IN THE SUPREME COURT OF ZAMBIA

SCZ/EP/3 & 4 OF 1996

HOLDEN AT LUSAKA

(Constitutional Jurisdiction)

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 41(2) of THE CONSTITUTION OF ZAMBIA.

IN THE MATTER OF THE PRESIDENTIAL ELECTION HELD IN ZAMBIA ON THE 18TH OF NOVEMBER, 1996

B E T W E E N

AKASHAMBATWA MBIKUSITA LEWANIKA	1ST PETITIONER
AND	
EVARISTOR HICUUNGA KAMBAILA	2ND PETITIONER
AND	
DEAN NAMULYA MUNG'OMBA	3RD PETITIONER
AND	
SEBASTIAN SAIZI ZULU	4TH PETITIONER
AND	
JENNIFER MWABA PHIRI	5TH PETITIONER
AND	
FREDERICK JACOB TITUS CHILUBA	1ST RESPONDENT

Coram: Ngulube C.J., Bweupe D.C.J., Sakala, Chirwa and Lewanika JJS.

23rd June and 23rd July, 1997

For the Petitioners: Mr. M. Chona SC, Mahachi Chambers.
Mr. E.J. Shamwana SC, of Shamwana & Company.
Mr. D. Lisulo SC, of Lisulo & Company.
Professor M.P. Mvunga, of Mvunga Associates.
Mrs. N.B. Mutti, of Lukoma Chambers.
Mr. E. Lungu of A.S. Andrew Masiye & Co.
Mr. W, Kabimba.
Mrs. M. Zaloumis, of Mvunga Associates.
Mr. S. Sitwala , of Light House Chambers.

For the 1st Respondent: Mr. V. Malambo and E. Silwamba of Malambo Silwamba & Company.

R U L I N G

Sakala JS delivered his Ruling.

This is an application, on behalf of the petitioners, by way of a Notice of Motion, made pursuant to Order 112(2) of the Supreme Court Rules, 1993 Edition of the White Book, seeking for an order or such other directions that the respondent do submit or be caused to submit to a test, being blood or such other tissue test to establish whether or not one, Luka Chabala Kafupi, is the biological father of the respondent. The application is supported by an affidavit sworn by one, Jennipher Mwaba Phiri, the 5th petitioner, on behalf of all the other petitioners. Paragraphs 5,6,7, 8 and 11 of that affidavit read as follows:-

"5. That I am informed by one Luka Kafupi Chabala that he is the biological father of the Respondent herein Titus Mpundu also known as Frederick Jacob Titus Chiluba and not Frederick Titus Jacob Chiluba.

6. That I have seen both the said Luka Kafupi Chabala and the Respondent and have noted the great similarity in physical and facial structure coupled with mannerisms and expressions.

7. That the claim by one Luka Kafupi Chabala to be the father of the Respondent could be true.

8. That there exists a medical test which is called DNA fingerprinting which can conclusively determine whether or not the claims by Luka Kafupi Chabala are true.

11. That the said LUKA KAFUPI CHABALA is ready and willing to submit himself to a medical test to determine the paternity of the respondent."

There was no affidavit in opposition.

Leading the arguments and the submissions on behalf of the petitioners, Mr. Lisulo, the State Counsel, informed the court that the application was for the issue of a directive involving the taking of blood samples from the respondent and Mr. Luka Chabala Kafupi, who had for a long period of time, consistently claimed to be the legal father, the natural father, or the biological father or

the procreator of the respondent. Mr. Lisulo pointed out that Mr. Luka Chabala Kafupi had repeated his claim with gusto and confidence before court to the extent of agreeing to have his blood tested for purposes of proving conclusively and scientifically that he procreated the respondent. Mr. Lisulo further pointed out that the first petitioner had demanded in his evidence that the respondent and Luka Chabala Kafupi have their blood tested. Counsel explained that before the court is a notice of motion pursuant to Order 112(2) of the White Book and an affidavit in support. He further explained that the court will observe that the petitioners have made serious allegations against the respondent centering on his paternity and place of birth and which allegations have been pleaded in the petition. Counsel pointed out that substantial viva voce evidence had been raised in relation to the respondent's paternity and place of birth and that there have been several versions regarding the respondent's place of birth and two versions regarding his paternity. Counsel also pointed out that Mr. Luka Chabala Kafupi's evidence on the issue of paternity had been persistent and that there is also evidence that the respondent's father was Jimmy Zharare Nkonde who came from Mozambique. According to counsel, from all this evidence the court should find ways and means of ascertaining and determining the whole truth about the respondent's place of birth and paternity, contending that the contradictions must be narrowed down to zero point and that this could come about by an analysis of blood or genetic finger printing, submitting that this was the only way the petitioners' counsel could help the court to come to the whole truth on the issues of paternity and place of birth. Mr. Lisulo's further contention was that the respondent is said to have been born in several places yet, even the Son of God was only born in one place.

Counsel explained that the application was made in terms of the provisions of Section 20(1) of the Family Law Reform Act of 1969 of the United Kingdom which provides for the taking of blood samples in any civil proceedings relating

to paternity. Counsel submitted that the taking of blood samples from the respondent for the purposes of a DNA test was a golden opportunity to establish the truth. He pointed out that under Section 20(1) of the Act, the court was only required to give a directive and not to consider whether or not that person would consent to the directive.

On the applicable law, counsel explained that section 10 of the High Court Act, Cap 27 empowers this court to apply the English law on the issues of paternity in the absence of our own law. Mr. Lisulo submitted that this was the authority he was depending on in adopting the English law. Counsel also cited Sections 12 and 13 of Cap 27 and drew the Court's attention to Section 2 of Cap 11, The English Law (Extent of Application) Act. He also referred the court to Phipson, 14th Edition, paragraphs 15-21 at pages 337to 340 inclusive and to Practice Direction (1975) 1 ALL ER 233 (b) and (c). Counsel submitted that he would like the matter to be scientifically proved and cited the cases of S V S and W V Official Solicitor (1970) 3 ALL ER 107 at pages 109 and 110 paragraph (h) as per Lord Reid in support of his submissions.

Counsel further contended that the Affiliation and Maintenance Orders Act, Cap 64, did not apply to the case before court as it applied to children defined as persons under the age of 18 years and related to Affiliation and Maintenance orders. Counsel argued that the question of the respondent's paternity and place of birth was key and fundamental and goes to the very root of the petition in that it would ascertain whether the respondent was duly qualified, constitutionally or otherwise to contest the 1996 November elections and finally elected President. He urged the court to grant the direction sought.

On joinder of Luka Chabala Kafupi as a party to the petition Counsel pointed out that Order 112/4 provides for a joinder of parties. Mr. Lisulo concluded his arguments by pointing out that while the petitioners could not request the respondent to prove their case they had to lay all their cards on

the table so that it was not later argued that they did not apply for blood samples.

Augumenting Mr. Lisulo's submissions, Prof. Mvunga observed that the application was unprecedented in the legal history of this country and that he felt duty bound to assist the court arriving at a conclusion fair in law. Prof. Mvunga further observed that this was not an ordinary paternity case, contending that it was a constitutional paternity case whose constitutional requirements arise out of the provisions of article 34 (3) (a) and (b) of the Constitution. Prof. Mvunga contended that there are broader interests conceived by article 34 transcending beyond the interest of the respondent. He submitted that the petitioners' desire and the desire of those they represent and the Zambian nation at large, was that the court should come to a conclusion on the paternity of the respondent.

Prof. Mvunga explained that before 1964 the Common law appeared to be at variance with statutory law in that the Common law took the position that the court had no inherent power to order blood samples as it would lead to violation of human rights but that now the Common law is compromised in the interest of truth. He drew the attention of the court to the case of **W V W(4) (1964) P. 67**, contending that the holding was most instructive in that it established the criteria in cases of this nature as being the discovery of the truth. Prof. Mvunga pointed out that this position is restated in Phipson, 14th Edition at page 337. Counsel submitted that advances of modern science had made discovery easier and that constitutional requirements impose a duty on this court to resolve the issue of paternity in order to settle the question of who contests the office of President. Prof. Mvunga contended that there has been so much uncertainity surrounding the respondent's paternity even on the evidence adduced so far. He pointed out that it had emerged by now that the petitioners had approached the paternity issue from two points of view namely, Chabala Kafupi's point of view that he is the father of the respondent and Jimmy Zharari Nkonde's view that he was the father of the respondent.

The Prof. explained that the reason for this approach was that the petitioners had been attempting to show that regardless of whether Nkonde or Chabala is the respondent's father, the respondent did not qualify for candidature of President because none of the two claimants was a Zambian. The Prof. further explained that this approach was necessitated by the respondent's stance on the issue, submitting that if the direction is given then the issue of paternity will be resolved once and for all and this will be in search of truth. Prof. Mvunga pointed out that the 1969 Family Law Reform Act clearly sets out that a grant of a direction pursuant to section 20(1) is not conditional to the requirement for consent and that the court is therefore not required to take into account the question of whether consent will be given or not, submitting that independent of consent, the court can direct, the emphasis not being on refusal. Counsel however submitted that from refusal to consent certain inferences could be drawn. He referred the court to the case of R V Smith (1985) 81 Crim App. 286 and submitted that refusal should lay a basis for an adverse finding against a party refusing to consent.

Prof. Mvunga concluded his submissions by pointing out that the seriousness of the petition and its national character in terms of the constitutional requirements impose a duty on the court to exercise its discretion in terms of section 20(1) in the affirmative because the petitioners and the nation at large are entitled to know the paternity of the rspondent and that it is up to the respondent to submit or not to submit and that if he refused to submit to a blood test then the usual inferences should follow. Prof. Mvunga contended that in the exercise of its discretion the court should not concern itself with the issue of convenience but with the discovery of the truth by conclusive evidence. He explained that a request for a blood test had been made but there was no response from the respondent.

On behalf of the respondent, Mr. Silwamba prayed that the application be dismissed as being grossly misconceived. He drew the attention of the court to the fact that although the application is brought in terms of Order 112(2) of the White Book, the heading, in so far as it related to

an application for a committal order for contempt made interesting reading and not supported by arguments but that since the respondent was magnanimous, he was turning a blind eye to that. Counsel submitted that the law under which the application was made namely, the Family Law Reform Act of 1969 of the United Kingdom was inapplicable to Zambia. For this submission Mr. Silwamba relied on the provisions of Chapter 10, the British Acts Extension Act, Chapter 11, The English Law (Extent of application) Act and Chapter 2, The Interpretation and General Provisions Acts and pointed out that all these acts do not make the Family Law Reform Act of 1969 applicable to Zambia. While conceding that in terms of Section 8 of the Supreme Court Act, Cap 25, this court was competent to look at the laws and procedure prevailing in England, and that in terms of article 41 of the constitution, this court is sitting as a court of first instance, exercising original jurisdiction, and that in terms of section 9 of the High Court Act Cap 27, this court can resort, in certain instances, to the practice and procedure of the High Court of Justice in England, counsel pointed out that in terms of section 10 of Cap 27, the Court can only resort to the English Law and procedures when there is a default in our own laws and procedures as observed in the case of **Siwingwa V Phiri (1979) ZR 145** although reversed in the case of **Kabwe Transport Limited V Press Transport (1975) Limited ZR 43.** Mr. Silwamba submitted that there is no default in our laws for the purposes of the present case as regards the applicable law, procedure and practice. Further on the point of law counsel drew our attention to the Affiliation and Maintenance Orders Act No. 19 of 1994 but quickly conceded that he took the point that the Act relates to affiliation and maintenance. Counsel also referred the court to the Legitimacy Act, the Adoption Act Cap 54, and the Trust Restriction Act Cap 63 but again conceded that there is no mention of blood samples in all these Zambian Acts, but that that in itself, did not amount to default in our laws.

In the alternative Mr. Silwamba submitted that in the event the court decided to depart from Kabwe Transport Company case and hold that there was default in our law and practice and procedure and that the Family Law Reform Act of 1969 applied to Zambia, he understood section 20(1) of that Act to govern only parties to an action contending that in the present case Mr. Chabala Kafupi is the petitioners' witness number 3 and clearly not a party although Order 112(4) provided for joinder of parties. Counsel contended that Luka Chabala Kafupi can not be joined as a party in these proceedings submitting that the Electoral Act provides as to who can be a party to proceedings brought in terms of article 41. Counsel advised that a separate process should be commenced by Mr. Luka Chabala Kafupi in order to claim for his child and whether he could succeed in his own action was a different issue. Mr. Silwamba also argued that section 21 of the Family Law Reform Act, 1969 is couched in mandatory terms and urged the court to follow the decisions in S V S, W V Official Solicitor (1970) 3 ALL ER 107 at page 111 and refuse to grant the application as consent is a condition precedent to issuing a direction and submitted that a direction without consent was incompetent. Counsel further cited Halsbury Laws of England Vol. I, 4th edition at paragraph 686, where the learned Authors discuss Section 21(1) of the Family Law Reform Act of 1969.

Reacting to Mr. Silwamba's arguments and submissions Mr. Lisulo explained that there was an error in the heading of the notice of motion where it makes reference to a committal order and asked the court to delete that particular portion of the heading. Mr. Lisulo contended that the application was in law properly founded since the aim was to prove the paternity of the respondent and that proof would solve the issue of whether or not the respondent was qualified to seek election to the office of President. Counsel submitted that an application for a direction does not mean ipso facto that the respondent will be dragged before a blood tester but that the application is the first step.Mr. Lisulo observed that Cap 10 of the Laws of Zambia had been misinterpreted, submitting that section 2 of that Act is not exhaustive and that the other laws

referred to by Mr. Silwamba were irrelevant and that Mr. Chabala Kafupi could be joined as a party to this application for a direction although not a party to the petition itself. Mr. Lisulo agreed with Mr. Silwamba that the respondent could not be forced to have his blood samples taken but pointed out that if consent was refused it would thereafter be for the court to draw its own inference contending that the petitioners' position was that consent is a condition subsequent to a direction and not a precondition to a direction. According to counsel if the application is not granted, the court will subsequently find it difficult to resolve the question of paternity. He urged the court to dismiss the objection by counsel as well as the arguments as irrelevant in the interest of justice and fair play.

In re-enforcing the reply by Mr. Lisulo, Prof. Mvunga contended that the petition and the paternity are inseperable issues, submitting that paternity arises from constitutional requirements and that having so arisen it has been presented to this court as a petition and therefore the issue of paternity must be resolved by way of a petition.

On English Law as applied to Zambia, Prof. Mvunga pointed out that if all the constitutional aids that guide the court are thrown away then the court will be left in a vacuum. The court will then have to look at the constitution under article 41 and it will note that there are no detailed procedures to guide it. The next law the court could look at would be the Electoral Act and the court would also note that there are no procedures governing the presidential election petition and that neither does the amended Electoral Act provide any guidelines on paternity. Prof. Mvunga submitted that in the light of the lacuna the court has to adopt one alternative and that is Cap 11 which enjoins the court to apply Common Law and Equity. According to the Prof. this should be the starting point. He also submitted that if there are inadequancies in our law, the court must advance the Common Law submitting that in the situation of a vacuum and there being default in procedures, the court has an inherent jurisdiction to devise procedures to enable it arrive at the truth. He contended that there are

convincing reasons for adopting the suggested approach as the petition involved a constitutional issue. He pointed out that if the court assumed inherent jurisdiction it will then be free to apply any aid including the English Statutes. According to the Prof. while the court is an arbiter it can not be viewed as a passive arbiter, it had to be a little more active in bringing any aids to determine issues contending that if this petition had been commenced by a returning officer as provided by article 41, the question of burden of proof would never be an issue as the issue would be to determine the matters that would arise for determination under article 41. Prof. Mvunga concluded his reply by referring the court to the book of Allot's New cases on African Law pages 9 to 28.

I have very anxiously addressed my mind to the application and to the detailed submissions by the three learned and experienced senior counsel. I am profoundly indebted to them all. In dealing with this application I Propose to confine myself to the issue of paternity and not with the respondent's place of birth although raised in Mr. Lisulo's arguments. I take note that the submissions by all the advocates cite the same law and rely on the same decided cases. The only point of difference is the interpretation of the law and the authorities cited. Indeed this application is, in the legal history of this country, unprecedented both in terms of the law, the practice and the procedure as well as in terms of fact. It raises very fundamental Constitutional issues never before litigated upon in our courts of law.

The specific constitutional provisions leading to the application are contained in Articles 34(3)(a) and (b) and 41(2) dealing with questions relating to qualifications to be a candidate for election as President and election of a President / Article 34(3)(b), introducing respectively a qualification of both parents of a Presidential Candidate to be Zambians by birth or descent, is a new introduction in the Constitution; equally is Article 41(2) conferring original jurisdiction on the Supreme Court to determine questions relating to elections of a President.

It is common cause that both the Constitution and the Electoral Act have not provided guidelines on the law, the practice and procedure applicable when questions relating

to the elections of a President arise for determination. It is also common cause and agreed that the Supreme Court, in the exercise of its original jurisdiction, is entitled to adopt and follow the law, the practice and procedure of original jurisdiction as exercised by the High Court of Zambia.

The first issue for determination therefore, as raised by this application relates to the relevant applicable law, practice and procedure. At the expense of repeating myself but for the sake of emphasis, I find it necessary, at this juncture, to recite some of the submissions in so far as they relate to the applicable law, practice and procedure. The case for the petitioners as pleaded in so far as it is relevant to this application, centres on the identity of the respondent and that of his parents. According to the petitioners they desire evidence of biological tests to ascertain the true parentage of the respondent which is one of the Constitutional requirements for a person to qualify to hold office of President.

Briefly the petitioner's submissions are that Mr. Luka Chabala Kafupi, has consistently claimed to be the respondent's father and has agreed in court to have his blood tested for purposes of proving conclusively and scientifically that he procreated the respondent. That before the court are two versions regarding the respondent's paternity and that the issue can only be narrowed down to zero by a blood test or genetic finger printing. That the petitioners have approached the paternity issue from two angles to show that regardless of who is the father of the respondent, the respondent did not qualify for candidature of President because none of the two claimants is or was a Zambian. According to the petitioners the applicable law to this application is that of the United Kingdom in the absence of our own specific statutes on the subject.

The case for the respondent as pleaded and argued on the other hand, is that his identity and that of his parents is not the subject of contradictory public records and that the onus is on Luka Chabala Kafupi to establish the alleged paternity. According to the respondent the United Kingdom law is inapplicable to the facts of this application.

This application, as already observed, is a consequence of a petition based on article 41(2) of the Constitution. The Notice of Motion is pursuant to Order 112 (2) of the Whitebook, 1993 edition and made in terms of Section 20 (1) of the Family Law Reform Act of 1969 of the United Kingdom which provides for the taking of blood samples in any civil proceedings relating to paternity. Mr. Lisulo contended and submitted that he relied on the English Law, Practice and Procedure on the strength and authority of Section 10 of the High Court Act, Chapter 27 of the laws of Zambia in the absence of our own laws, practice and procedure on paternity issues. Mr. Lisulo also contended that Mr. Kafupi can properly be joined as a party to this application though not a party to the petition itself.

Prof. Mvunga submitted that the Constitution and the Electoral Act have no detailed guidelines on practice and procedure to be applied in determining constitutional paternity once raised in connection with the elections of a President. The Prof. urged the court that in the light of a lacuna and a vacuum in our laws, on a question of paternity, the court had only one alternative namely; to adopt the provisions of section 10 of Cap 27 of our laws and apply the English law.

Counteracting these submissions of the petitioners Mr. Silwamba, on behalf of the respondent, prayed the court to dismiss the application for being grossly misconceived and that the Family Law Reform Act, 1969 of the United Kingdom was inapplicable in Zambia. Mr. Silwamba, however, conceded that this court whether exercising original or appellate jurisdiction was competent, in terms of section 8 of the Supreme Court Act, Cap 25 and in terms of Section 9 of the High Court Act, Cap 27, to resort, in certain instances, to the law, practice and procedure exercised by the High Court of Justice and Court of Appeal in England.

But Mr. Silwamba quickly submitted that in terms of Section 10 of Cap 27, this court can only resort to the English Law when there is default in our own laws contending that the present application has not established any default in our law.

In the alternative Mr. Silwamba submitted that in the event we did not agree with him and held that the English law was applicable to this application his understanding of Section 20(1) was that it is subject to the consent of the parties and that it is only applicable to parties to an action, contending that in the present application Mr. Luka Chabala Kafupi is not a party but a witness for the petitioners in the petition although Order 112(4) provided for joinder of parties.

The submissions relating to the law applicable to this application have, in my view, been very well taken by all the three learned counsel. I found them very persuasive indeed. But on a careful consideration of the facts as disclosed in this application and the issues raised for determination, I am satisfied that the Affiliation and Maintenance Orders Act, the Adoption Act, the Trust Restriction Act and the Legitimacy Act are not relevant laws in resolving the issue of Constitutional paternity by the taking of blood samples. The petitioners appear categoric that there is default in our law on this issue. Counsel for the respondent showed some hestation to accept the existence of default in our law on the issue of taking blood samples.

For my part to ascertain the law applicable to this application, the first relevant starting provision of law is section 10 of the High Court Act, Chapter 27. This section reads:

"10. The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

The last words of the section are significant and instructive. These are:

"....and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

These words were discussed in the case of Bowmaker Finance Ltd V Buck (1967) ZR 79 where Evans J observed as follows:-

"Our High Court Rules are not intended to be a complete code governing the practice and procedure in this court: were they so intended, the words (in the said section 10) "and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice" would be otiose."

As it will be observed later the words are not otiose. In the case of Siwingwa Vs Phiri (1979) ZR 145a case referred to us by Mr. Silwamba, Moodley J., after setting out the whole of section 10 of Cap 27, had this to say at page 149:-

"There is no ambiquity in the above section. Thus in the absence of statutory or judicial authority in Zambia in matters relating to practice and procedure then the High Court in Zambia will exercise jurisdiction in those matters in substantial conformity with the law and practice for the time being in force in England. The operative words are "in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice." It should be added that s.9(1) of the High Court Act , Cap. 50, empowers the High Court to possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England."

For different reasons the Supreme Court, only disapproved the conclusion of the Siwingwa case in the Kabwe Transport Company case also referred to us by Mr. Silwamba. But the Supreme Court had the opportunity in the Kabwe Transport case to explain section 10 of Cap27 in more detail and stated as follows at page 46:.

"The case of Siwingwa V Phiri (4), which was decided in this country by a High Court Judge resulted in a ruling that the the Civil Evidence Act 1968 applied in this country by virtue of section 10 of the High Court Act, which provides that the practice and procedure at present prevailing in the courts of England and Wales shall apply in this country. Mr. Jearey argued that the provision can be called in aid in default of any legislation in Zambia. There is in fact in Zambia an Evidence Act, Cap 170, in which there is no provision for the calling of evidence in criminal proceedings to assist a decision in civil proceedings. This court has been asked to decide whether the provisions of section 10 of the High Court Act enables courts in this country to decide that there is an absence of legislation when, in this specific instance, there is a definite act dealing with evidence. We have no hesitation in finding that, where there is a specific act dealing with a matter of law, such as evidence, in this country, there is no default of legislation as envisaged by section 1o of the High Court Act."

The emphasis is on the words "..where there is a specific act ...in this country ...there is no default." In my view this court acknowledged in the converse in the Kabwe case that where there is no specific act in this country there is then a default in our laws. From our own statutes, it appears to me that the arguments in favour of applying the English Law, when there is no specific act dealing with a matter of law in this country are very persuasive. But before making my finding and before leaving the point of the applicable law, I wish to observe that in addition to section 10 on practice and procedure there is also section 9 of Cap 27 confering jurisdiction on the High Court and specifically providing that the High Court "....shall, within the limits ....possess and exercise all jurisdiction power and authorities vested in the High Court of Justice in England."

It should also be observed that this application raises issues of paternity, parentage and family. In general, Learned Authors like Rayden and Jackson on Divorce, treat all these issues as family matters under Matrimonial Causes and Matters. In this connection it will be noted also that the whole text of the Family Law Reform Act is discussed with commentaries in the sixteenth edition of Rayden and Jackson on Divorce. Also to be noted is that Section

11, Cap 27 providing for Probate and Divorce Jurisdiction on the High Court is couched in the following terms:

"11. The jurisdiction of the Court in divorce and matrimonial causes and matters shall, subject to this Act and any rules of court, be exercised in substantial conformity with the law and practice for the time being in force in England."

I have deliberately examined the numerous acts and all the laws referred to us on practice and procedure. Having also listened and considered all the learned arguments and submissions, I am satisfied that there is no specific provision in our laws or in our practice and procedure relating to taking of blood samples for determining the issue of paternity or parentage. In the circumstances, I hold that the English Law is the applicable law to this application in default of our own law on the subject of paternity.

The second question for consideration is whether the facts of the application warrant the issuance of a direction. The application before this court sitting as a court of first instance in a Presidential election petition is for an order or such directions that the respondent do submit or be caused to submit to a test being blood or such other tissue test to establish, whether or not, one Luka Chabala Kafupi, is the biological father of the respondent. The scenario in this application, as I see it, is that the petitioners have produced a witness claiming to be the father of the respondent but whom they say is not Zambian by birth or descent. These claims have been denied by the respondent in his answer. The question that emerges from the scenario is this: Why do the petitioners want a blood test? Their contention is that a blood test will conclusively , by scientific evidence, establish one way or the other that the witness they produced is or is not the respondent's father, thereby resolving some of the issues prayed for in the petition.

Having found that the Zambian laws are silent on the practice, and procedure and in the absence of any statutory or judicial authority in Zambia in matters relating to practice and procedure in an application for taking of blood samples, and this court, sitting as a court of first instance, to exercise the jurisdiction on matters of taking blood samples in substantial conformity with the law and practice for the time being in force in England, I now proceed to apply the English law to this application.

The Practice and Procedure for the time being in force in England is Order 112 of the 1995 edition of the White Book headed "Applications for use of Blood Tests in determining Paternity". The law for the time being in force in England is the Family Law Reform Act, 1969. Among the objects of the Act as set out in the preamble is "...to make provision for the use of blood tests for the purposes of determining the paternity of any person in Civil proceedings..." After indeed very anxious moments, I am satisfied and have come to the conclusion that the application both in terms of law and practice is well founded and properly before this court and I so hold.

Mr. Lisulo argued that the petitioners have made serious allegations against the respondent centering on his paternity and that substantial viva voce evidence has been adduced in support of the allegations. Mr. Lisulo contended that the only way to establish the truth about the respondent's paternity is by a blood test. According to Prof. Mvunga this is a constitutional paternity case raising issues that transcend beyond the respondent's interests. In dealing with this appplication I have been mindful not to stray into the merits of the issues raised by the petition itself.

Section 20(1) of the Family Law Reform Act, 1969, that confers power on the court to require use of blood tests reads as follows:-

"20(1) In any civil proceedings in which the paternity of any person falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of that person and for taking, within a period to be specified in the direction, of blood samples from that person, the mother of that person and any party alleged to be the father of that person or from any, or any two, of those persons."

As already observed the practice and procedure of making the application and the taking of blood samples is set out in Order 112. It was common ground that the court has judicial discretion to give or not to give the direction. All the learned counsel drew our attention to a number of decided cases that have settled the principles on which a court should act in determining whether or not to direct use of blood tests. The general principle seems to be that in considering whether to order the taking of blood samples the court is entitled to take into account the probable outcome of the proceedings in which the issue arises. Balcombe L. J in Re F(a minor) blood tests Parental rights, (1993) 3 ALL ER 596 stressed the point at page 600 as follows:

"As is apparent from the provisions of s. 20(1) of the Family Law Reform Act 1969, the power to direct the use of blood tests to determine parentage only arises in civil proceedings in which the paternity of any person falls to be determined. If the probable outcome of those proceedings will be the same whoever may be the natural father of E, then there can be no point in exposing E to the possible disadvantages of a blood test."

It is the case of the petitioners as pleaded and as so far testified that this court must determine, among other issues, the respondent's paternity.

In the case of S V McC and M (1970) 1 ALL ER 1162 Lord Denning M R stressed the role of blood test in the Administration of Justice. At page 1165 he stated thus:

"In my opinion, when a court is asked to decide whether a child is legitimate or not, it should have before it the best evidence which is available. It should decide on all the evidence, and not on half of it. There is at hand in these days expert scientific evidence-by means of a blood test-which can in most cases resolve the issue conclusively. In the absence of strong reason to the contrary, a blood test should be made available. The interests of justice so require."

It is the petitioner's case that the interest of justice in the petition requires the taking of a blood test. And Lord MacDermott in S V S, W V Official Solicitor (1970) 3 All ER 107 at page 118 made the point as follows:-

"...the application for a blood test was a proper step to procure the best evidence....."

I am alive to the fact that a blood test has frequently arisen as an issue in family proceedings involving the paternity of an infant, a minor or a child in which the interest of a child and that of justice have always been the subject for consideration. I am also alive to the fact that until 1st March, 1972, the date of coming into force of the provisions for use of blood tests in determining paternity in the Family Law Reform Act 1969, there was no statutory power enabling a court to order the use of blood tests to assist in the determination of paternity. On the other hand it had been established by decided English cases that a Judge of the High Court could order blood tests in certain circumstances. See **Halsbury's Laws of England Volume I, 4th Edition para 685** under the heading: Powers of Court to require use of blood tests" and the cases under note 2.

The major submission in favour of a blood test in the instant case was that the petition does not raise an ordinary paternity case but a constitutional paternity issue in that it is a constitutional requirement that among other qualifications, a person shall be qualified to be a candidate for election as President if (a) He is a Zambian citizen and

(b) Both his parents are Zambians by birth or descent.

According to Prof. Mvunga, these requirements transcend beyond the interests of the respondent to compel this court to judicially exercise its discretion by making a direction with a view to discovering the truth of the respondent's paternity by conclusive evidence.

After a very critical analysis of the facts in support of the application, I am satisfied that the petitioners have made out a case for this court to consider the exercise of its discretion of whether to grant or not to grant the application for the order sought in terms of section 20(1) of the Family Law Reform Act of 1969. But before considering the exercise of that discretion I must first deal with the issue of consent.

The third and final issue for determination in this application centres on section 21(1) of the Act dealing with consent for taking of blood samples.

Section 21(1) reads as follows:-

"21-(1) Subject to the provisions of subsections (3) and (4) of this section, a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent."

Subsections (3) and (4) are not relevant here.

The gist of Mr. Silwamba's alternative submission is that Section 20(1) of the Family Law Reform Act is applicable only to parties to an action and that a direction pursuant to section 20(1) is incompetent without a consent given under section 21(1) of the Act since consent is a condition precedent to a direction. On the other hand, counsel for the petitioners contended that consent is a condition subsequent to a direction under section 20(1).

While I agree with Mr. Silwamba that section 20(1) applies only to parties to an action I also take note that under Order 112(4) of the White Book, this court has a discretion and is competent to direct that a person, from whom blood samples have to be taken and is not a party to the application, be made a party to the application. On the other hand I do respectfully disagree with Mr. Silwamba that a direction pursuant to section 20(1) is dependent on consent under section 21(1). I am fortified on this conclusion by the very wording of the two sections. Section 20(1) giving power to court to require use of blood tests in part reads as follows:-

"In any civil proceedings in which paternity of any person falls to be determined ...the court may give a direction for the use of blood test....."

Section 21(1) in part states as follows:-

"....a blood sample which is required to be taken from any person for the purpose of giving effect to a direction under section 20 of this Act shall not be taken from that person except with his consent."

My understanding of these two sections is that consent is only necessary for purposes of giving effect to a direction. This means you can not seek for a person's consent before you obtain a court's direction. In my view this makes good sense on account of the fact that the court has a discretion to give or not to give a direction. This conclusion is fortified further by the provisions of section 23(1) which state:

"23-(1) Where a court gives a direction under section 20 of this Act and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances."

It follows from the wording of this section that a direction under section 20 comes first followed by consent which in my view is a step to giving effect to a direction, failure of which may enable a court to draw any such inferences. My understanding of the law is that once a direction has been issued, a party is at liberty to refuse to consent. In the event of refusal to consent to a direction for a blood test, the court is also at large to draw any inference whether favourable or adverse depending on the circumstances of the case.

In the case of B V B and E (B intervening) (1969) 3 ALL ER 1106 the court directed a blood test to determine the paternity of a child. One of the parties refused to consent to a blood test. The court of appeal held that in the circumstances of that case the refusal to submit to a blood test was reasonable. This buttresses my finding that a direction under section 20(1) is not dependent on consent.

From the decided English authorities it would appear to me that whether or not a court will exercise its discretion to give a direction largely depends on three factors. These are:

The issues to be determined,
The circumstances of the case and
The purpose of the application for a blood test.

Before this court is a petition in which the petitioners have, among other prayers, raised the following issues for determination:

"1. That it may be determined and declared that the provisions of Article 34(3)(a),(b) and (e) in respect of the 1st Respondent have not been satisfied and accordingly that the 1st Respondent did not qualify to contest the election and to be elected President of the Republic of Zambia and that his election was void.

2. That it may be determined and declared that the 1st Respondent has falsely sworn as to the citizenship of his parents and is in contravention of section 9 of the Electoral Act 1991 as amended by Act No. 23 of 1996."

The circumstances leading to the petition as pleaded are that on 18th November, 1996 a Presidential Election was conducted and the respondent was declared as elected and subsequently sworn in office as President. That among the qualifications for one to stand as a candidate for election as President is that he must be a Zambian and both his parents must be Zambians by birth or descent. The case for the petitioners, as pleaded and testified to so far, is that there is doubt whether the respondent met the constitutional requirements as to his identity and paternity which issues must be resolved by this court.

The purpose of this application for a blood test, as I have understood it, is to obtain the best evidence on the issue of the respondent's paternity. The application, in my view, has met all the three factors to enable this court to judicially exercise its discretion under section 20(1) of the Family Law Reform Act, 1969.

I therefore hold that whether the respondent consents or does not consent to the taking of a blood test, is not, as of now, this court's concern and is not relevant to this application at this stage.

On the basis of what I have said in considering the issues raised by this application, the conclusions that emerge can be summarised as follows:-

(a) that the application is unprecedented in Zambia both in terms of the law, the practice and the procedure.

(b) that in view of the provisions of Article 41(2) of the Constitution, conferring original jurisdiction on the Supreme Court to determine questions relating to elections of a President, the Supreme Court is entitled to adopt and follow the law and practice as exercised by the High Court in the exercise of its original jurisdiction.

(c) that there is no specific provision in our laws and in our practice and procedure relating to the taking of blood samples for purposes of determining issues of paternity and hence the existence of a default in our laws.

(d) that in terms of section 10 of Cap 27 and there being a default in our laws, the applicable law in this application is the English Law namely; Order 112 of the White Book, 1995 Edition and the Family Law Reform Act, 1969.

(e) that in terms of section 20(1) of the Family Law Reform Act, 1969, this court has a discretion to issue a direction for the taking of blood samples in any civil proceedings and that in terms of Order 112(4) this court can order any person to be a party to an application for a direction for the taking of blood samples.

(f) that consent under section 21(1) of the Family Law Reform Act is subsequent to a direction under section 20(1) of the same act and that a party is entitled to withhold consent to the taking of blood samples.

(g) that the paternity of the respondent has risen for determination in the Petition requiring the taking of blood samples for blood tests to procure the best evidence.

(h) that whether or not a court will exercise its discretion to give a direction depends on the circumstances of the case, the issues to be determined in the case and the purpose for the blood test.

(i) that the Petitioners herein have established grounds in support of the application to enable this court to judicially exercise its discretion in their favour.

For the reasons and the conclusions I have set out in this ruling, I would, in the exercise of my discretion, give a direction for use of blood tests and taking of blood samples. Accordingly I grant the application as prayed.

For the avoidance of any doubt, I direct that Luka Chabala Kafupi, Petitioners' witness No. 3 be made a party to this application, only for the purpose of blood tests and taking of blood samples. I also direct that the blood samples be taken from the respondent and Luka Chabala Kafupi and that blood tests be carried out within twenty-one days from today's date.

Dated this 23rd Day of July 1997 at Lusaka in Open Court.

E.L. Sakala,
SUPREME COURT JUDGE.