

2
EDITION

SEPTEMBER
2022

ADVOCATUS

NEWSLETTER

**MR. DICKSON JERE
ON SMEs**

**DR. CHIPASHA MULENGA
AND DAVISON MWALE ON
GREEN ECONOMY AND ITS
IMPLICATION ON SMALL
AND MEDIUM ENTERPRISE**

STUDENT AFFAIRS

University of Lusaka Academia and Legal Writing Society (UNILAW)

THE UNIVERSITY OF LUSAKA ACADEMIA AND LEGAL WRITING SOCIETY

THE **ADVOCATUS** NEWSLETTER

ISSUE No.2

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SECOND EDITION



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STUDENT LED PUBLICATION

THIS IS THE SECOND EDITION OF THE
UNIVERSITY OF LUSAKA ACADEMIA AND
LEGAL WRITING SOCIETY(UNILAW)



EDITOR'S NOTE



The ADVOCATUS is the University of Lusaka Academia and Legal Writing Society's (UNILAW) student-led, and premium peer-reviewed newsletter. It contains legal articles written and submitted to its student-led editorial board by the University of Lusaka LLB students in all modes of study.

The second edition of the ADVOCATUS newsletter contains articles whose core subjects are: SMEs in Zambia and its regulatory framework, the Ministry of Green Economy and Environment, Sustainable Development Goals and how SMEs can survive under green economy, the law on witchcraft, a discourse on indecent curiosity in Zambia, and laws that have minors at their concern.

On behalf of the editorial board, I would like to pass my gratitude to Mr. Dickson Jere for according us time and opportunity to have him feature in this edition. I would like to thank the school management for their countless efforts in building us into productive citizens. This is indeed the best University to be at. I would like to pass my gratitude to all the Students who took time to submit their articles to the UNILAW editorial board. This newsletter would not have life if not for their participation

Yours faithfully

Davison Mwale



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BARRIERS TO ACCESS TO JUSTICE AND ITS IMPACT ON RIGHT TO JUSTICE IN ZAMBIA



LAMECK MUNKANTA

INTRODUCTION

The respect, enjoyment and protection of human rights is usually guaranteed by the availability of effective judicial remedies. This entails that where there has been a violation of human rights, access to justice plays an important and fundamental role in the life of an injured person in seeking recourse. In other words, access to justice acts as an essential component of the system of protection and enforcement of human rights. Access to justice can therefore be defined as, the ability of a person to seek and obtain a remedy through formal or informal institutions of justice in conformity with human rights standards.^[1] This can be seen under **Article 8^[2] of the Universal Declaration of Human Rights**, which confers everyone with the right to an effective remedy for the act of violation of fundamental rights. However, where there are barriers to access to justice, human rights enjoyment and protection are negatively affected, among which, is the right to justice. Therefore, this article aims at discussing the barriers to access to justice that negatively impact the full enjoyment and protection of the right to justice in Zambia, these include; the mechanisms of the Judicial system, illiteracy and poverty and inadequate legal aid. Further, it will provide remedies to the said barriers.

MECHANISMS OF THE JUDICIAL SYSTEM

^[1] Francioni F. Access to Justice as a Human Right, Oxford University Press, 2007

^[2] Universal Declaration of Human Rights

From the onset, it is imperative to note that justice can be accessed outside the courtroom, however, it is ‘only when individuals ultimately have unhindered access to the courts that they can promote and seek effective protection of their basic rights.’^[3] It is in this regard that the judicial system can be said to play a vital role in access to justice and consequently promotion of the right to justice. Hence, there is a need for effective and efficient operation of the courts. Further, an effective judiciary ensures that the rule of law in the country is promoted this can be done by it conducting checks and balances on both the Executive and the Legislature so that there is compliance with the law. However, it is only when the judiciary is effective that it can achieve such functions. An effective and efficient judiciary has been said to be “one that is independent, impartial, predictable, resolve cases in a reasonable time frame and accessible to the public.”^[4]

In Zambia, the judiciary has been accused by some of the members of the public of not being independent but rather politically manipulated and compromised hence resulting in what can be considered to be impartial and unfair adjudication of justice in most court cases. It has long been speculated that in some politically sensitive cases some judges fail to resist political influence and consequently make politically inclined decisions. This means that in most of these cases judges abdicate their duty to make decisions based on the presented evidence and the law but rather on assumptions in favour of the Executive. An example of this action can be seen in a well known Supreme Court's decision in the case of **Attorney General V Nigel Kalonde Mutuna and Others** where three judges sought an action to challenge the decision by President Micheal Sata of suspending them as well as the establishment of the Tribunal to investigate their suitability for judicial office. In determining the matter, the court stated the following: “...we are satisfied that bearing in mind the authoritative position of His Excellence, it would be illogical and unreasonable to hold that he did not receive credible information as President for him to act as he did. **He is the overall authority on everything.** His sources are exclusive to the public domain and must be impeccable.”^[5]

^[3] Appeal No. 008/2012 [2013] ZMSC 38

^[4] The Mast, Inaugural Lucy Sichone Memorial lecture delivered by Justice Malila, 17 January 2017. Accessed on www.themastonline.com

^[5] Dakolias M “Court Performance Around the World: A Comparative Perspective.” Yale Human Rights and Development Journal, Vol.2, iss 1

This decision by the Supreme Court of considering the president as being the ‘overall authority on everything’ is highly questionable and criticized in terms of its legitimacy. And it can be argued that it does not only contravene the provisions of the country’s Constitution which provide for the three equal arms of government, that is, the Executive, Legislature and Judiciary but also acts as a barrier to access to justice as members of the public will regard the Judiciary as a non-independent body which is influenced by the Executive in its decision making. Hence, desist from seeking redress from the courts, especially on matters relating to the members of the Executive which will in turn negatively affect the full enjoyment and protection of the right to justice.

In addition to this, another aspect of the judicial system which has an impact on the right to justice is its efficiency in the delivery of judgements. **Article 118^[6] of the Constitution** provides that the courts, in the exercise of their judicial authority shall be guided by a number of principles, among which, is that ‘justice shall not be delayed.’ However, despite the constitution providing for such a provision, an evaluation on the framework and hierarchical structure of the Zambian Courts reveals some of the reasons that lead to delays in the delivery of court cases. This includes ‘lack of a mechanism to control, manage and monitor complex litigation as well as appeals due to the hierarchy of the courts.’^[7]

Appeals in most instances have proved to be one of the major causes of delayed judgements. An example can be seen in the case of **Maketo and 7 others v The People^[8]** where the appellants were convicted of manslaughter and on appeal on the sentence, the court opted not to impose or increase the effective prison sentence which the appellant so deserved due to the delay that occurred before the appeal was heard.

Additionally, in the case of **Denis Bwalya v The People^[9]** where the appellant was convicted of forgery and theft of public servants. On appeal the Supreme Court quashed the decision of the trial court, however, this was done when the appellant had already served approximately five years imprisonment.

^[6] Act No.2 of 2016

^[7] T Banda, Access to justice: Court Efficiency in Zambia. Occasional Paper series of Institute for African Development, Cornell University, 2019. Available at <https://saipar.org/wp-content/uploads/2021/11/SAIPAR-FinalPaper-1.pdf>

^[8] (1979) ZR.23 (S.C.)

^[9] (1979) Z.R. 1(S.C)

. This kind of delay can, therefore, arguably be said to prove the adage that ‘justice delayed is justice denied.’ And it is for this reason that it can be argued that delay in the delivery of judgements in court cases acts as a barrier to access to justice and consequently affect the right to justice.

ILLITERACY AND POVERTY

It has been argued that “a key prerequisite to full exercise or enforcement of any right is the knowledge of those rights, that is, what they are and what they entail”.^[10] However, citizens need not only to know their rights but also how and where they can seek redress when they experience the violation of the same rights. Due to lower access to quality levels of education, the majority of the rural population as well as part of the urban population experience a high level of illiteracy which poses the biggest challenge to access to justice. This level of illiteracy usually results in many people in rural areas being intimidated by the formal procedure of the legal system, as they understand and are more aware of their customary laws which are informal and considered to be flexible to meet the needs of the people in a particular area whom it serves. Despite the constitution pursuant to **Article 7^[11]** recognising customary law, the traditional courts are not recognized as part of the Judiciary. Further, many scholars have argued that there have been lower levels of awareness on the availability of formal justice mechanisms as well as on rights, especially in the lives of women and children and the general public and that this, therefore, entails the right to justice is as good as being denied.^[12]

Furthermore, poverty has also been seen to be one of the barriers to access to justice. It has been argued by many scholars as well as legal practitioners that the costs of court proceedings or litigation are quite expensive for the indigent to afford.^[13] This, therefore, makes it difficult for the majority of vulnerable persons to have access to justice as they are unable to meet the cost of legal representation. Hence, affects their full enjoyment and protection of the right to justice.

INADEQUATE LEGAL AID

In Zambia, the law provides for the existence of The Legal Aid Board (LAB) pursuant to the Legal Aid Act, as amended by **Act No.1 of 2021**, as a board which is mandated to provide legal aid to indigent litigants or people who cannot afford to engage a private legal practitioner. Therefore, **Section 5 of the Act** provides for functions of the said Board which includes, *inter alia*, to

^[10] J. Shezongo-Macmillan, ‘Zambia: Justice Sector and Rule of Law’. The Open Society Initiative for Southern Africa, 2013. Available on <https://www.asclibrary.nl/docs/371244099.pdf>

^[11] Supra note (5)

^[12] P Matibini, Access to Justice and the rule of law ^[13] ibid

“administer a comprehensive legal aid system in the Republic that is accessible, effective, impartial and sustainable.”^[14] Legal aid has been considered to be ‘an essential element in administering an efficient and effective justice system’.^[15] However, despite the existence of the LAB with such essential functions in the access to justice, it has been observed that the presence of the Board is limited only in few parts of the country, for example, it only has about ‘ten offices in ten towns of the whole country, that is, Lusaka, Kabwe, Ndola, Kitwe, Mongu, Livingstone, Chipata, Mansa, Solwezi and Kasama.’^[16] This existence shows therefore that legal aid is not easily accessed in many parts of the country hence acting as a barrier to access to justice, especially to those who cannot afford private legal practitioners and consequently affecting the full enjoyment of the right to justice as it was stated by his Lordship Justice Dr Mumba Malila, that “access to justice requires more legal aid services and prepared defence lawyers.”^[17]

In addition to this, research conducted by the Danish Institute for Human Rights has shown that the Zambian Legal Aid Board has **an insufficient number of staff** to provide effective representation of indigents. Hence, the labour turnover of lawyers is very high and there is a need for this challenge to be addressed in order to have effective access to justice. Further, it was also observed that LAB lacks the availability of legal resources and materials which are required in terms of research by lawyers in the exercise of their duties helps.^[18]

RECOMMENDATIONS

In order to curb the said barriers to access to justice, it is important firstly that the judiciary comes up with effective mechanisms to ensure the effective and efficient operation of the courts. This should include; a mechanism to control, manage and monitor complex litigations in order to ensure that cases of delaying in the delivery of judgements and ruling are minimized; to ensure that trust and confidence in the judicial system by the public is reclaimed, this can be done by ensuring that

^[14] Act No.1 of 2021

^[15] O Kaaba, *The Challenges of Accessing Justice in Zambia*, 2015. Available on <https://www.researchgate.net/publication/328830127>

^[16] *ibid*

^[17] *Supra* note (3)

^[18] *Supra* note (10)

judges exercise their functions in a fair and independent manner as conferred on them by the Constitution, without any direct or indirect interference from the Executive branch of government.

Further, in order to reduce levels of illiteracy, there is a need for more awareness to educate people on their rights and how they can be enforced. This can be done either through campaigns or sessions on social media pages, radio stations as well as televisions.

Additionally, with regard to legal aid services, it is important that the government should open up more legal aid offices in almost all towns in the country to enable indigents to access legal services. And more personnel should be employed for example more resident lawyers in all the Legal Aid offices in the country. LAB offices should also be sufficiently funded in order for them to meet their needs and conduct their duties effectively. On other hand, the presence of paralegals should be increased, that is, in Police Stations and Prisons to deal with many aspects of procedural matters as this may enhance access to justice. And more civil society organisations like Up Zambia should be opened to assist in providing legal services to the indigent.

CONCLUSION

In light of the above arguments, it can be concluded that barriers to access to justice has a great negative impact on the full enjoyment and protection of many human rights, which includes the right to justice. Therefore, there is a need for the government, and the judiciary, to implement measures that will enhance access to justice for all and promote the protection and enjoyment of the right to justice regardless of one’s status in life.

THE UNIVERSITY OF LUSAKA PARTICIPATION IN MOOT COMPETITIONS

The Musa Dudhia & Company Inter-University Moot Court Competition

The University participated in the Musa Dudhia & Company Inter-University Moot Court Competition for the second time in 2019. The final round was held on 20 September at the Supreme Court of Zambia. UNILUS was announced as winner of the competition, with Nkole Catia, a fourth Year, first Semester student being awarded the prize for ‘best orator’.



Writing is a paramount skill in the legal profession. Prior to any oral arguments, an advocate of the court of law is obliged to present his or her written brief before the honorable judges. It is from this very brief that his oral argument is solely based. For this reason, the advocate must ensure that his or her submitted brief has correct grammar, punctuations, etc. Having a wrong punctuation in a writing changes the meaning of the message one intends to pass. For this reason, one must ensure that all is correctly written.

This society has as one of its goals, among others, to help law students become exceptional writers.

The University of Lusaka Academia and Legal Writing Society (UNILAW) is composed of the Executive and Editorial board both vested with differentiated functions aimed at achieving one end goal.

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ELIMINATION OF DOUBLE TAXATION: A CONTRIVANCE TO FOSTER FOREIGN DIRECT INVESTMENT IN ZAMBIA.



RYAN MBULA

INTRODUCTION

The term foreign direct investment (herein referred to as FDI) can be said to mean investment by a party from a particular state into a business or corporation in another state. It is considered a cross-border investment in which an investor resident in one state establishes a lasting interest in another state. FDI is increasingly being spread across the globe because of the benefits that it confers on a state. Most legal scholars have as such argued that the development of a state's economic sector is largely dependent upon the acceptance of FDI. A practical example beyond our jurisdiction is Kunshan, a city in China. Prior to the acceptance of FDI, Kunshan was considered an impoverished area. Today the city has been recognized as one of the best world-class information technology (IT) centres by virtue of accepting FDI from Taiwan.^[1] There exists in Taiwan a Taiwanese electronics manufacturing company called **Pegatron Corporation**. Pegatron is Apple's second-largest contract manufacturer.^[2] Kunshan hence accepted FDI from Taiwan and today Kunshan is well known for assembling iPhones manufactured in Taiwan.^[3] This, therefore, shows how important FDI can be once accepted by a country.

^[1] <https://www.tandfonline.com/doi/full/10.1080/09654310903491564><accessed on the 7th of September 2022 at 19:37

^[2] <https://www.indiatvnews.com/business/news-apple-iphone-pegatron-second-largest-contract-manufacturer-approves-investment-make-in-india-667122><accessed on the 7th of September 2022 at 20:07

^[3] <https://www.verdict.co.uk/new-luxshare-plant-in-china-upsetting-the-apple-supply-chain-applecart/>

There are a number of natural resources that Zambia as a country is endowed with but however lacks capital like most developing states. It has hence embraced the notion of FDI to a larger extent. It has further opened up its markets by taking up the free market approach with regards to FDI. It is however notable that Zambia faces a challenge with investors when it comes to setting investment in Zambia. Some have argued that it is as a result of political affiliated reasons while some have argued that it is as a result of how our Zambian laws have been laid down. There's been a number of instances in which we have witnessed the Zambian government calling upon foreign investors in order for them to invest in Zambia something which they should naturally do because of the number of resources Zambia has. One of the most recent events is the one where the Minister of Labour and Social Security on the 11th of May, 2022 called on investors to consider Zambia the best investment destination.^[4] Political, legal and other reasons led to these investors refraining from coming to Zambia is something that would have to be looked at in depth. Central to the discussion of this article however is the enlightenment on the need for elimination of double taxation as means of attracting these investors. International double taxation occurs when two or more states impose taxes on the same taxpayer for the same subject matter. The general rule of tax law is that all income must be subjected to tax. The rationale underlying this rule is that a state must benefit from persons who are allowed to generate income from that state and also benefit from those considered residents in that state. Taxing individuals on their income serves as a viable contribution to government revenue.

All states exercise discretionary powers in the determination of what would amount to income and therefore taxable. The **Income tax Act** (hereinafter referred to as the Act)^[5] is the main piece of legislation that governs tax law in Zambia. **Section 17** of the Act attempts to lay down that which is classified as income and is further Supplemented by the first schedule of the Act.

^[4] Cap323

^[5] <https://www.moneyfmzambia.com/2022/05/11/zambia-is-becoming-more-attractive-for-investment-government/>

Most investors in Zambia usually set up investments as entities or corporations. Some usually set up subsidiary companies here in Zambia while their parent company is in their home state while others from scratch set up parent companies here in Zambia. Be it a Subsidiary or parent company, the **Companies Act** under **Section 16**^[6] provides that all companies registered under the act acquire a separate legal status and shall continue to exist as a corporate until it is removed from the Register of Companies. This was the legal principle that was espoused by the court in the celebrated case of **Salomon v A Salomon**^[7] which emphasized that a company is in the eyes of the law a legal person separate from those that constitute and can as such enter into contracts, sue and also be sued in its own capacity. A company being a legal person at law is, therefore, liable to tax regardless of whether it is owned by either local or foreign investors.

The effects of double taxation on foreign investors have been a major drawback and also one that can be considered a disincentive to the facilitation of investment in Zambia. Despite the availability of resources, market and demand in the country, most foreign investors have still refrained from investing in Zambia. To begin with, it can be noted that double taxation will occur firstly within the country when the profits or income of a corporation is taxed both to the corporation and to its shareholders when distributed as a dividend.^[8] That received by shareholders can be taxed too for tax purposes even though in essence it is the same income it will still be taxed in the hands of two taxpayers thereby leading to double taxation. Investors interested in yielding profits from a state will therefore analyse the profits and loss, taking into account also the tax laws of a state and deciding whether or not to invest in the country. Double taxation will further arise in a situation where an investor is taxed in their home state as well as the host state. **Section 14 of the Income Tax Act** imposes a charge of tax on income received from a source within Zambia and as such all income derived from Zambia will be subjected to tax based on the source principle that Zambia utilizes to a larger extent. Although no country purely relies on the residence-based principle,^[9] a situation can arise leading to double taxation if there exists an investor who comes from a country that embraces the residence principle and deems such an investor as resident therein perhaps through the application of the facts and circumstances test. Such an investor if decides to set up investment in Zambia will be

^[6] <https://www.elibrary.imf.org/view/book/9781513511771/ch007.xml>

^[7] No 10 of 2017

^[8] [1897] AC 22

^[9] <https://irwinlaw.com/cold/economic-double-taxation/text=Economic%20double%20taxation%20dividend>.

taxed following the source principle that Zambia has adopted thereby leading to a situation of double taxation. In such circumstances, it will be difficult for most investors coming from countries of residence to set up investments taking into circumstances the tax liability that will accrue to them.

Government should hence consider the elimination of double taxation if they are to attract investors into the country. Eliminating double taxation will automatically draw investors to the country and instead of calling upon investors, investors by themselves will be inclined to plead with the government to allow them to establish an investment in Zambia. One way of eliminating double taxation is the entry into double taxation agreements with the home states of foreign investors. It is not possible to enter into double taxation agreements with all states and as such entry into such agreements should be strategic. Of course, the country cannot guess and predict which states will have potential investors for purposes of entering into a DTA but this is something that requires some proper calculation and planning. It is not in dispute that Zambia is rich in minerals and as such its comparative advantage remains the same minerals that it exports to other countries. In the year 2018, the World Bank published an article in which it asserted that Zambia is among the top 10 countries in Africa endowed with natural resources as per the World Bank's Changing Wealth of Nations 2018.^[10] It however still lacks investors in the mining sector that would enable it to process these minerals. Zambia can hence analyse and carry out an investigation on which countries specialize in the processing of natural resources and enter into DTA with them. In the year 2020, it was on record that the top importers of copper were china which spent over 33.4 billion dollars on the importation of copper and the others were Japan(8.51B), South Korea(4.22B), Germany(2.03B) and Spain(1.8B).^[11] among these countries, Zambia has entered into DTA with China, Germany and Japan.^[12] It however, can be argued that even though the DTAs between these countries are still in force, most foreign investors originate from china as only a selected few are from Germany and Japan. The current government can take a positive step in ensuring that they get into double taxation agreements with other large copper importers like South Korea and Spain and also familiarize themselves with the tax laws of those states to ensure that a befitting DTA is entered into and it is effective enough to attract investors from these states.

^[10] Ivailo Izvorski - Souleymane Coulibaly, Rein vigorating Growth in Resource-Rich Sub-Saharan Africa (World Bank Group) 2018

^[11] [https://oec.world/en/profile/hs/copper-ore#:~:text=Historical%20Data&text=In%202020%2C%20the%20top%20importers.and%20Spain%20\(%241.8B\)](https://oec.world/en/profile/hs/copper-ore#:~:text=Historical%20Data&text=In%202020%2C%20the%20top%20importers.and%20Spain%20(%241.8B)).

^[12] <https://www.zra.org.zm/download/double-taxation-agreement-rates/#>

In seeking to eliminate Double Taxation, the government can also consider putting in place laws that will provide for investors setting up investment in the country as partnerships. As opposed to setting up foreign companies as investment in the country, investors should be advised or encouraged to set up partnership firms. Setting up companies and corporations will lead to investors undergoing a situation of double taxation as they will be required to pay corporate tax and also that which is distributed to them as dividends will be taxed in their own hands. The court in the case of *Scirocco Enterprises Limited v Kafue District Council and Attorney General*^[13] in defining the meaning of Double Taxation adopted the definition given in Black's Law Dictionary by Bryan A Garner who defined it as "*The imposition of two taxes on one corporate profit*". Double taxation is hence expected to most likely occur when these investors set up investment themselves as companies. The Authors of Business Accounting Joe Ben Hoyle and C. J. Skender, stated that as opposed to a corporation which is a separate legal person, partnerships on the other hand are not subject to the same double taxation effect as corporations hence the owners save money.^[14] The Zambia revenue Authority also recently published an article in which they stated that the **Income Tax Act** does not recognize a Partnership as a distinct taxable person. For this reason, a partnership is not chargeable to tax, but each partner is taxed individually.^[15] Individuals, therefore, setting up investments as partnerships will only be liable to pay tax in their own capacity as there is nothing like corporate income to be taxed as with a company. Emphasis must however be made that though the elimination of a DTA agreement is a great tool in the attraction of Foreign direct investment, the government on the other hand must ensure that they put in place measures that will maximize the benefits of FDI. Investors can come, set up investment and expect profits from their investment but if it is noticed that there are a number of setbacks consequently leading to losses then such investors will be demotivated and be forced to close down. Mr John Gladston, head of government affairs for first quantum minerals^[16] issued a statement stating "We have every intention of making Zambia reclaim its rightful position as Africa's number one copper producer.

^[13] <https://zimeczambia.com/speaker/john-gladstone/>

^[14] (Appeal 60 of 2011) [2012] ZMSC 85 (03 August 2012)

^[15] Joe Ben Hoyle and C. J. Skender Business Accounting (Volume 2) P. 946

^[16] <https://www.zra.org.zm/wp-content/uploads/2021/08/Taxation-of-partnership-business.pdf>

And I think that is entirely achievable,"^[17] he further stated that restoring Zambia as Africa's number one copper producer is key to attracting foreign direct investment but the challenge remains the current high electricity tariffs which do not reflect the underlying production cost, and that reforms were needed to improve the operational efficiency of national electricity utility ZESCO.^[18] First quantum minerals is a Canadian company whose principal activities include mineral exploration, development and mining and Its main product is copper something which is a Zambia's comparative advantage. Zambia entered into a DTA with Canada to facilitate investment hence therefore we see the coming into the picture of first quantum which has operated closely with the mining sector in Zambia. It however makes notable observations on the challenges that hinder investment and among them being the high electricity tariffs and low supply of electricity something that is needed in the mining sector. Zambia can hence enter a number of DTAs but if it does not provide the investors with the resources they need then development will still be a mystery and a theory which cannot be actualized in practice.

^[17] <https://www.miningreview.com/top-stories/zambia-reclaim-title-africas-top-copper-producer/>

^[18] ibid

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EMANCIPATION OF MINORS IN ZAMBIA



ALBERT
MWABA

INTRODUCTION

Today in Zambia with the increase of independent minors supporting themselves, a question arises as to whether they ought to be emancipated at an early stage, taking into consideration their sufficient maturity prior to their legally recognized age. Seeing as this is the case, one wonders what is required for the successful emancipation of that child?

Emancipation is defined as the legal authority of releasing a juvenile out of the custody of his/her parents (also called “divorce from parents”) upon that child being self-independent, married, enlisted in the military service or having attained the legal age applicable in the Republic of Zambia, providing the juvenile/child with rights and responsibilities of their own. ^[1]

WHO IS A JUVANILE?

According to **Section 2 of the Juveniles Act** ^[2], a juvenile has been defined to be a person who has not attained the age of nineteen including a young person and a child, the latter being defined under the same section as one below the age of sixteen. On the other side of the coin, we have **Article 1 of the Convention on the Rights of The Child** ^[3] which provides that ‘for purposes of the present Convention, a child is every human being below the age of eighteen unless, under the law applicable to the child, a majority is attained earlier.’

The essence of emancipation is to release a Child/Juvenile(minor hereinafter) from the parent or guardians' care, to be treated as an adult although still under the legal age as provided for by **Article 266 of the Constitution of Zambia**^[4] recognizing a child to be a child below the age of nineteen years which as it stands is the recognized supreme law of the Republic of Zambia, the issue then arising is that above what age can a minor be legally emancipated, and how then does the court approach such issue seeing that **Article 3 of the Convention on the Rights of the Child** provides that ‘For in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of a child shall be the primary consideration.’ This proviso has been applied in many Zambian divorce cases such as the case of **Mponda v Mponda**^[5] concerning parental custody of a child, however, draw to attention the words stated in the proviso ‘In all actions concerning children,’ in the literal interpretation of this proviso, this is applicable to all cases of a child including where a child seeks to get a declaration of emancipation from the judge through a court order which can only be granted upon proof of certain requirements being met by the said minor some of which are;

A child is not of tender years. According to **Section 122 of the Juveniles (Amendment) Act**, this act provides for a Juvenile witness who it is at the age of fourteen or above is (1) *to be allowed to give sworn evidence, this proviso is for the purpose that one who is fourteen or above understands the nature of an oath and is of sufficient intelligence to justify the reception of the evidence. Breaking down these two words ‘Tender Years’ the word tender means young and inexperienced, therefore the court in cases of emancipation have to be satisfied that the child in Zambia is above the age of thirteen years old with sufficient maturity and that;* (2) *He/ She desires to be emancipated from the parents with their consent for reason being that; The Minor can solely support himself/herself having secured a legal job or means of creating income are recognised legal and that he/she has sufficient intelligence.*

In Zambia as already stated above, a child in court can be emancipated or divorced

^[1] <https://www.findlaw.com/family/emancipation-of-minors/automatic-emancipation-of-minors.html>

^[2] Chapter 53 of the Laws of Zambia

^[3] Convention on the rights of the children

^[4] The Constitution (Amendment) Act No. 2 of 2016

^[5] (2018) ZMSC 350

from the parents/guardians upon the court being satisfied that he/she is independent with sufficient maturity, a child can also be emancipated automatically in other instances such as simply attaining the legal age recognized under the constitution (Amendment) Act, through marriage and by being enlisted in the military service.

Lord Penzance in the 1866 English case of **Hyde v Hyde**^[67] defined marriage to be the union of two persons male and female to the exclusion of others for eternity. In Zambia however to clear the error of presumptions of marriages, as held in the case of **Fenias Mafemba v Sitali**^[27] The presumption of marriage is not legally recognized or rather cohabitation does not amount to marriage in Zambia.

MARRIAGE

In Zambia, marriage can either be statutory or customary law marriage; **Part II of the Marriage Act** ^[8] provides for the preliminaries to marriage, Part III provides for when consent is to be obtained and other alternatives of consent where due to certain circumstances parental consent is not obtained and Part IV provides for the solemnization of a marriage which all stated have to be complied with for a valid marriage. The marriage act section 33(1) provides that marriage must be between persons above the age of fifteen which differs from Customary law marriages which under the practice observed in **Munalo v Vengesai**^[27] is a marriage conducted in accordance with a specific tribe. Under Customary Law, the marriage of persons under the age of sixteen is not prohibited for in practice what is taken into consideration is the puberty of the female and independence of the male. ^[10]

Marriage then with all being stated is a contract which provides for a child departing from the parents for the sole purpose of cohabiting with the spouse, Lord Penzance stated it to be of the exclusion of others which includes the parents hence marriage is an automatic way of the emancipation of children from their parents. The third recognized automatic way of the emancipation of children is where they have obtained parental consent to be enlisted in the military service, **Section 14(2) of the Defence Act** ^[11]

^[6] Ir 1 PD 130

^[7] (2007) ZR 215 SC

^[8] Cap 50 of the laws of Zambia

^[9] (1974) Z.R.201

^[10] https://www.equalitynow.org/discriminatory_law/zambia_the_marriage_act/

^[11] Chapter 106

provides for a recruiting officer not to enlist a person under the age of eighteen years old unless parental consent has been obtained. It further has been elucidated in the case of **Bishop v Bishop**^[12] which was an American case that the general rule is that a child is emancipated from his parents once he enters the military service reason being that the minor is then under the control of the government which is inconsistent with the parent's control.

CONCLUSION

Emancipation of children in Zambia has advantages and disadvantages for both the minor and the parents/guardians however where a minor seeks to be emancipated he/she ought to be emancipated and where there are other recognized situations of automatic emancipation with the parental consent that child then is emancipated.

In my own view, the Republic of Zambia must extend on the emancipation of Children to also include Children who due to their parents denying that which is foreseeable to bring the child great fortune i.e for his/her own best interests, they must be allowed to be emancipated unless proven that the child is not of sufficient maturity and that it's not in the child's best interest to be emancipated.

Emancipation allows minor new rights and responsibilities such as independent decision-making (without parental consent);

- i. To select the place of residence
- ii. To enter into contracts and or leases
- iii. To buy or sell property
- iv. To attend school of their choice
- v. To be medically treated and;
- vi. To get married

However, these rights and many more not disclosed are still subject to all the laws that govern the Republic of Zambia hence if a minor is contrary to any of the laws of Zambia he/she is to be tried before the courts of the law taking into consideration of the offender/accused being a juvenile. Not to mention the legally recognized age is required for certain rights to be applied such as the right to drive and to vote as well as the right to obtain a liquor licence. ^[13]

Therefore always note that emancipation does not make every right applicable or excuse a minor from the laws of a country but simply just ensures that the minor's parents recognize such child as an adult as well as the country.

^[12] (1995) 287 N.J Super. 593

^[13] <https://www.findlaw.com/family/emancipation-of-minors/automatic-emancipation-of-minors.html>

SECTION 137(3) OF THE PENAL CODE: INDECENT CURIOSITY



LUMBWE
 MWEVA

INTRODUCTION

For instance, a man at the age of twenty-seven years saunters over to the bathroom in his home and decides to surreptitiously peer through the door, where he is of the full knowledge that a woman is taking a bath. Astonishingly, he fully intends to watch her as she takes her bath. Thereafter, he is apprehended by police and charged with what is termed as ‘indecent curiosity as expressly prohibited under **Sub-section three (3) of Section one-hundred and thirty-seven (137) of the Penal Code.**^[1] As per the Lusaka Times, this was the shocking story of a man who, at the time, was residing in Gwembe Township and unlawfully, yet wilfully, secretly watched his uncle’s wife take a bath and had been known to have done it so many times before.^[2] It was on this one occasion that she finally made the decision to report the matter to the police. With this introductory scenario, it is this article’s aim to fully scrutinize the offence of ‘indecent curiosity. It goes without saying that this act is obviously morally wrong, many people seem to be ignorant of the same, and it is prohibited by law under the **Penal Code Act**. The commission of indecent curiosity is stated to be “found in any building or dwelling house, or in any veranda or passage, or in any yard, garden or another land adjacent to or within the

curtilage of such building or dwelling house not being a public place for the purpose of and from the motives of... gazing at or observing any woman or girl who may therein be in a state of undress or semi-undressed”.^[3] A publication in the Medical Journal of Zambia sampled this definition and listed the offence as one of the types of sexual abuse.^[4] It is rather interesting to note that the Act expressly specifies that this offence can only be committed against a girl or a woman. A man or a boy therefore cannot be a victim of indecent curiosity, whether it is committed by another man or woman with the same intentions stated in the Penal Code, or whether they too are undressed or semi-dressed.

Further, in order to understand the offence in much greater depth, **Section 137(3)**^[5] must be read wholly as opposed to partly. Part (b) of this sub-section adds on to say that the offence is committed with the intent to annoy or indecently insult any woman or girl.^[6] To borrow an interpretation from foreign jurisdictions, ‘intent to indecently insult’ could speak to offending a person’s privacy or personal integrity,^[7] thus satisfying both elements of the crime. To put the wording of the Act differently, the indecent observation of any girl or female who is undressed or underdressed, with the ill intention of indecently insulting her, annoying, or offending her personal integrity can be said to define ‘indecent curiosity. This is a rather debatable term to define as it is clear that in the age of today, what is considered ‘indecent’ varies from culture to culture, from community to community, or even from personal opinion to personal opinion. The Zambian jurisdiction does nothing to define what such a term constitutes for the purposes of defining the offence. In the New Zealand case of **Rowe v R**^[8], the courts learnedly opined that the term ‘indecent’ is to be determined by reference to community standards. The brief facts were that a man was caught seemingly secretly taking photographs of young girls in swimming attire as they were at the beach. But because the girls were neither undressed nor underdressed, the man was not convicted.

^[1] Penal Code Act, s 137(3) (a) ^[2] ‘Police arrest and charge a man with indecent curiosity’ Lusaka Times (Lusaka, 18th October 2012) <<https://www.lusakatimes.com/2012/10/18/police-arrest-charge-manindecentcuriosity/>> accessed 24th August 2022

^[3] Penal Code Act, s 137(3) (a)

^[4] C Kamuwanga and CM Ngoma, ‘Perceptions of Child Sexual Abuse Among Convicted Prisoners in Zambia’ (2015) 42 Medical Journal of Zambia 139

^[5] Penal Code Act s 137(3) (b)

^[7] R v Price [1919] GLR 410

^[8] Rowe v R [2017] NZCA 316

In a Zambian setting and within the context of indecent curiosity, one may wonder, to what extent must a woman or girl's body be covered before she is considered 'decent'? If this girl or woman was to secretly be observed, by how much would her body need to be underdressed for the conditions of the offence to be satisfied? The courts in this case profoundly questioned whether the particular subject matter would have a tendency to offend a reasonable and recognised standard of decency that reasonable members of a community ought to impose.^[9] If the answer to this is "yes," then it is considered indecent.

A similar opinion from **R v Rowley**^[10] took the meaning of 'indecent' to mean actions "of a lewd, obscene and disgusting nature and outraging public decency." This definition is arguably fitting if one was to define the word 'indecent' within the meaning of the offence of indecent curiosity. It can safely be said, therefore, that if a woman or girl was to be dressed in such a way that if she was to be secretly watched or observed, it would offend herself or be contrary to the community standards of what is considered 'decent,' then it could satisfy the meaning of "indecently insult" as used in the Penal Code.

PROSECUTION OF THE OFFENCE

It is daunting to learn that so far, Zambian case law is deficient in terms of the offence of indecent curiosity, hence the need to borrow definitions and interpretations from other jurisdictions. It has been made difficult to fully understand the offence and the way in which the courts might interpret it. On the face of it, the law appears to be clear and straightforward. Conversely, the reality of enforcement is something different. ^[11]

Sure enough, there have been a plethora of charges, however, no convictions. It is as if the offence is not taken seriously. This opinion may be formed when reading the countless newspaper articles or hearing a concerning number of stories in which the offence is committed against another, yet none of the perpetrators is seen to be tried in court, or rather the trite phrase "yet to appear in court"^[12]

^[9] Sydney G Mula, 'A Critical Analysis of The Current Law on Offences Against Morality in Zambia' (LLB Thesis, Cavendish University 2020)

^[10] 'A 36-year-old man Formally Arrested After Gazing At Girls Who Were Bathing Outside in Kasama' (Zambian Observer 6th November 2021) < <https://zambianobserver.com/a-36-year-old-man-formally-arrested-after-gazing-at-girls-who-were-bathing-outside-in-kasama/>> date accessed 24th August 2022

which would instead fill the general public with pessimistic expectations if they were to ponder the seriousness of the offence. It is of utmost importance that any person who commits this offence is tried in the courts of law so as to awaken the public to the seriousness of the offence as well as to educate those who may not even know that this is indeed a crime that has been committed against them. In any case, it is yet to be seen just how far one is able to put their trust in the Judiciary if the offence is to ever be committed against them.

CONCLUSION

The offence of "indecent curiosity" is one that is not known by many to be expressly prohibited by the **Penal Code Act**. It can be defined as the indecent observation of any girl or female who is undressed or underdressed, with the ill intention of indecently insulting her, annoying, or offending her personal integrity. Despite the many instances in which the offence is committed, the Zambian courts are far too relaxed in taking the appropriate measures. It is the author's view that there must be an immediate change as any type of sexual offence must not be taken lightly.

THE UNIVERSITY OF LUSAKA PARTICIPATION IN MOOT COMPETITIONS

The Musa Dudhia & Company Inter-University Moot Court Competition

After being crowned winners of the 2019 moot court competition, in 2020 the school participated in the same competition and UNILUS was announced winner of the competition, with Isaac Musungilo being awarded the prize for 'best orator'



Link to UNILAW website:
<https://undergrad.unilus.app/law/>

THE ADVOCATUS

UNIVERSITY OF LUSAKA STUDENT COUNSELLOR'S OFFICE

notice to unilus students:

Office of the student counsellor at leopards hill campus is located near to the legal aid clinic office on ground level.

MRS CHOLA
 UNIVERSITY OF LUSAKA STUDENT
 COUNSELLOR



Mrs. Chola holds a BA in psychology from UNZA and an Msc in Foundation of Clinical Psychology from University of Southampton. She is a student counsellor at UNILUS

WHAT IS THE STUDENT COUNSELLING OFFICE ALL ABOUT? WHAT DOES IT DO?

“Right now it is functioning in many capacities, but yes it is for counselling as the main purpose. It provides counselling on many issues which include; psycho-social issues, guidance, career issues, and mental health, it is also a minor sick bay it helps people with minor helmets, like headaches. It is also responsible for facilitating extra curriculum activities for those in societies, associations and sports by channeling their memos or applications and ensuring that the activities work well.”

WHO CAN ACCESS COUNSELLING SERVICES AND IN WHAT SITUATION OR CIRCUMSTANCES?

“Any student can access counselling services. It is open for all students, different modes of study, be it full-time, part-time or distance, and for all years of study.”

“Circumstances in which one may need counselling include; psycho-social problems, relationship problems, career concerns, and mental health issues. The category is broad hence it can be said that all psycho-social challenges and guidance issues.”

HOW CAN ONE ACCESS COUNSELLING?

“All they need is to come through to the office, sometimes by appointment, due to some demands, but sometimes when someone feels completely overwhelmed, I do attend to them as a psychological emergency. Hence, a person can just come and ask if am available and I will be able to attend to them if not, we will make an appointment at the time that will be favourable to both of us.”

HOW RELEVANT OR IMPORTANT IS STUDENT COUNSELLING AT THE UNIVERSITY?

“It is very relevant, a student’s life is full of many issues and challenges, it is full of freedom and with freedom comes a lot of responsibilities, it comes with a lot of pressure, most students fail to handle the freedom,

WHAT INSPIRED YOU TO BE A STUDENT COUNSELLOR?

“I have a passion for helping people, I studied psychology, and when the opportunity came to be a student counsellor at the University of Lusaka, I applied for the job because of my passion to help young people. Hence, it is the passion that inspired me to become a student counsellor. I did clinical psychology at the master's level and even though my field is very broad, it can be applied in many aspects, I still use the skills either way.”

HOW DO YOU MANAGE TO CARRY OTHER PEOPLE'S BURDENS?

“Well, it is not easy but I am trained for it. There is training involved. We learn to separate work from private life. But that being said, it is a demanding job but I make it a habit with my passion for caring. Sometimes I need time after talking to people to unwind to ensure that I separate myself from all the issues because some of the things may be quite heavy but I unwind and let it go. We also talk with my colleagues in practice; counsellors, and therapists, of course not about the cases but just our own issues so that we are not heavily laid down. We talk so that we get help for ourselves as much as we listen to other people.”

hence there is need for help and support which can be acquired through counselling. Besides freedom and other issues, is academic pressure, which makes counselling even more relevant as students need help and support in their academic journey. University life comes with a lot of academic pressure and many times students fail to handle it well. Others are worried even as they begin the semester as to whether they made the right decision in the first place to do the program they are pursuing and as they realise, the pressure keeps on mounting and consequently they end up failing a course and become frustrated about it.”

“To others failure may not come due to the above reason, however, it still exerts a certain impact that many students fail to handle and only counselling may be a solution.”

“Additionally, students face many other challenges besides school which could be at their boarding houses, relationships, challenges at home, or finances, all that pressure can make their lives really hard in their studies and hence makes it more relevant to seek counselling as a way of support.”

HOW OFTEN DO STUDENTS VISIT THE OFFICE?

“On average three times a week, that is just an average but sometimes more students come, sometimes few people come and in certain instances none. However, it is not okay for students out there who need help to shun seeking counselling. Otherwise, it will be ideal if many can come through for help.”

HOW SAFE IS THE INFORMATION SHARED BY STUDENTS IN TERMS OF CONFIDENTIALITY?

“The information which is shared is very safe, there is utmost confidentiality hence students need not worry. We are trying to move to be a more professional counselling service, such as signing consent forms, so that students can know that there is the utmost practice of confidentiality. Nonetheless, students who come for counselling are assured that the office is a safe space, and that the information being shared is confidential.”

“The only time confidentiality may be broken is when one wants to harm themselves, or others but even in such circumstances, consent is still sought from them. The person informed that the information told may need at least to be shared with someone, hence it will be a joint process. Nonetheless, it is to be noted that many issues that students bring end here, hence confidentiality is highly observed.”

WHAT ARE SOME OF THE CHALLENGES, IF ANY, THAT YOU FACE AS A STUDENT COUNSELLOR?

“Time management, sometimes the issues that students bring are a bit heavy and hence take longer time than usual.

The standard practice is that counselling should take an hour but sometimes I go beyond, looking at the issue at hand which may require more time, for I cannot let someone go without receiving the help that they need or without equipping them with the skills that they may use to resolve their problems. Furthermore, I need more people to come through so that we can help each other to come up with solutions to their problems. Many are not aware of my office, this goes to all students, including senior students. I am more than willing to provide support with all you need is to be free and come through to my office.”

WHAT IS THE BIGGEST MYTH ABOUT COUNSELLING?

“People think counselling is a piece of advice, and because of that, they think they can acquire it from anyone and hence no need to see a counsellor. However, what should be understood is that counselling is not advice, it goes beyond advice. It is a different professional exercise which comes with a lot of responsibilities, it requires both parties to be involved, trying to work together to come up with a solution to the problem. It requires active participation; a person needs to be an active participant. And when it comes to mental health issues it even becomes deeper, more skills are employed; trying to know what thoughts are going through someone’s mind and how best they can be improved.”

WHAT ARE SOME OF THE FUTURE PLANS THAT YOU HAVE AS A STUDENT COUNSELLOR?

“Working closely with UNILUS safe space as they are currently pushing the agenda of mental health, hence working closely with them to push an agenda in ensuring that many students are aware of my office, also to improve their mental health in general. Ensuring that students are more aware of the issues affecting them, taking care of themselves more and also visiting my office so that they can acquire more skills. Further, it is the plan of my office to come up with more forms because in many instances students come but in some situations, I cannot go beyond counselling, for example, there are those that may require the giving of therapy hence the need for a system to be referring them to mental health practices, therapy centres so that they can even be helped more.”

“Word of advice: With all being said, it is important for students to know that mental health is really a big issue, and many are prone to it. Many things may be a cause which may include relationships, depending on how they are handled, financial stress, academic stress and interpersonal relationship with families and friends. Hence, there is a need to be aware that mental distress is real, it may not be a mental illness but distress itself which needs a solution and coming for counselling will make it easy to come up with a solution and skill that can even be applied in similar circumstances in future. Students need not be discouraged or scared to open up whenever they are faced with the above-mentioned situations or circumstances for as a student counsellor, I am more than willing to help and support them.”

THE ADVOCATUS

WITCHES GET STITCHES: ANALYZING THE LEGAL FRAMEWORK OF THE WITCHCRAFT ACT, CAP 90 OF THE LAWS OF ZAMBIA



YAIMAN BANDE

INTRODUCTION

Kondwani Kaira, a Zambian musician popularly known as ‘Chef 187’, once said that: ‘In Zambia, material success is often seen as a sign of witchcraft. Hence, work hard until they call you a Satanist.’ The practice of witchcraft in modern-day Zambia is time and again looked at with disdain and protest. But there lies mischief in the question: what exactly is witchcraft? It is no surprise that the courts of law have had to fight tooth and nail with criminals who often clothe themselves under the guise of witch hunts. Therefore and that being the case, this writing attempts to critique the legal framework that governs alleged witchcraft practices in Zambia and also advocates for reformation of the Act to make it more fitting for the legal needs of modern Zambian society.

ORIGINS

Understanding the legal ramifications of witchcraft practices has to begin firstly with an analysis of its origins. According to **section 2 of the Witchcraft Act**^[1], the term ‘witchcraft’ is defined as including ‘the throwing of bones, the use of charms and any other means, process or device adopted in the practice of witchcraft or sorcery.’ Clearly, this definition is not helpful as it does not disclose what exactly ‘the practice of witchcraft or sorcery’ entails. Hence, reference has to be made to other literature. **Black’s Dictionary of Law**^[2]

defines the term as ‘the practices of a witch, especially in black magic; sorcery. The definition then goes on to give a brief history of the origins by saying that, ‘Under the Witchcraft Act of 1541 and the Witchcraft Act of 1603, witchcraft was a felony punishable by death without the benefit of clergy. These acts were repealed in 1736, and the last execution in England for witchcraft occurred in 1716.’^[3] In the United Kingdom, the Witchcraft Act was repealed in 1951 by the Fraudulent Mediums Act, which in turn was also repealed in 2008. Having been colonized by the British, Zambia appears to have adopted the same archaic approach as its colonial master. Although the laws are somewhat more relaxed (i.e. no one convicted of practicing witchcraft can be sentenced to death), the same problems that adjudicators faced nearly three centuries ago are still ripe up to this day. One of these problems which will now be considered is applying the laws of evidence in proving the practice of witchcraft, let alone its existence.

The Law of Evidence and the Witchcraft Act

The preamble of the **Witchcraft Act** gives the intents and purposes of its enactment. It stipulates that, ‘an Act to provide for penalties for the practice of witchcraft; and to provide for matters incidental to or connected therewith.’ **Section 6 of the Witchcraft Act**^[4] provides for acts that constitute practice of witchcraft. These come into three categories: The first includes the exercise of witchcraft through supernatural means to attempt to discover where and in what manner property alleged to have been stolen may be found or to name or indicate another person as the thief. The second includes an attempt to discover whether or not a person has committed any crime or any other act complained of. Then after that, causing to be administered to that person with or without his consent any emetic or purgative or apply or cause to be applied to any person with or without his consent the boiling water test. Under section 2 of the Act, the boiling water test is defined as ‘the dipping into boiling water of the limbs or any portion of the body of a person.’ The last category prohibits the instigating, directing, controlling or presiding at the doing of any of the aforementioned acts.

^[3] *ibid*

^[4] *Supra* note 1

^[1] Chapter 90 of the Laws of Zambia

^[2] B. Garner, *Black’s Law Dictionary*(8thedn, West Publishing Co 2004)1631

Under **Article 18(2) (a) of the Constitution of Zambia** ^[5], all persons charged with a criminal offence are presumed to be innocent until proved or pleaded guilty. It, therefore, follows that from the holding of **Mwewa Muroño v The People**^[6] that the burden of proof in criminal matters lies, from the beginning to the end (unless under the exceptions prescribed by statute or in a case dealing with insanity of the defendant), on the prosecution. The aforementioned case also went on to state that the standard of proof is high: it has to be beyond reasonable doubt. Furthermore, the High Court of Zambia under **Article 134 of the Constitution** is said to have unlimited and original jurisdiction to hear any civil or criminal matter. In the case of **Zambia National Holdings Ltd and UNIP v the Attorney General**^[7], the court interpreted this provision as meaning that although the High Court has unlimited jurisdiction, such jurisdiction is not limitless. Essentially, it is bound by other rules and procedures stipulated by law. Coming to the Witchcraft Act, there is no law in place which suggests that matters arising from an abrogation of this Act are to be only dealt with exclusively in the Local Courts administering African Customary Law.

Therefore, the High Court of Zambia has original jurisdiction to hear a matter arising from the abrogation of the Witchcraft Act. Given the descriptions of what the Act regards as the practices of witchcraft, it, therefore, follows that the prosecutor must prove his case that there was the practice in an attempt to discover stolen property (for example) and this must be done beyond all reasonable doubt. Doing so, however, becomes difficult because of a lack of definition of what exactly amounts to sorcery or the practice of witchcraft. The situation is made even more complicated by **Section 4 of the Witchcraft Act** which expressly states that ‘whoever shall be proved to be by profession a witchdoctor shall be liable upon conviction to a fine of not more than one thousand five hundred penalty units or to imprisonment with or without hard labour for any term not exceeding two years, or to both.’ So the question that must be posed is: How does the court (e.g. the High Court) know through proof of evidence that a person is by profession a witch doctor?

CRIMINAL LAW AND THE WITCHCRAFT ACT

Most of the cases in criminal law that the courts have dealt with Witchcraft arose from a belief in its existence and allegations of it. To give a balanced view, it is cardinal to note that the

Witchcraft Act does provide some form of protection for persons accused of being witches. For example, it makes it an offence for someone to claim that they are a witch finder. That is why the court warned in the case of **Patrick Mumba and Others v The People**^[8] that, ‘it is with this in mind that the sentences have to be passed and in doing so, we agree with Mr. Mchanga that a message must be sent to witch-finders that when they conduct their business of pointing at people as responsible for death or other calamities, they are committing an offence under the Witchcraft Act and when the offence is followed by an assault, by a gang for that matter, a deterrent sentence must be imposed.’ The case of **Abednegal Kapesh and Others v The People** ^[9] is a landmark decision in this regard. In that case, the Supreme Court of Zambia held for the first time that a belief in the existence of witchcraft should not, on its face, be taken as an extenuating circumstance to murder. It has to reach a threshold that goes beyond a defendant’s subjective thought processes. Notwithstanding the court’s ruling to raise the bar of the belief in witchcraft as an extenuating circumstance, it is argued that the ruling is not enough to curb the inefficiencies under the Witchcraft Act. The court in the Kapesh case should have advocated, at least in passing, the reformation of the Act as well as pointed out its inefficiency to deliver justice in witch accusations. Indeed, the Supreme Court recognized at J37 that the Act criminalized the practice of witchcraft. It should have mentioned further the scraping off of section 6 of the Act which criminalizes witchcraft practice.

To reiterate, section 6 criminalizes the exercise of witchcraft through supernatural means to attempt to discover where and in what manner property alleged to have been stolen may be found. By this definition, could it be said that men who claim to ‘prophesy’ in present-day Zambian Pentecostal churches should be found wanting under the Act when they attempt to discover who has stolen some particular piece of property or where it could be located? Since there is no definition as to what exactly amounts to witchcraft or procedure in proving its practice, this question would undoubtedly pose a huge challenge to a court of law. Indeed, some traditional leaders have already shown discontent with the Act because of its vague provisions and have advocated for a complete repeal or at the very least reform. ^[10] This Article favours the latter approach over the former.

^[8] (2004) Z.R. 202

^[9] SCZ Selected Judgment No.35 of 2017

^[10] Lusaka Times, Revise Witchcraft Act, Local Courts are Abusing it-Headman available at

<https://www.lusakatimes.com/2015/03/26/revise-witchcraft-act-local-courts-are-abusing-it-headman/> accessed at 12th August 2022 at 14hrs.

^[5] (Amendment) Act No.2 of 2016

^[6] (2004) ZR 207

^[7] 1994 S.J. 22 (SC)

CONCLUSION

In closing, it is vital to mention that a belief, no matter how strong it may be, is not evidence that an individual is guilty of an offence. Therefore, wisdom cautions that the Witchcraft Act is not only misplaced but it is also unfitting in a democratic society governed by the rule of law. Families may be broken by a simple unsubstantiated accusation by unscrupulous individuals who have no regard for human rights. To echo the words of Lord Chief Justice Hewart: 'Justice should not only be done but should manifestly and undoubtedly be seen to be done. A reform of the Witchcraft Act to strike out all acts that are alleged to be witchcraft practices and leave only provisions that criminalize the belief in witchcraft is one such step towards justice; A step which would undoubtedly lead to a better society for mother Zambia.

THE UNIVERSITY OF LUSAKA PARTICIPATION IN MOOT COMPETITIONS

The Musa Dudhia & Company Inter-University Moot Court Competition

In 2021 the school again participated in the competition and UNILUS was announced winner of the Competition with Towela Chimfwembe being awarded the prize for 'best orator'.



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This year, the school went on to participate in the competition and UNILUS was announced winner of the Competition with Suwilanji Namumba being awarded the prize for 'best orator'. This makes it the fourth consecutive wins for the University of Lusaka



Link to UNILAW website:
<https://undergrad.unilus.app/law/>

GREEN ECONOMY AND SMES

DR CHIPASHA MULENGA
INTERVIEWED BY DAVISON
MWALE



Dr Chipasha Mulenga holds a doctorate (LLD) from the University of Pretoria and is an advocate of the Zambian Bar. Since 2012, he has been involved in teaching and research in the field of Investment, Mining, and Environmental Law. His passion for academics has culminated in book publications and peer-reviewed articles.

On 16 September 2022, he was interviewed by Davison Mwale on the subject 'Green Economy and its Implication on Small and Medium Enterprises (SMEs) in Zambia'.

UNIVERSITY OF LUSAKA ACADEMIA AND LEGAL WRITING SOCIETY
ADVOCATUS NEWSLETTER

WHAT IS MEANT BY A GREEN ECONOMY?

A green economy is an economy that aims at enhancing human well-being and social status through the reduction of environmental risks posed by activities. It is also aimed at promoting sustainable development without degrading the environment.

WHAT IS THE MAJOR CONCERN OF THE MINISTRY OF GREEN ECONOMY AND ENVIRONMENT IN ZAMBIA?

“In 2021, the government has established the Ministry of Green Economy and Environment, however, it has no specific policy or legislation that governs its functions, purpose and direction. This is notwithstanding the Ministry’s administration of the Biosafety Act and Forest Act 2015.

IN YOUR OPINION, DO YOU THINK THE MINISTRY CAN ATTRACT SMES TO GO GREEN?

“There are no special requirements for SMEs to ‘go green’ or operate in a sector dubbed ‘green economy’. The issue is that the Ministry will promote projects or businesses that have the consciousness of going green. This implies that SMEs that want to manufacture products must have a consciousness of the environment. I doubt the ministry will not go out and tell people to operate in the sector but it might regulate how people will set up businesses and incentivize those that embrace ‘green’ tenets. The challenge for most SMEs are finances and in the event that other institutions provide them with ‘green finances’, this would assist SMEs immensely. Though there are plans to incentivize institutions that provide green financing, this has not yet been actualized by the Ministry.”

HOW RELEVANT ARE THE FORESTRY ACT 2015 AND ENVIRONMENT MANAGEMENT ACT 2011 TO THE MINISTRY?

“It is possible that the Ministry can administer the Forestry Act 2015 and Environmental Management Act 2011; the question, however, is what the Ministry’s core business is? Arguably, forestry falls under the Ministry of Lands and this explains the closeness of this policy to the National Land Policy.

Green economy is not so much about the protection of the environment but about ingraining tenets of sustainability in the business model of a corporation. In the absence of specific provisions or legislation on green economy, enforcement becomes problematic; the Environmental Management Act 2011 may not be adequate. Assuming it was, the Act is not administered by the Ministry of Green Economy but Lands.

WHAT WOULD YOU SUGGEST SHOULD BE IN THE POLICY OF THE MINISTRY?

“The policy must propose how Zambia can transition from what it is now to a green economy and within what period. This must be aligned with vision 2030, the 8th National Development Plan (8NDP), and the African Union’s Agenda 63. In short, the policy must be aligned to the dictates of today.”

THERE ARE THOSE WHO ARGUE THAT IT WAS NOT NECESSARY TO ESTABLISH THE MINISTRY OF GREEN ECONOMY. WHAT ARE YOUR THOUGHTS?

“When we look at most of the things it has to do, most of them are economic and social rights which are by nature expensive to deal with. Most of the aspects it is concerned with are dealt with by the Environmental Management Act, does it mean the ministry will have to adopt the act? These questions remain unanswered. From the objectives that are on the website, they are more to do with poverty reduction than what a green economy really is. It can thus be opined that this Ministry has no originality as it has principles that are sufficiently covered by other ministries such as the Ministry of Natural Resource Environment and Land, which also administers National Policy on Climate Change. Perhaps the Ministry should have been a department under the Ministry of Natural Resource Environment and Land.”

When the government established the Ministry, it should have been made clear what policies and rules regulate govern its operation. In my opinion, it seeks to promote sustainable development through emphasis on consciousness of sustainability in business activities. Above all, it must create its own policy rather than adopt already existing policies that never envisaged creation of such a Ministry.

IN YOUR OPINION, WAS THE MINISTRY ESTABLISHED PREMATURELY?

“Notwithstanding the hastiness with which the Ministry was established and the absence of specific policies on green issues, this is the proper direction taken by the government. Today, the world is grappling with the effects of climate change and environmental degradation, therefore, going ‘green’ could be part of the panacea. The challenge, however, seems to be the resources needed for this noble cause. Whether or not Zambia is ready to ‘go green’ is still debatable, however, there is a global expectation that doing so would present more good than harm to the environment

SMEs IN A GREEN ECONOMY



DAVISON MWALE

INTRODUCTION

Green economy is arguably a beneficial alternative vision for the safety maturation of a country. It can assist in generating economic development while improving people's lives in ways that advocate for environmental and social well-being. [1] This meets the notion and needs of Environmental law. However, considering the seasonal affective disorder of Zambia's economy, is this the right path to cure the economic malaise that endures largely on mining? The growth of a country's economy puts enormous insistency on natural resources, how then can a country like Zambia strike an equilibrium or meet the trending and world focus on environmental sustainability and the competitiveness of the economy in the efforts to increase the consumption of natural renewable resources? Can SMEs survive in a green economy? Is Zambia ready to go on this transition? This article seeks to answer these questions.

A CONCISE EXPLANATION OF GREEN ECONOMY

The green economy is a paradigm that advocates for obtaining material wealth in a way that will not result in environmental risks, ecological scarcity, or social

[1] Söderholm, P. The green economy transition: the challenges of technological change for sustainability. *Sustain Earth* 3, 6 (2020). <https://doi.org/10.1186/s42055-020-00029->

inequality. [2] This basically entails that a country will have to employ methods that will adhere to its economic growth needs while taking cognizance of the environment. This paradigm would be the best way to promote economic emancipation through diversification and local investment-oriented export. Through effective legislation, the paradigm can promote a needed transition from monoculture, which is dependent on mining, to six key sectors of economic emancipation: agriculture, fisheries, renewable energy and tourism. Having a regulatory framework that is not biased toward foreign investors but more favourable to local investors in the sector, would spur the growth of the economy through a much-needed diversification. Thus making the green economy beneficial to Zambia.

SMEs UNDER GREEN ECONOMY

In light of the above, it appears pertinent to prepare a prognosis of the concept of green economy under the Ministry of Green Economy and Environment. Small and Medium-size Enterprises (SMEs) can contribute largely to the reduction of inequalities, growth of the economy and protection of the environment through green economy, albeit policies are a major catalyst to attain such a status quo. There are so many green ideas that might lower poverty levels and increase the economy of the country. SMEs such as maintenance, manufacturing and eco-design may become huge drivers of job creation and economic growth of Zambia. However, such SMEs would need incentives that would enable the business environment in which green ideas can easily develop, and access finances needed for them to be established in the market. For example, if the government enacts law(s) that are denuded of biasness and supports the supra mentioned SMEs that embrace Sustainable Development Goals (SDGs) by making it easy for them to acquire financial assistance and get contracts, these SMEs would employ more citizens and purchase modern machinery to enable them compete with FDIs. This would in turn grow the SMEs to a large scale industry with a huge taxable income.

[2] Aldieri, L.; Vinci, C.P. Green Economy and Sustainable Development: The Economic Impact of Innovation on Employment. *Sustainability* 2018, 10, 3541

With a good policy unlike the current **Zambia Development Agency Act** ^[3] which is more biased towards foreign direct investors (FDIs), SMEs can survive under the principles of Sustainable Development Goals (SGDs) ^[4] and green economy. SMEs would actually survive much easily under green economy as large scale enterprises such as mines, are more reluctant and less willing to consider the sustainability policies at the expense of their thirst for profits.

However, this trending paradigm is one that will be hard if not impossible for a country like Zambia to implement and economically benefit from due to a number of reasons. It will be hard to implement if the government does not enact regulatory frameworks that subsequently produce a benefit outweighing its administrative spending. The sector is one which can be very useful for Zambia's economic emancipation as it can be used to promote export diversification and move away from our monoculture economy which is largely on mining. The government can try to put up measures and incentives for those local investors who would want to establish companies in the sector. Taking time to enact a law that will have adequate provisions to regulate the sector and benefit the country economically should be of prime consideration. SMEs contribute largely to the economy of a country. In China, SMEs have enormously contributed 60 percent to GDP growth. ^[5] SMEs are the most dynamic part of the market, this entails that they can survive under green economy policies albeit they massively need supportive mechanisms that will help them be more competitive.

CONCLUSION

In light of the above, with good public policies to attract Small-Scale nature-based investment, Zambia's economy can grow. However, with the new Ministry of Green Economy and Environment, more is still needed for Zambia to benefit from this ministry or it otherwise remains a ministry which is just on the book and adds no value. The government needs to put up laws that acts as enabling factors to speed up the trajectory and foster SMEs' green ideas. This is because it lacks regulatory frameworks on whose guidance it will perform.

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^[3] Act No.11 of 2006

^[4] These are the United Nations targets for global development adopted in September 2015 set to be achieved in 2030. To promote prosperity while protecting the planet. They recognize that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, social protection, and job opportunities while tackling climate change and environmental protection. Accessed on <https://www.un.org/sustainabledevelopment/> on the 21st of September, 2022

^[5] <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7346806/#bib9>

MR DICKSON JERE. SMES AND ITS REGULATORY FRAMEWORK.

UNIVERSITY OF LUSAKA
ACADEMIA AND LEGAL
WRITING SOCIETY.

Dickson Jere is a Zambian lawyer, journalist, published author who has been practicing law for 29 years. He currently holds an LLB (Legum Baccalaureus) from the University of Zambia (UNZA) He is also a holder of two prestigious Master's Degree; holding a Masters Degree in Intellectual Property which he obtained from African University in Zimbabwe and Masters in Human Rights from the esteemed University of Lusaka (UNILUS) were he scooped the best graduating student award in 2016. He also holds a diploma in Journalism and Public Relation. He has been part of various government committees that dealt with the economic sector of the country. He has served as President of the Media Institute of Southern Africa (MISA).



ADVOCATUS

MR. DICKSON JERE'S TAKE ON SMALL TO MEDIUM-SIZED ENTERPRISES AS WELL AS THEIR SURROUNDING LEGISLATION. INTERVIEW BY YAIMAN BANDE AND LUMBWE MWEWA.

HOW HAS YOUR JOURNEY IN THE LEGAL FRATERNITY BEEN LIKE?

Dickson Jere is a Zambian lawyer, journalist, published author who has been practicing law for 29 years. He currently holds an LLB (Legum Baccalaureus) from the University of Zambia (UNZA) He is also a holder of two prestigious Master's Degree; holding a Masters Degree in Intellectual Property which he obtained from African University in Zimbabwe and Masters in Human Rights from the esteemed University of Lusaka (UNILUS) where he scooped the best graduating student award in 2016. He also holds a diploma in Journalism and Public Relation. He has been part of various government committees that dealt with the economic sector of the country. He has served as President of the Media Institute of Southern Africa (MISA).

“After obtaining my LLB from the University of Zambia, I later found myself working in State House. So, I could not proceed to study at the Zambia Institute of Advanced Legal Education (ZIALE). My class went ahead of me because I was still in government then, working as a special assistant to the President for the press and public relations (Press aide). I was only able to go to ZIALE in the year 2012 after I left State House in 2011. During that period, I did my pupillage under Professor Mvunga, who was my principal when I was at ZIALE and also my lecturer when I was at the University of Zambia. I have worked all of my life, in terms of the law, at his law firm, Mvunga Associates. But I also worked with him some time back when the late President Levy Patrick Mwanawasa appointed him and myself to sit on the Constitutional Review Commission. So, he was quite close to me and that is how I ended up working at his law firm.”

“I was the best graduating student among the Postgraduates in 2016. I also have another Master's Degree in Intellectual Property which I obtained from Africa University in Zimbabwe. It is a program which is jointly offered by Africa University and the World Intellectual Property Organization (WIPO). I am also a fellow of the Chartered Institute of Arbitrators having been admitted last year. I am the immediate-past honorary secretary of the Chartered Institute of Arbitrators Zambian Branch. So I am a practitioner in that sense, in arbitration, and I am actively involved in arbitration and handle quite a number of cases. I am also a mediator in that I am able to bring parties together and find a resolution.”

“So that is basically my journey in the legal profession. Three years ago, I left Mvunga Associates and launched my own law firm. So I am the managing partner of Dickson Jere and Associates which is a boutique law firm in Zambia specializing mainly in litigation and a little bit of consultancy in corporate services. Of course, I have so many other things outside the legal practice but I think our interview is restricted to the legal career. So that's why I have decided to give you a short synopsis of my journey.”

WHAT ARE SMALL AND MEDIUM ENTERPRISES (SMES) IN ZAMBIA AND HOW DO THEY HELP DEVELOP THE COUNTRY'S ECONOMY?

“Well, it is always difficult to define what SMEs are in Zambia. There isn't much a definition which is cutting across all the statutes or institutions. If you go to the Zambia Revenue Authority (ZRA), the definition of what they consider to be SME is quite different from what you would find when you go to

the Citizens Economic Empowerment Commission (CEEC) and also what you would find at the Zambia Chamber of Small and Medium Business Associations (ZCSMBA), or what you would find in the NGO (Non-Governmental Organization) world. But basically, these are upcoming companies or businesses that have not yet reached the pinnacle of being the 'big boys,' so to speak, in the market.”

“They are important in the sense that they capture a bigger population in terms of employment. Quite a number of people cannot be employed by government agencies or big companies, and so, they end up working for small companies. In fact, I can categorize quite a number of law firms as being part and parcel of SMEs; they employ maybe two or three associate lawyers. Others employ up to seven or eight lawyers. So, they do fit into the description of SMEs.”

“I must say that the current government i.e., the government of President Hakainde Hichilema, is the first to have given quite a big emphasis on SMEs. As you are aware now, there is a ministry which has been formed for Small and Medium Enterprises – a full-fledged ministry that has been formed to look after the interests of the SMEs. So, they are indeed a major factor. Especially those who are involved in manufacturing, agriculture and construction, because they are the drivers of the economy and when you have young people who have just left school or who are in the University, quite a number of them associate themselves with SMEs by either getting into agriculture or getting into small businesses like co-operatives which are aimed at giving employment to a certain sector. Especially in construction, were you have a number of brick layers coming together, ten or fifteen of them, and forming a company able to bid for these contracts which ordinarily would go to big Chinese companies or big Indian companies. But now they are able to get to the Zambians. So, in that sense, SMEs are the major drivers of the economy because without the SMEs, quite a number of young people will not have disposable income, access to employment, and the experience which is built or developed by the SMEs.”

HOW INSTRUMENTAL ARE SMES IN JOB CREATION AND PARTICULARLY, WHAT IS YOUR ADVICE FOR SMES THAT ARE INVOLVED IN AGRICULTURE?

(This question was partly based off of a Tweet made by Mr. Jere on the 13th of February 2022, which read: “Statement by Zambia Farmers Union makes sad reading. You mean the country is still importing onions and potatoes from South Africa while the “huge” harvest in Zambia goes to waste? Days ago, Kenyans, went on protest and stopped KFC from importing chips! Let us protest for our farmers!”)

“Yes, that is a very important point because the SMEs are the drivers of the economy. For them to be drivers of the economy, they would sometimes need a bit of protection which can come in form of policies and the law, so much that they are allowed to grow. So, you touched on my tweet which has to do with my comment over the importation of onions and potatoes from South Africa. You will note that countries like Botswana and Kenya had passed policy and then legislation that restricts the importation of certain products such as potatoes, onions and tomatoes which can be grown locally by the locals. That is how the law can be used to advance an agenda to protect a certain sector, in this situation the SMEs. We need the SMEs to be protected in order for them to grow. If they are not protected, then it means that they may not grow or they may be wiped out of the market. This is because the ‘big boys,’ big farmers from South Africa have the capacity to bring in thousands and thousands of tons of onions, tomatoes, or potatoes and run on a loss for purposes of making sure that the market is saturated and kill that particular SME in Agro-business. It is important to note that the Zambian government took that stance by stopping the importation of onions, potatoes and tomatoes from South Africa. What that has done is that it has a trickle effect that most SMEs now are able to invest or borrow money to invest in onion dryers, which is the

biggest problem in terms of the quality of onions in Zambia. Others have now gone into out-grower schemes of tomatoes, onions and potatoes in order to fill up that gap. Since Shoprite, Choppies and Pick 'n' Pay are more or less being pushed to get local supply. It means that jobs are being created in value chain: Of the people who are growing and the people in transportation who are moving the products from the farms into town. Small guys with Canters, with little trucks are making money through the process of moving the products to Lusaka, the Copperbelt and so on.”

“In that sense, we need to protect the SMEs in order to have jobs protected and created within the economy. I am glad that even the president of Zambia did make a comment and applauded Choppies for having been one of the first big supermarkets that have strictly decided that they will stock agro-products from Zambia. That is the only way to go. The challenge now is that once there is policy and law backing that particular pronouncement, we need to now work on quality control so that our SMEs should be trained on packaging, branding and general safety measures to do with the preservation of these products. So we are on the right track, but we need to make sure that our farmers are empowered with the necessary equipment, knowledge and systems to enable them to compete with the other products that are coming from South Africa.”

IT IS KNOWN THAT A COUNTRY WITH A BROAD TAX BASE REDUCES THE TAX ADMINISTRATION COSTS AND THUS ALLOWS FOR MORE REVENUE TO BE RAISED AT LOWER RATES. SO, COULD YOU SHED LIGHT ON HOW SMES INCREASE OR BROADEN A COUNTRY'S TAX BASE?

“It is always a ‘catch-22’ when we talk about SMEs and taxation: more taxes kill SMEs, so we need to work towards making sure that SMEs are not overtaxed. If they are not overtaxed, then it means that they would be able to grow and spread quite easily. The only way to make them grow is to make sure that only taxes that are important are the ones to be spread among them. You will notice that this year, from January, the Zambian government has taken some measures to try and reduce taxation for SMEs. In particular, ZRA has now announced, after the Ministry of Finance budget, that they have zero-rated taxes on manufacturing and processing of equipment. So, if you want to bring in equipment for processing and manufacturing in the agricultural sector, which is now zero-rated, meaning, you do not have to pay any taxes. That decision was made to try and trigger some investment in the area of processing. As you will know, we have so many foods grown in Zambia which are seasonal. If you drive to Chipata during the rainy season, you would find mangoes everywhere. Within two or three months, those Mangoes go to waste because we would not be able to process them as there is no mechanism of preserving them for longer term use. So, the government has decided that we need to invest in that particular field. Any SME who is bringing in equipment for preservation, processing, manufacturing in that sector now does not have to pay taxes.”

“The government has also gone further and implemented a zero tariff on taxes on brewing equipment. So, if an SME wants to bring in equipment for brewing, be it alcohol, soft drinks or any others, they do not need to pay taxes on that machinery. Again, it is a government policy to try and trigger investment in that particular sector, so that we can have employment being created in the brewing sector.”

“Thirdly, the government this year again has zero-rated on the importation of refrigerated trucks. This means that government wants Zambians, especially SMEs to invest in the transport business of fresh foods. So that you are able to move your vegetables from Chipata to Lusaka, or to move your Kapenta from Mbala to Mpulungu, or even move your fish from Siavonga, Kariba into Lusaka in a refrigerated

truck without problems. They have decided that when you import a truck which is refrigerated, it will be zero-rated. All these measures which were announced are meant to steer growth among the SMEs and also to bring new players in the transport sector in that particular area.”

“The taxes need to be balanced. The more you overtax, the more you kill the SMEs. The more you balance the taxes, like government has done now with zero-rating some of the major sides, that then triggers the growth of SMEs. So we are yet to see. I am hoping that by December we should be able to look back and see if we have made a significant impact in that area.”

WHAT IS YOUR COMMENT ON HOW SMES CAN BE USED TO EARN INCOME FOR LOW-INCOME EARNERS?

“SMEs will not be able to pay quite huge salaries in comparison with the big and major companies such as Trade Kings, the mining sector and so on. However, SMEs will be able to be the income earning sector for the lower end of people, especially the carpenters, bricklayers, plumbers, or the low skilled, the craftsmen and those who are living in compounds. They will be able to pick up a trade or a craft in which they can work and earn an income through a salary which may not be quite significant, but it will be a salary which can make the ends meet. And so, we need to support the SMEs in that particular category so that most people who are less educated and skilled are able to be captured, work in these SMEs and raise a little bit of salaries which can be used to help maintain their households. In the long run, SMEs play a major role because government cannot employ all of the unemployed. Most of the unemployed can only survive if they work through the SMEs.”

GOVERNMENT HAS RECOGNIZED THE IMPORTANCE OF SMES AND HAS ENACTED THE SMALL INDUSTRIES DEVELOPMENT ACT, CAP 425 OF THE LAWS OF ZAMBIA. IN THIS REGARD, WHAT IS YOUR OPINION ON HOW THE LAWS AND REGULATIONS OF THE COUNTRY AFFECT THE PROFITS OF SME OWNERS IN ZAMBIA?

“We need to be careful when we go to regulation as well as laws. We need to protect the SMEs that they should not operate in an over-regulated environment. Over-regulation always bring problems and it is difficult for SMEs to survive. In fact, I must mention that even now the country is highly over-regulated. For one to start a company, especially an SME, there is a process you have to go through and some of the requirements are highly tedious. First, you start with the Patents and Companies Registration Agency (PACRA). From PACRA, you will have to register the name of your company. Then, you incorporate. If you want to incorporate you go to a cooperative. From there, you need to go and get your license or the TPIN from ZRA so that you are registered as a tax payer. If you are in Lusaka, you have to go to the Lusaka City Council where you have a number of licenses that you have to apply for to the council. You have to get the business premises certificate, payment of business levy certificate, a fire certificate, etc. You need to get quite a number of certificates from the council. If you are in construction, you have to go to the National Council for Construction (NCC) and get your certificate for practice, which is annual. If you are a law firm, you go to the Law Association of Zambia (LAZ) to get your practicing certificate. If you are an accountant, you have to go to the Zambia Institute of Chartered Accountants (ZICA) to get your practicing certificate. So, there are so many regulatory requirements for one to operate in Zambia. That tends to slow down the business because even from the word ‘go,’ your investment is a bit higher in terms of licensing. Some of these licenses are to be renewed annually, so every year you have to go through the process of compliance. That tends to slow down the way business is done. Other countries operate in what we call a ‘one market place.’ This is where there is one core place which does all your processing of

the licenses. If you have registered your company with PACRA and have filed your annual return, that should follow with the council, and so on and so forth. So over-regulation can actually affect the growth of SMEs. Although so far, we are not doing badly in terms of trying to give support to the SMEs and that is why the government has given those tax concessions on the specific number of ventures which have been zero-rated by the Ministry of Finance. So, the law is there to give a push, but we need more in terms of policy and also government giving a leeway that SMEs to grow.”

“One way most countries have developed with SMEs is through the development of Multi-Facility Zones where the areas are declared Tax free zones. Take an area which is less developed, for argument’s sake, Shan’gombo for instance, and you decided to declare Shan’gombo as a Multi-Facility Zone. People who go and invest their companies there, will end up putting in a lot because they know for another twenty to twenty-five years, they will not pay tax. That will trigger development in an area that ordinarily would not attract any investment. And so, government needs to invest in infrastructure to make sure that areas like Shan’gombo are accessible. But once you put a tax-free arrangement, everybody will be able to get there and go and operate from there. Therefore, it can be said that the law and policy go together, in trying to enhance the growth of SMEs.”

WHAT IS YOUR ADVICE TO FUTURE LEGAL PRACTITIONERS?

“What I would say is that our education system in Zambia tends not to grow with time. Even now, students are studying but the law is moving. What is being studied may not necessarily fit in what is pertaining in the development of the sector. Because the curriculum is not reviewed very often, students tend to be behind. That has nothing to do with what students are learning, because even us who are in practice, are slow to adjust. The Law Association of Zambia (LAZ) is slow to adjust. For instance, all lawyers are using the 2002 Legal Practitioners Rules, which are totally outdated, if you check what is pertaining in different jurisdictions. We are still very much restrictive in advertisement of legal services. Even though in 2017, a new amendment was passed which allows for advertising and so-called ‘publicity rules’ were developed, there lies a problem in that even the same advertising is very restrictive. So many things are not allowed to be advertised by lawyers or put in newspapers, billboards, and so on. If you go, let’s say to South Africa, as you drive from Oliver Tambo Airport getting into Sandton, you see massive billboards of various law firms advertising. You go to South Africa, and you tune in to the South African Broadcasting Corporation (SABC) TV, you will find massive advertising for people in insurance and legal claims and which lawyers you can use or deposit the money for emergencies in terms of legal services. All of that is not allowed in Zambia. So, we are not moving with time. I hope that we will eventually move with time.”

“Now, when you get to ZIALE, you will be taught things which are not necessarily what is pertaining in the market. I will give you a good example in conveyancing. They still teach you at ZIALE to memorize all of the assignments: the terms and agreements and clauses of assignments and what you are being examined on. But in practice, none of us even spend any time memorizing that because the assignment will be right there in your computer, you would be able to make changes to the assignment without memorizing. But at ZIALE, they expect you to memorize the assignment, the contract of sale and so on.”

“I think we need to spend more time adjusting to what is pertaining in the practice and in the market than sticking to the old ways of doing things. So, for law students, you need to have that balance in order to pass your exams, to understand what is required at ZIALE or what is required at your university. But when you get into practice, you know that things may be done a bit differently. So many things are at a

variance. Most law firms today, if you go and check, you will find that they are representing clients who have not adequately paid for the services and they are hoping that probably they will be able to be paid if they are successful at the end of the case. But under the Zambian law, that is not allowed because the rules prohibit contingency type of arrangements in billing of bills. Now, that is archaic because if you go to advanced jurisdictions including where we borrowed these rules i.e. the United Kingdom, it is allowed for lawyers to engage in contingency arrangements whereby you take a risk and take up a case hoping you will make your money once that case has been disposed of and you have won, likely to get either a percentage of the claim or indeed you will get the costs which may be awarded by the court. All that needs to change and move with time. So it has always been my cry.”

“Study to understand, mastering will not help. Practice requires you to know the law and take your clients interests seriously.”

A photograph of a desk setup. In the center is a silver laptop with a black screen. To the left of the laptop is a black pen and a small orange object. To the right is a black pen and a white notebook. The background is a brick wall.

CALL FOR LEGAL ARTICLES

The University of Lusaka Academia and Legal Writing Society (UNILAW) is calling upon all interested law students to submit articles to its editorial board for inclusion in its 2nd newsletter issue.

- 1-Applicants must be law students at the University of Lusaka in the school of law(full-time/part-time/distance)
- 2-Write on any legal topic of interest
- 3-Font 12 Times New Roman
- 4-1.5 Line spacing
- 5-Pages must be numbered
- 6-Submission open till further notice
- 7- It MUST be accompanied by at least a minimum of 8 LEGAL AUTHORITIES
- 8-Use OSCOLA referencing style (only)
- 9-2 minimum pages and 5 maximum pages.
- 10-Query and submission should be made to writingresearch99@gmail.com