said on the 12 th August, 1993 he received a letter from the clerk of the National Assembly which stated that because he had resigned from the MMD, he had ceased to

be a Member of Parliament .The letter also asked him to purpose how he was going to settle his indebtedness to National Assembly .He said he attended the Press Conference at the Pamodzi hotel in his capacity as one of those members who was going to resign from MMD. He denied signing any document at the conference. He his presence at that conference was not to support the formation of the National Party and he was aware that a Political Party called National Party has now been registered but that he is not a member of the party and had no intentions of joining that party ; at least not for the time being . He said he was seeking three reliefs in the form of declarations:

> (a) that the seat in the National Assembly has not become vacant and that he is entitled to resume his seat and enjoy all the privileges and immunities as a member of parliament;
>
> (b) that to deny him entry and access to the National Assembly premises on the basis that he has resigned from the MMD is ultra vires Articles 21 and 23 of the Constitution of Zambia;
>
> (c) that there should be no by elections in Mufulira Constituency on the 12th October 1993 as to do that would lead to absurdity.

The second Respondent Dr John Mubanga Mulwila, was also seeking for a declaration that his seat in the National Assembly has not become vacant; that to deny him entry and access to the National Assembly on the basis that he had resigned from the MMD is ultra vires Articles 21 and 23 of the Constitution of Zambia; and that there should be no by election in Lukasha Constituency on the 12th October, 1993 as to do that would lead to absurdity. He testified that he was elected as a member of parliament on the MMD ticket for the Lukasha

Constituency. He was present at the Press Conference at Pamodzi Hotel on 12th August, 1993 at which he announced his resignation from MMD. He said he also received a letter from the Clerk of the National Assembly advising him to stay away from the National Assembly since he had resigned from the MMD, his seat had become vacant. He was also asked to propose how he hoped to settle his indebtedness to the National Assembly. He said that he had tried to go to the National Assembly Motel but he was denied entry, by the Security Officer who insisted that he should ask somebody to sign him in since he was no longer a member. He said at the moment he did not belong to any political party although that did not mean that he would not join any other political party. He denied having signed the Declaration of Liberty which was read out at the Conference.

The 3rd respondent, Katongo Mulenga Maine brought her case by originating summons. She sought the determination of the following questions:

1. whether under article 71(2)(c) of the Constitution of Zambia the fact of resigning from MMD, on whose ticket she stood on election automatically means she vacated her seat; or
2. whether the loss of such Parliament seat under article 71(2)(c) only occurs if such member joins another party in addition to resignation from the party under which she was elected; and
3. a declaration that the Parliamentary seat in Chinsali Constituency is not vacant

She deposed in the court below that she did not attend the Press Conference at Pamodzi Hotel

on 12th August 1993. She said however, that she held a press conference at a later date at which she announced that she had resigned from MMD and expressed sympathetic terms for the National Party. She said she had not yet joined the National Party although she is aware that the National Party has been registered. She told the court that she also received letters from the Clerk of the National Assembly informing her, like the other petitioners who had resigned from MMD, that she had vacated the seat in the National Assembly and that she should indicate how she would settle her indebtedness to the National Assembly. Under cross examination she said that as at 12th August, 1993 she was one of the 11 Mps who had resigned from the MMD; that in his statement Mr Kasonde was speaking on her behalf in some instances although she was not present; that she had read the declaration of Liberty and that she associated herself with part of the sentiments; that she had not become member of the National Party; and that she was still ad MP for Chinsali Constituency.

The fourth respondent, Miss Chilufya Chileshe Kapwepwe, was seeking a declaration that the purported declaration by the Speaker was a front to Article 72(1) (a) of the Constitution of Zambia as it purported to and the powers vested in the High Court and therefore nullity and initio; that the application of Article 71(2)(c) to her had contravened her fundamental rights as enshrined in Articles 11, 19 to 23 of the Republican Constitution and therefore null and void ab initio; that her seat in the National Assembly has not become vacant and that she is entitled to resume her seat and enjoy all the privileges and immunities as are ordinarily enjoyed by any member of Parliament. she said she was also elected on MMD ticket to the National Assembly to represent Lunte Constituency. She

attended the Press Conference at Pamodzi Hotel on 12th August, 1993 where she announced her resignation from MMD. She said she received a letter from the Clerk of the National Assembly in which she was advised she was no longer a member of Parliament since she had resigned from the MMD and requested to indicate how she would settle here indebtedness to the National Assembly. She said she has heard of a party called National Party but that she is not a member of the party. She said although her name was on the list of Mps which was read out at the Press Conference on 12th August, 1993 as those who had resigned from MMD she did not sign the document called the Declaration of Liberty.

The first appellant filed an answer to some of the Petitions. It states that following the resignations of the petitioners from other members from the MMD and a declaration to form National Party the petitioners later formed and joined the said party and by virtue of the said resignation and joining the new political party, the petitioners vacated their seats in the National Assembly by virtue of the provisions contained in Article 71(2)(c) of the Constitution of Zambia. In the alternative he contended that having regard to the intention of the legislature and the context of the legislation generally, the purpose of the National Assembly in enacting Article 71(2)(c) of the Constitution was to ensure that Mps did not move from one party to another or leave parties to become independent while retaining their seats in Parliament so that even assuming that they have not joined the National Party by resigning from the MMD, the petitioners have vacated their seats in Parliament pursuant to Article 71(2)(c) of the Constitution and that having vacated their seats the petitioners had no right of entry to the National Assembly and as such they were properly barred from entering the premises.

The respondent's witness, Clement Zulu DW1, testified that he was Registrar of Societies. He said that so far 25 political parties have been registered. He said an application for the registration of the National Party was received on the 1st September 1993. In the application forms ten names of office bearers appeared, none of whom are the respondents. Apart from the officer bearers it was indicated on the application forms that the number of members was fifty. He said that when the application was being lodged the first petitioner was there and the

Party was finally registered on 10th September, 1993 and certificate for registration No. ORS 133/35/1 was issued. According to this witness at the time when the Clerk of the National Assembly wrote to the Petitioners, the National Party did not exist.

The second witness, Mr Edward Mwanza, DW2, said he was Principal Engineer with the Zambia National Broadcasting Corporation. He said that a team from the ZNBC recorded the press conference on 12th August 1993. The team also prepared the film for a programme entitled "Frank Talk" in which the first petitioner appeared as a guest and it was aired on 15th August, 1993. He produced both tapes to form part of the evidence. (Both tapes were played to the court at the Mass Media Complex). DW2 conceded that the tape for the press conference did not appear to be complete, he said this could have been caused by the microphone changing hands from the questioner to the person answering. He also conceded that this could be as a result of editing.

p11

After hearing evidence from the parties the learned judge found that a National Party which was referred to in the "Declaration of Liberty" and read out at a press conference at Pamodzi Hotel on the 12th of August 1993 was the same party which was registered as the National Party and that by their own declaration all the petitioners were going to form and belong to this party. The judge further found that they were therefore caught by the provisions of Article 71(2)(c) and that in terms of this Article they vacated their seats when their party came into existence on 10th September, 1993.

On the interpretation of Article 71(2)(c) the learned judge held that if a member of Parliament leaves the party on whose ticket he or she was elected into Parliament but does not join any political party that person retains the seat as an independent.

In his Memorandum of Appeal, the learned Principal State Advocate submitted the following grounds of appeal:

1. The learned trial judge erred in law in not holding that having regard to the intention of the legislature and the context of the legislature generally, the purpose of the National Assembly in enacting Article71(2)(c) of the Constitution of Zambia was to ensure that members of Parliament do not move from the political party to another or leave political parties to become independents while retaining their seats in Parliament and accordingly the very fact the respondents had resigned from the Movement for Multiparty Democracy(MMD) on whose ticket they stood and were elected to the Parliament, they had automatically vacated their seats in Parliament.
2. In construing the provisions of Article 71(2)(c) of the constitution of Zambia, the learned trial judge erred in law in applying the literal rule of Statutory interpretation.
3. In construing the provisions of Article 71(2)(c) the learned trial judge should have applied the purposive rule of Statutory interpretation.
4. The learned trial judge erred in Law in holding that in enacting Article 71(2)(c) of the Constitution of Zambia, the intention of the legislature was not to include a situation where a Member of Parliament shall vacate his or her seat if he or she resigns from a political party on whose ticket he or she was elected to the Assembly.
5. The learned trial judge should have held that in interpreting a statute it is premissible to construe an enactment in such a way that it furthers the purpose or object of the enactment and should have further held that in construing the provisions of Article 71 (2) (c) of the Constitution of Zambia by applying the literal rule of statutory interpretation its purpose will be defeated.
6. The learned trial judge should have held that to accept the provisions of Article 71(2) (c) of the Constitution of Zambia on their face value create a departure from the

spirit of Article 71(2)(c) in that a member of that party on whose ticket he or she won his seat or if he or she has elected an independent member, he should continue to sit in parliament as an independent member.

p12

Mr Kinariwala then went on to argue these six grounds. He said while interpreting Article 71(2)(c) the learned judge recognised the fact that the Mvunga Commission of Inquiry recommended that the new Constitution should discourage the crossing of the floor in parliament and this recommendation was accepted in a white paper by the Government.

Following that Parliament amended Article 71 of the Constitution and replaced it with the following:

> "(2) A member of the National Assembly shall vacate his seat in the Assembly-
>
> (c) In the case of an elected member, if he becomes a member of a political party other than the party, of which he was elected to the National Assembly or, if having been an independent candidate he joins a political party."

He argued that under Article 67 of the Constitution the Composition of the National Assembly consists of 150 elected members; 8 nominated members, and the Speaker. He said the elected members are those of the political parties or independent members. Entry to the National Assembly is through political parties or independent members - there is no other way. In a multiparty political era a member can only stand as a member of a political party or as an independent. Once one has been elected Article 71(2)(c) of the Constitution requires that he should pay allegiance to a party on whose ticket he was he joins another political party and this applies to an independent if he joins a political party. He said the only reasonable interpretation one can place an Article 71(2)(c) of the Constitution is that if an MP resigns from one status he should lose his seat. The principal is that one either remains an independent or one who was elected on a party ticket, should maintain his status through and through. He said the intention of parliament was absolutely clear. He urged the court to read the omission so that the Article should read that "in the case of an elected member who resigns from a party on whose ticket he was elected and does not join a political party he shall also vacate the seat."

He further argued that if the court does not interpret the article that way then it would be discriminatory against an independent who changes his status by joining a political party and the one who resigns and joins another party.

He said there was a distinction between the purpose or object of an enactment and the legislative intention governing it. The distinction is that the former relates to the mischief to which the enactment is directed and its remedy, while the latter to the legal meaning of the enactment. In this case the intention was to entrench the loyalty of the members.

Mr Mwansa, the legal counsel for the 2nd appellant, MMD, said that although he did not file a notice of appeal he wished to be heard in the Supreme Court. He said the 2nd appellant was appealing against that part of the Judgement of the lower court which reads (at page 21) of the Judgement:

> Based on the fact that the frames of the present constitution had the benefit of the 1964 constitution whose express provisions on the issue before the court, now were left out from the present constitution, I am

> not persuaded to find that the intention of the legislature was to include a situation where a member of the Assembly just resigns from a political party on whose ticket he/she was elected to the Assembly. Asking the court to read these words into Article 71(2)(c) is asking the court to legislate by including that which was omitted. If anything the evident intention expressed was to leave out what was provided in an earlier constitution. The only solution therefore is for the respondent to seek a constitutional amendment if they now wish to reinstate what was applicable in the first republic."

Mr Mwansa vividly argued that the court was wrong to have restricted itself to the literal interpretation since that would have produced an absurdity. He said the decision of the court below, if allowed to stand, would discriminate against an independent who joins party or member of parliament who resigns from a party on whose ticket he/she was elected and joins another party and gives to those who opt not to join another party but become independents the privileges that are denied to the other members. He said the decision is therefore unconstitutional since some members would be discriminated against on account of the political beliefs as provided by Article 23 of the Constitution. He said such literal construction in this case has produced injustice. He referred the court to the case of *R vs KUNTAWALA* (1) as quoted by W L Church, in AN INTRODUCTION TO THE LAW OF ZAMBIA (2). He also referred to the case of *MUHAMMAD NAWAZ SHARTZ PRESIDENT OF PAKISTAN AND OTHERS THE ALL PAKISTAN LEGAL DECISIONS* (CONSTITUTIONAL) PETITION (3)

Mr Mwansa said the words to be interpreted in this case were to be found in article 71(2)(c). Admittedly Article 71(2)(c) does not include a situation where one resigns from one party and does not join another party. He said the court should look at the intention of the legislature. The court should have used the Golden Rule to arrive at a justifiable decision; the court should probe the spirit of the provision which is very clear. It was intended to stop the crossing of the floor in the House. He said the function at Parliament is to legislate and there is no obligation for parliament to look at what was before. The court should therefore have looked at the spirit of the law. He said it can never be the intention of parliament to legislate a discriminatory Act. It creates an absurdity if it is discriminatory and the court is obliged to clear the absurdity and make the law more meaningful. He concluded that there were enough grounds to justify the interference that the legislature intended something which it omitted to express and that the Shariz case already supported his detention.

Submitting on behalf of the four respondents the learned advocate Mr Shamwana, SC., left no stone unturned. He argued with all the ingenuity imbued in him that the learned trial judge was right to hold that a member of parliament who resigns and does not join another party remains a member of parliament and that this is so because the words of the Statute are very clear. He said Article 71(2)(c) is quite clear, it states:

> "In case of an elected member, if he becomes a member of political party, other than the party of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, joins a political party."

He said the court was invited by Mr Kinariwala to believe that if Article 71(2)(c) was interpreted or understood as it is written there would be an absurdity. In all respect there is no absurdity at all. Parliament makes no mistakes. It made its intention clearly known and there was no absurdity. The mischief that was intended to be cured was that no one should join another party. The words are quite clear and there is no ambiguity. Referring to Odgers on

construction of statutes, at page 62, he said there is nothing harsh, unfair or ambiguous in this particular case. The manifest intention was not to join another party and that was the real objection. The concept of an independent is not new. Referring to N Wilding and P Launchy, ENCYCLOPAEDIA OF PARLIAMENT 4th Edition he described a Member of Parliament as follows:

> "A member of Parliament is described as Independent if he acknowledges no allegiance to any political party, whether he/she has obtained his seat without the aid of any party organisation or whether he/she leave his party to become independent after he/she has been elected-------"

It is not true to say that there would be a problem for the independent member to find a seat where to position himself. He said the intention of Parliament was not to penalise changing of status but to penalise joining another party. The duty of the court is to interpret the law and not to make it. Both the golden and literal rules agree unless there is ambiguity. In the instant case there is no ambiguity. Where is the ambiguity in Article 71(2)(c) of the Constitution "if a member leaves the party on whose ticket he was elected and joins another 'party." It is clear from the words used that Parliament allowed limited crossing of the floor.

He argued that "purposive rule" of interpretation can only be resorted to where the words are ambiguous. If in the unlikely event the court thinks there is ambiguity in Article the effect is that such doubt should be resolved in favour of his clients. He said there is no excuse for the court to shy away from the only and true interpretation. There is no discrimination against an independent because he was an individualist. He concluded that the society has been given a constitution which has allowed limited floor crossing. There was no prohibition in Sharif's case because it merely states that it was desirable.

Mr Shamwana further argued that article 71(2)(c) allows limited crossing. Whether or not our constitution allows this limited floor crossing is the issue which will be resolved later in this judgement.

In reply, Mr Kinariwala said it was not their intention to contend that the words were ambiguous but that there was an absurdity which is discriminatory against an independent. Indeed the Act is silent about a member of Parliament who resigns from a party on whose ticket he was elected and does not join another party. He refers the court to the booklet "The Discipline of Law" 1979 Edition, at p. 12. He read a passage in that Book of what Lord Denning said in *Seaford Court Estate Led v Asher* (4).

> "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even, if it were, it is not possible to provide for them in terms free from all ambiguity. The English Language is not an

> instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsman of Acts or parliament have often been unfairly criticised. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsman have not provided for this or that, or have been guilty of some other ambiguity. It would certainly save the judges trouble if Acts of parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge can not simply fold his hands and blame the draftsman. He must set to work on the constructive task of

finding the intention of parliament, and he must do this not only from the language of the statute but also from the consideration of the social conditions which gave rise to it, and the mischief which it was passed to remedy, and then he must supplement the written word so as to given 'force and life' to the intention of the legislature. That was clearly laid down by the resolution of the judges in *HEYDONS* CASE and it is the safest guide today. Good practical advice on the subject was given about the same time by plowden---- put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases."

Mr Kinariwala went on to say that in *Kammisi v Zenith Investments Ltd* (5) Lord Diplock drew a clear distinction between the literal approach' and the purposive approach', to solve the question.

He further referred to the case of *Nothman v Barnett Council* (6). In this case men and women teachers were entitled, under their contracts, to continue in employment until the age of 65. A lady of 61 was dismissed. she claimed compensation for unfair dismissal. The Employment Appeal Tribunal held that, if she had been a man, she would have been entitled: but as she was a woman she was not. They regretted it. They said they were bound by the literal meaning of the words. Lord Denning summarised their view point and commented:

"The Employment Appeal Tribunal realised this was most unjust, but felt could do nothing about it. I will give their words:

"The instant case provides as glaring an example of discrimination against a woman on grounds of her sex as there could possibly be. The facts of this case point to a startling anomaly".Yet they thought the judged had their hands tied by the words of the statute. They said;

"Clearly someone has duty to do something about this absurd and unjust situation. It may well be however, that there is nothing we can do about it. We are bound to apply provisions of an Act of parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of parliament and is not as many mistaken persons seem to imagine, the privileges of the judges or the judicial tribunal."

p16

Lord Denning continued:

I have read that passage at large because I wish to repudiate it. It sounds like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach.'' In all cases now the interpretation of statutes we adopt such a construction as will "promote the general legislative purpose" underlying the provision. It is no longer necessary for the judges to wring their hands and say: "There is nothing we can do about it."

Whenever strict interpretation of a statute gives rise to an absurdity and unjust

> situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what parliament would have done, had they had the situation in mind."

In *Stock v Frank Tomes Tipton Ltd* (7) Viscount Dilhone said:

> "It is now fashionable to talk of purposive construction of a statute, but it has been recognised since the 17th century that it is the task of the judiciary in interpreting an Act to seek to interpret it, 'According to the intent of them that made it' (Coke 4 lust 330)".

Mr Kinariwala then urged the court to interpret the article in the way it was intended.

Mr Mwansa, the advocate for the 2nd appellant, in his reply, also urged the court not only to look at the literal interpretation but the intention of parliament. He said the article itself was silent on the position of the respondents in this case. It is that silence which creates the absurdity which the court can resolve. It can not be said that simply because the article is silent then it gives them a right to be in parliament. Since there is silence it is the duty of the court to look beyond the literal meaning. He said there are two situations which the law has stipulated (a) where there in unfairness and (b) what is the spirit or intention of parliament for the court to look beyond the literal interpretation. The spirit or situation was change of status.

After the submissions on the main appeal Mr Shamwana argued the cross-appeal. He summarised thus:

(a) The court was wrong to hold that the respondents/appellants joined the party by attending a meeting without any evidence;
(b) The decision of the court below was perverse in that the court looked at the facts and interpreted them and when interpreted one would hold that they did not join any party.
(c) The fourth respondent/appellant did not attend the meeting.

p17

Dealing with (a) Mr Shamwana said that the evidence is in fact quite specific. The respondents/appellants were asked whether they had joined any party. One said he had not joined any party and some said perhaps in future they may join a national party. The fourth appellant said a national party should embrace all the tribes of Zambia otherwise she should not join. Therefore the trial judge's interpretation and conclusions that they became members of the national party on the authority of the *Attorney General v Marcus Kachiume* (8) and *DPP v Ngandu and Others* (9). Was not supported by evidence on record. He said it is quite clear the judge drew wrong conclusions from the facts of the case. She found as a fact that a "National Party" which was referred to in the Declaration of Liberty at the Press Conference and in the Frank Talk programme is the same party which was registered as the National Party. Both the first and fourth petitioners gave uncontroverted evidence that the party that was referred to in the Declaration of Liberty and at the press Conference was not the National Party that was registered on 10th September 1993.

On the question of signing the Declaration of Liberty the learned State Council submitted that there was no evidence that the respondents/appellants had signed it. He said according to the evidence of the first petitioner who read at the Press Conference. nobody signed the declaration of liberty and that he and E.G. Kasonde were not authorised spokesman of the petitioners and the people who resigned at the Press Conference. He said the evidence was not controverted. Nor is there any finding by the trial judge that either the first or third petitioners

jointly or severally was or were not to be believed. Thus the learned judge should not have linked all the petitioners' names to the Declaration and to the National Party if she took a well balanced view of the whole of the evidence. Failure to do that was serious misdirection.

He said the learned trial judge upheld the Declaration by the Speaker that the petitioners' seats in the National Assembly had become vacant without appreciating that the Speaker or his agents declared the seats vacant upon receipt of a letter from the National Secretary of the MMD that the petitioners had resigned from the party not that they had joined any other political party.

As to the existence of the National Party the State witness called, Clement Zulu, said that he received the application on 10th September, 1993. He said the Party did not exist until that date. There is no evidence that the respondents /appellants at any time applied to be members. the judge concluded that the respondents/appellants joined by attending a Press Conference. The primary reason for the meeting was to announce their resignations from the MMD. The society is formed from the date of registration. The National Party started its life on the 1st September 1993.

The trial judge misdirected herself by construing the intentions to join a party that was going to be formed as an act of joining that party. Intention alone is not sufficient.

In reply to the submission of Mr Shamwana in the cross appeal the learned principal state advocate Mr Kinariwala argued that, although all the respondents /appellants had denied, there was evidence in form of video tape which showed that the National Party was formed on the date of the Press Conference by implication. He said under section 9(c) of the Societies Act a party can exist from time of declaration. The inference made by the judge that the respondents joined the National Party was based on evidence, the question is when was the party

p18

formed? He contended the National Party was formed at the Press Conference by declaration that the National Party was formed. To suggest that video tapes were not authentic was wrong. Mr Mwanza explained how the press conference and Frank Talk programmes were recorded. He said what was in the tape is what transpired and there was nothing added or subtracted. The evidence was to the effect that the National Secretary to MMD wrote to the Speaker that the respondents/appellants had resigned from the ruling MMD and upon the receipt of that letter the speaker made a declaration that seats in those constituencies had become vacant. The procedure is laid down in sections 7 and 8 of the Electoral act No. 2 of 1991. It is the Speaker who has to make a decision and a declaration. Counsel for Miss Kapwepwe contended that it was the duty of the High Court to declare the seats vacant. This was rejected because the High Court only comes in when there is a dispute. It is incorrect to contend that the learned trial judge failed to consider all the issues raised in the petitions.

In responding to the cross appeal, Mr Mwansa, Advocate for the second appellant/respondent said the judge did not err in the judgement. The court concluded from the evidence on record before it that the petitioners had joined the National Party. The court considered the petitioners denials that they signed the declaration of liberty but despite their denials the Court was satisfied that the petitioners had signed. The intention to form the Party was made on 12th August, 1993 at Pamodzi Hotel and that intention was put into effect by the application on 10th September 1993. The people who gathered at Pamodzi Hotel were the same people who formed the National Party. The inference by the court below that these were members of the National Party is very strong inference which could not be easily overturned by this court. The letter from the National Secretary did not ask the Speaker to declare the seats vacant but

rather gave information to the effect that the petitioners had resigned from the MMD. It remained for the Speaker to make a decision.

In reply, the learned Counsel, Mr Shamwana,S.C., emphasised that there was no evidence that any of the petitioners had joined any party. The video tape was vehemently objected to and the finding of the judge were "flies in the eyes of the established law". The judge was therefore wrong. The contents of the video tape if disregarded then what remain is that they "resigned to join a National Party" in small letters and not "National Party" in Capital letters.

We have very carefully considered and analysed the evidence on record; the documents produced; the authorities cited; and the submissions and arguments presented by all the parties and we have come to the conclusion that the main issue in the main appeal concerns the interpretation of article 71(2)(c) of the Republican Constitution. This article reads:

> "2. A member of the National Assembly shall vacate his seat in the Assembly.
> (c). in the case of an elected member who becomes a member of a political party other than the party of which he was an authorised candidate; if he is an independent, joins a political party."

It is quite clear that the Article provided two types of situations (a) a member

p19

who resigns from a party on whose ticket he was elected and joins another political party and (b) an independent who joins a political party. These are members who have to automatically vacate their seats. the article is in total silence as to what happens to a member "who resigns from the party that sponsored his candidature and does not join another party". That situation is not expressly covered. There can be no doubt there is a *lacuna* or a void in this article. The learned trial judge applied the literal construction that is that a statute must be construed in the ordinary and natural meaning of the words used. She quoted the case of *Barrel* (*Pauper*) *v Fordree* (9) where Lord Warrington of Cliyffe said:

> "----------in my opinion the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases."

She then referred to Maxwell on interpretation of Statutes by P. ST. LANGAN, MAXWELL ON INTERPRETATION OF STATUTES 12th Edition, page 33 where the learned author said:

> "it is a corollary to the general rule of literal construction that nothing to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislative intended something which it omitted to express."

She also quoted in furtherance of this principle the case of SHOP AND STORE DEVELOPMENT LIMITED AND COMMISSIONER OF INLAND REVENUE (1967) 1 Appeal cases 472 at 493 where Lord Morris of *Borth v Gest* said:

> "My Lords, the decision in this case calls for a full and fair application of particular statutory language to particular facts as found. The desirability or undesirability of one conclusion as compared with another can not furnish a guide reaching a decision. The result reached must be that which is directed by that which is enacted."

The learned Advocates for the appellant argued and argued with much force that to apply the literal rule of interpretation would depart from the spirit or context of the Constitution which is that a member of Parliament must sit in the Assembly as a member of a Party on whose ticket he was elected or if he is an independent he must continue as an independent, in other words, the article prohibits crossing of the floor. They asked the court to apply purposive interpretation in order to further the purpose or object of the enactment.

They pointed out that English courts have recently adopted this purposive construction where the literal interpretation of the legislative language used would lead to results which would defeat the purpose of the act but before this is done, the court must first determine the mischief which the enactment intended to remedy. It must also be apparent that the draftsman and parliament have by inadvertence overlooked, and committed to deal with an eventuality and that additional words would have been inserted by the draftsman and approved by parliament had their attention been drawn to the omission. The respondents referred the judge to Act 30 of 1993, an amendment to the Local Government 1991

p20

which stipulates inter alia that a Counsellor would vacate his seat if he resigns from a political party to become an independent. According to them, when a member of parliament resigns or he is expelled from the party without belonging to any other party, his changed party loyalty is the determining factor as to whether or not retains his seat, and thus the petitioners accordingly vacated their seats in the National Assembly.

In adhering to the literal rule of construction the learned judge considered the above authorities cited; the recommendation of the Mvunga report on floor crossing and its acceptance by the Government. She then asked herself this question: "What grounds could there be in this case to depart from the language used in the enactment and conclude that the legislature intended something which it omitted to express? The strongest ground advanced by the respondents is that any other interpretation would defeat the intention of the legislature which was to stop crossing of the floor." She then referred to the recent case of *Muhammad Nawaz Sarif v President Of Pakistan* (3) where it was held:

> "------ in the constitution contained in a written document wherein the powers and duties of various agencies established by it were formulated with precision, it was the wording of the constitution itself that was enforced and applied and this wording could never be overridden or supplemented by extraneous principles or non specified enabling powers not explicitly incorporated in the constitution itself."

The learned trial judge then went on to say:

> "Based on the fact the framers of the present constitution had the benefit of 1964 constitution whose express provisions on the issue before the court now were left out from the present Constitution, I am not persuaded to find that the intention of the legislature was to include a situation where a member of the Assembly just resigns from a political party on whose ticket he/she was elected to the Assembly. Asking the Court to read these words into Article 71(2) (c) is asking the court to directly legislate by including that which was omitted. If anything the evident intention expressed was to leave out what was provided in an earlier Constitution. The only solution, therfore, iis for the respondent to seek a Constitutional amendment if they now wish to reinstate what was applicable in the first Republic."

In considering the law relating to this appeal we have referred to learned author of Maxwell on interpretation and Statutes who, at p. 43, had this to say on the Golden rule:-

> "The so called 'Golden rule' is really a modification of the literal rule. It is stated in this way by Parke B:
>
> "It is a very useful rule in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language used may be varied or

p21

> modified, so as to avoid such inconvenience but no further." *Becke v Smith* (1836) 2M and W. 191 (10) "if" said Breth L.J. "the inconvenience is not only great, but what I may call an absurd inconvenience by reading an enactment in its ordinary sense whereas if you read it in a manner in which it is capable, though not its ordinary sense there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning" *R v Tonbridge Overseers* (1884) (11).

And Craies on Statute Law at p. 64 has this to say:

> "The Cardinal rule for the construction of Acts of parliament is that they should be construed according to the intention expressed in the acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expand those words in their ordinary and natural sense. The words themselves alone also in such case best declare the intention of the Law giver. "The tribunal that has to construe an act of legislature or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view". In 1953 Lord Goddard said in *Bernes v Jarvis* (12) "A certain amount of common sense must be applied in construing of statutes. The object of the Act must be considered."

Against these authorities is that referred to by Mr Kinariwala namely *Nothman v Barnett Council* (6) affirmed by the House of Lords in 1979 1 All E.R 142. Lord Dennings words are most appropriate in this case namely:

> "Whenever a strict interpretation of a statute gives rise to an absurdity and unjust situation, the judges can and should use their good sense to remedy it - by reading words in if necessary - so as to do what parliament would have done had they had the situation in mind."

It is perfectly clear on the face of it the article is intended to prohibit floor crossing generally. In the event the wording of it does not clearly carry out that intention if we were to follow the construction contended for by Mr Shamwana, the result would be discriminatory in favour of Party members who become independent.

Both Maxwell and Craies on statutes said only where there is absurdity or repugnance can the court come in to modify the language used in the statute. We are, therefore, satisfied that Article 71(2) (c) is discriminatory in itself against an independent member who joins any party and against a member who resigns from one party and joins another party. It is discriminatory

and, therefore, unreasonable and unfair and it is the duty of the court to make it reasonable as it offends against Article 23 of the Republican Constitution.

In the instant case, we have studied the judgement of the court below and we find it sound and correct by applying the literal interpretation. However, it is clear from the *Shartz* and *Nothman* cases that the present trend is to move

p22

away from the rule of literal interpretation to 'purposive approach' in order to promote the general legislative purpose underlying the provision. Had the learned trial judge adopted the purposive approach she would undoubtedly have come to a different conclusion. It follows, therefore, that whenever the strict interpretation of a statute gives rise to unreasonable and an unjust situation, it is our view that judges can and should use their good common sense to remedy it - that it by reading words in if necessary - so as to do what parliament would have done had they had the situation in mind. We, therefore, propose to remedy the situation in this case by reading in the necessary words so as to make the constitutional provision fair and undiscriminatory. Consequently the necessary words to be read in are "vice versa" Hence Article 71(2)(c) should now read (leaving out those sub clauses of no application):

71 (2) A member of the National Assembly shall vacate his seat in the Assembly:

(c) in the case of an elected member, if he becomes a member of a political party other than the party, of which he was an authorised candidate when he was elected to the National Assembly or, if having been an independent candidate, he joins a political party or vice versa;"

For the foregoing reasons we would allow the appeal by the appellants.

As regards to the cross appeal, we are satisfied that the Video Tapes evidence was wrongly admitted as there was no link in the chain of possession and there was no evidence that the respondents had joined any other political party. The only evidence on record is that there was an intention of forming a National Party. For these reasons, we would also allow the cross appeal.

The effect of our interpretation of Article 71(2) (c) is that the respondents in the main appeal who were petitioners in the Court below had vacated their seats in the National Assembly on 12th of August 1993, the date on which they announced their resignation from the MMD, the party on whose tickets they were elected to the National Assembly.

We order each party to bear its own costs.
Appeal allowed.