

The Right to Run for Election in Zambia: A Preserve of the “Educated” Class?

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Abstract

The 2016 amendments to the Constitution of Zambia 1991 have transformed Zambia’s constitutional order in many respects. Among other transformative provisions, the Constitution now requires everyone seeking elective public office to have, as a minimum qualification, a grade twelve certificate or its equivalent. This article examines the rationale for this requirement, as judicially interpreted, through the lens of the right to run for election. The article’s core argument is twofold. First, that the requirement is an unwarranted restriction on the right to run for election and cannot be justified when considered in its relevant context. Secondly, that the Constitutional Court of Zambia’s recent interpretation of the requirement further limits the right to run for election and in turn narrows the field of candidates from which voters may choose, potentially depriving the country of resourceful political leadership. The article concludes with a call for reform.

Keywords

Democracy, equality and non-discrimination, participation in public affairs, right to stand for election, right to vote

INTRODUCTION

The 2016 amendments to the Constitution of Zambia 1991 (the Constitution)¹ have transformed Zambia’s constitutional order in many respects. Among other transformative provisions, the Constitution now requires everyone seeking elective public office to have “as a minimum academic qualification, a grade twelve certificate or its equivalent” (the requirement).² As one would expect, the requirement has been at the centre of controversy in the political arena. The latest judicial interpretation of the requirement has effectively

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1 Constitution of Zambia 1991, as amended by Act 2 of 2016.

2 Constitution, arts 100(1)(e), 110(2), 70(1)(d) and 153(4)(c); Electoral Process Act 2016, sec 33(3).

excluded more citizens from running for public office, sparking further controversy. Thanks to this latest interpretation, even former elected officials, including erstwhile government ministers, have been effectively disqualified from running for public office in the future unless and until they acquire a grade twelve certificate or its equivalent.³ Curiously, by accident or design, the court stopped short of pronouncing on the implications of its interpretation of the requirement on the right to run for election in general or in relation to the respondent in the case that was before it. All indications are that the court did not even consider that the right to run for election was engaged.

Against this backdrop, this article critically examines the rationale for the requirement through the lens of the right to run for election. To lay a foundation for this examination, the next section provides an overview of the relevant law governing the right to run for election in Zambia. The section that follows examines how the judiciary has interpreted the requirement thus far. More specifically, it provides a summary of two judgments, one delivered by the High Court for Zambia (High Court) and the other delivered more recently by the Constitutional Court of Zambia (Constitutional Court), which seem to provide contradictory interpretations of the requirement. There follows a critical examination of the requirement, as judicially interpreted, through the lens of the right to run for election. The last section concludes with a call for reform.

THE RIGHT TO RUN FOR ELECTION IN ZAMBIA

The Constitution guarantees a range of civil and political rights. These are enshrined primarily in part III of the Constitution (the Bill of Rights). The Bill of Rights does not, however, provide for electoral rights as such. Instead, the rights to vote and to run for election are contained in part V of the Constitution, specifically article 45, which provides that citizens shall be “free to exercise their political rights” and that political elections shall be “free and fair”,⁴ and article 46, which guarantees the right to vote. As has been pointed out elsewhere, the “right to free elections” implies two individual rights: the right to vote and the right to stand or run for election,⁵ otherwise referred to as the right to political candidacy.⁶ These two electoral rights typify the indivisibility, interdependence and interrelatedness of human rights as affirmed in the Vienna Declaration and Programme of Action

3 See for example, N Kachemba “Nkhuwa drops out, son steps in” (3 April 2021) *Zambia Daily Mail*, available at: <<http://www.daily-mail.co.zm/nkhuwa-drops-out-son-steps-in/>> (last accessed 6 June 2022).

4 Constitution, art 45(1)(a) and (2)(a).

5 *Mathieu-Mohin and Clerfayt v Belgium* appln 9267/81 (European Court of Human Rights (ECtHR), 2 March 1987), paras 48–51; *Ždanoka v Latvia* appln 58278/00 (ECtHR, 16 March 2006), para 102.

6 FS Le Clercq “The emerging federally secured right of political participation” (1975) 8/4 *Indiana Law Rev* 607 at 625; A Johns “The case for political candidacy as a fundamental human right” (2016) 16/1 *Human Rights Law Review* 29 at 29.

1993.⁷ More specifically, the right to run for election is intertwined with the right to vote, “since restrictions on candidacy have an obvious impact upon the right to cast a meaningful vote for the candidates of one’s choice”.⁸ The two rights should therefore normally be considered together.

Article 46 of the Constitution provides for the right of every citizen who has attained the age of 18 years to be registered as a voter and to vote in a political election by secret ballot. This right to vote was the subject of litigation before the High Court in the *Brotherton* case⁹ and, more recently, before the Constitutional Court in the *Malembeka* case.¹⁰ In the first of these cases, the High Court took the view that the respondent Electoral Commission of Zambia (ECZ), the body constitutionally mandated to conduct elections and referenda in Zambia,¹¹ had unlawfully discriminated against persons with disabilities by not providing premises and services that were accessible to such persons to enable them to exercise their right to vote. The High Court thus found a violation of both article 23 of the Constitution, which provides protection against discrimination and article 46 (then article 75), which guarantees the right to vote.¹² In the second case, the Constitutional Court found that sections 9(1)(e) and 47 of the Electoral Process Act 2016 (which disqualified persons in lawful custody from registering as voters and from voting in political elections) were inconsistent with the right to vote guaranteed in article 46 of the Constitution.¹³ The court thus annulled the two provisions for being unconstitutional.

The Constitution does not contain a provision on the right to run for election that corresponds to article 46. However, as already noted, the right to run for election is intimately connected to the right to vote. Indeed, it is axiomatic that there can be no elections, let alone free and fair elections, without candidates. The expression “free and fair elections” used in article 45 implies competitive elections, in which as many aspiring candidates as possible are allowed to participate. It therefore follows that article 45 of the Constitution protects the right to run for election insofar as that article guarantees political rights in general, and free and fair elections in particular. The right to run for election is also a necessary corollary of the freedom of political association guaranteed in article 21 of the Constitution under the Bill of Rights, since the right to form or belong to a political party would be meaningless if the

7 Vienna Declaration and Programme of Action (adopted 25 June 1993), sec I, para 5.

8 Le Clercq “The emerging federally secured right”, above at note 6 at 625. See *Lubin v Panish* 415 US 709 at 716 (1974).

9 *Brotherton (suing as secretary of the Zambia Federation of Disability Organisations) v Electoral Commission of Zambia* 2011/HP/0818 (19 September 2011).

10 *Malembeka (suing as executive director of Prisons Care and Counselling Association) v Attorney General and Another* 2016/CC/0013 (17 September 2018).

11 Constitution, art 229.

12 *Brotherton*, above at note 9 at 25.

13 *Malembeka*, above at note 10 at 38.

party cannot present candidates to the electorate.¹⁴ Moreover, the conditions for the exercise of the right to run for presidential, parliamentary and local government elections in Zambia (like the conditions for the exercise of the right to vote) are prescribed by the Constitution itself.¹⁵ Thus, in the *Zulu* case,¹⁶ the High Court held that, like the right to vote, the right to run for election is a constitutional, rather than a mere statutory, right.¹⁷ In any event, the right to run for election is “inherent in the concept of a truly democratic regime”.¹⁸

The recognition of these electoral rights in the Constitution is not without significance. First, the Constitution is the supreme law of the Republic of Zambia; it binds all persons in Zambia, including state organs and institutions, and its validity cannot be challenged by or before any state organ or any other forum.¹⁹ Any other law, act or omission that is inconsistent with the provisions of the Constitution is illegal and void to the extent of the inconsistency.²⁰ This means that all public authorities, without exception, must uphold both the right to vote and the right to run for election whenever their official functions affect the exercise of these rights. Secondly, the two rights are essential features of democracy and Zambia is, by constitutional decree, a democratic state.²¹ There are, it must be acknowledged, various models of democracy.²² Even so, the participation of citizens in the government of

14 See *Duncantell v City of Houston* 333 F Supp 973 at 976 (SD Tex 1971); *Barnhardt v Mandel* 311 F Supp 814 at 824 (D Md 1970). See also Le Clercq “The emerging federally secured right”, above at note 6 at 625; MA Bragg “*Adams v Askew*: The right to vote and the right to be a candidate: Analogous or incongruous rights” (1976) 33/1 *Washington & Lee Law Review* 243 at 252.

15 See Constitution, arts 100, 110, 70 (read together with the Electoral Process Act 2016, sec 33) and 153, specifying the qualifications and disqualifications for election as president, vice-president, member of Parliament (MP) / mayor / council chairperson and ward councillor, respectively. See *Shakafuswa and Another v Attorney General and Another* 2018/CC/005 (22 June 2018), holding that a person qualifies to be elected as mayor / council chairperson if he or she has the “same qualifications as those prescribed for the office of MP” in the Constitution, art 70.

16 *Zulu v Electoral Commission of Zambia and Another* 2016/HB/24 (10 May 2016).

17 *Id* at 21–22.

18 *Podkolzina v Latvia* appln 46726/99 (ECtHR, 9 April 2002), para 35. See generally Johns “The case for political candidacy”, above at note 6.

19 Constitution, art 1.

20 *Ibid*. See for example, *Mumba v The People* (1984) ZR 38; *Mulundika and Others v The People* (1995–97) ZR 20; *Chipenzi and Others v The People* HPR/03/2014 (3 December 2014); *Malembeka*, above at note 10; and *Mulubisha v Attorney General* 2018/CCZ/0013 (27 November 2019), invoking the supremacy of the Constitution to annul unconstitutional legislative provisions.

21 Constitution, art 4(3). The preamble to the Constitution also declares that Zambia is a “democratic State”.

22 See generally JT Ishiyama, T Kelman and A Pechenina “Models of democracy” in JT Ishiyama and M Breuning (eds) *21st Century Political Science: A Reference Handbook* (2011, SAGE Publications) 267; R O’Connell *Law, Democracy and the European Court of Human Rights* (2020, Cambridge University Press) at 5–32.

their country, directly or through representatives, lies at the very core of democracy however conceptualized.²³ In Zambia, as in other democracies, this participation is secured primarily through the right to vote and the right to run for election.

The Constitution, according to its article 267(1), must “be interpreted in accordance with the Bill of Rights and in a manner that ... promotes its purposes, values and principles”. Among other values and principles, the preamble to the Constitution declares that Zambian women and men are entitled to participate in the government of their country on an equal footing and in accordance with the principles of democracy. Article 8 of the Constitution substantively enshrines democracy, equality and non-discrimination as national values and principles. Furthermore, under the Bill of Rights, article 23 of the Constitution prohibits the enactment of laws, or the implementation of measures by public authorities, which are discriminatory either “of themselves” or “in their effect”.²⁴ In *Brotherton*, the High Court held that article 23 “basically provides that a person shall not be discriminated [against] in any manner by any person acting by virtue of any written law or performance of a function of any public office”.²⁵ The import of article 267(1) of the Constitution is that all these values and principles must be given due consideration whenever the right to vote, the right to run for election or any other constitutional right is at issue.

It goes without saying that neither the right to vote nor the right to run for election is absolute. As already noted, the Constitution itself prescribes certain conditions that a person must satisfy to be able to exercise these rights. All in all, the state may claim an interest in restricting ballot access in order to: maintain the integrity of the ballot; prevent voter confusion; ensure competent candidates; and ensure administrative expediency.²⁶ There are many specific interests under these four broad categories, the legitimacy of which judicial bodies around the world have recognized, and rightly so. However, the underlying premise for the state’s interest in ensuring competent candidates is least convincing.²⁷ Perhaps what makes it most objectionable “is the attitude of paternalism which underlies this kind of state interest. It results in legislative generalizations about competency of doubtful validity in a situation which ultimately demands the individual judgment of the voter”.²⁸ Every restriction on ballot access, in any event, must be interpreted in the light of the values and principles of the Constitution and the Bill of Rights

23 See UN Human Rights Committee General Comment 25: Article 25 (Participation in Public Affairs and the Right to Vote), the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (adopted 12 July 1996), para 1.

24 Constitution, art 23(1) and (2).

25 *Brotherton*, above at note 9 at 16 (emphasis added).

26 JS Jardine “Ballot access rights: The constitutional status of the right to run for office” (1974) 2 *Utah Law Review* 290 at 303–06.

27 *Id* at 305.

28 *Id* at 306.

including, in particular, article 23 of the Constitution, which prohibits discrimination.

Article 23 provides, *inter alia*, that nothing contained in any law shall be held to be discriminatory to “the extent that it is shown that it makes *reasonable provision* with respect to qualifications for service as a public officer or ... for the service of a local government authority”.²⁹ The Constitution does not elaborate on what it means to make “reasonable provision” in this context. However, when read in the light of relevant international standards, this would require showing not only that the provision in question pursues a legitimate aim but also that there is a reasonable relationship of proportionality between that provision and the aim sought to be attained thereby. Indeed, Zambia has given an undertaking at international level to secure for its citizens both the right to vote and the right to run for election, subject only to lawful and reasonably justifiable restrictions. To be more specific, Zambia has ratified international instruments that protect these rights. These include the African Charter on Human and Peoples’ Rights (African Charter)³⁰ and the International Covenant on Civil and Political Rights (ICCPR).³¹

Article 13(1) of the African Charter protects the right of every citizen “to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law”. Thus, in the *Legal Resources Foundation* case,³² the African Commission on Human and Peoples’ Rights (ACHPR) observed that a “measure which seeks to exclude a section of the citizenry from participating in ... democratic processes ... is discriminatory and falls foul of the [African] Charter”.³³ In that case, the ACHPR found that the Republic of Zambia had violated articles 2, 3(1) and 13 of the African Charter by introducing a constitutional amendment in 1996 that required everyone seeking to run for president to prove that both his or her parents were citizens of Zambia either by birth or by descent. In *Tanganyika Law Society and Others*,³⁴ the African Court on Human and Peoples’ Rights (ACtHPR) acknowledged that article 27(2) of the African Charter does allow for the imposition of restrictions upon citizens’ rights to participate in the government of their country, directly or through representatives, as enshrined in article 13(1). The ACtHPR, however, underlined that any such restriction must “take the form of ‘law of general application’ and must be *proportionate* to the *legitimate aim* pursued”.³⁵ In the ACtHPR’s judgment, a legitimate aim under article 27(2) may relate only to a need to protect

29 Constitution, art 23(5) (emphasis added).

30 Adopted 27 June 1981, entered into force 21 October 1986.

31 Adopted 16 December 1966, entered into force 23 March 1976.

32 *Legal Resources Foundation v Zambia* comm 211/98 (ACHPR, 7 May 2001).

33 *Id.*, para 64. See also *Tanganyika Law Society and Others v Tanzania* applns 009/20111 and 011/2011 (ACtHPR, 14 June 2013), para 117, citing this holding apparently with approval.

34 *Ibid.*

35 *Id.*, para 107.1 (emphasis added).

“the rights of others, collective security, morality and [/ or a] common interest”.³⁶

Article 25 of the ICCPR similarly provides that “[e]very citizen shall have the *right* and the *opportunity*” to “take part in the conduct of public affairs, directly or through freely chosen representatives” and to “vote and to *be elected* at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”.³⁷ The article also specifically provides that these rights must be enjoyed “without any of the distinctions mentioned in article 2 and without unreasonable restrictions”. Article 2 of the ICCPR prohibits discrimination.³⁸ According to the UN Human Rights Committee (HRC), the term “discrimination” in this context should “be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground ... or ... status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*”.³⁹ The HRC, however, “observes that not every differential treatment will constitute discrimination, if the criteria for such differentiation are *reasonable* and *objective* and if the aim is to achieve a purpose which is *legitimate* under the ... [ICCPR]”.⁴⁰ Accordingly, the HRC evaluates the reasonableness of restrictions affecting the exercise of citizens’ rights under article 25 of the ICCPR “on a case-by-case basis, having regard in particular to the *purpose* of such restrictions and the *principle of proportionality*”.⁴¹ As concerns the right to political candidacy specifically, the HRC considers that “[p]ersons who are otherwise eligible to stand for election should not be excluded by *unreasonable* or *discriminatory requirements such as education, residence or descent, or by reason of political affiliation*”.⁴²

It should be noted, however, that Zambia takes a “dualist” approach to its treaty commitments. International instruments as such are not binding upon national courts unless they have been domesticated through national

36 Id, para 107.2.

37 ICCPR, art 25(a) and (b) (emphasis added).

38 See ICCPR, art 2(1).

39 HRC General Comment 18: Non-Discrimination (adopted 10 November 1989), para 7 (emphasis added).

40 Id, para 13 (emphasis added). Echoing this position, see also *Gillot et al v France* comm 932/2000 (HRC, 15 July 2002), para 13.5. The European Court of Human Rights also shares these sentiments with respect to art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). See for example, *Lithgow and Others v United Kingdom* applns 9006/80, etc (ECtHR, 8 July 1986), para 177; *Religionsgemeinschaft der Zeugen Jehovas v Austria* appln 40825/98 (ECtHR, 31 July 2008), para 87. See also R O’Connell “Cinderella comes to the ball: Art 14 and the right to non-discrimination in the ECHR” (2009) 29/2 *Legal Studies* 211 at 221–24.

41 *Gillot v France*, id, para 13.2 (emphasis added).

42 HRC General Comment 25, above at note 23, para 15 (emphasis added); compare with para 10 regarding the right to vote.

legislation. Nevertheless, where such instruments have been ratified by the executive, as is the case with respect to the African Charter and the ICCPR, their provisions do possess some persuasive value in that courts may be inspired by those instruments when interpreting national law.⁴³ Indeed, in *Malembeka*, the Constitutional Court indicated its willingness to adopt international standards in its interpretation of both the right to vote and the right to run for election. In that case, the Constitutional Court cited with approval the Universal Declaration of Human Rights,⁴⁴ the ICCPR and the African Charter in this connection.⁴⁵

JUDICIAL INTERPRETATION OF THE REQUIREMENT

What does the Constitution mean by requiring everyone seeking elective public office to have, as a minimum academic qualification, a grade twelve certificate or its equivalent? This question has been considered by Zambian courts on two occasions so far. The first was in *Zulu*,⁴⁶ just four months after the adoption of the 2016 constitutional amendments. At the time the action was filed, the Constitutional Court had not yet been operationalized as it had also just been created through those amendments. *Zulu* was therefore filed in the High Court pursuant to the transitional arrangements that had been put in place.⁴⁷ The second occasion came in 2021 in the *Nkunika* case,⁴⁸ which was filed in the Constitutional Court following its operationalization. *Nkunika* was filed pursuant to article 128 of the Constitution, which vests in the Constitutional Court original and final jurisdiction in matters relating to the Constitution, except for specific matters that remain the province of the High Court under that provision.

The *Zulu* case

The dispute in *Zulu* had arisen just before the 2016 general election. *Zulu* sought to contest that election either as a member of Parliament (MP) or as ward councillor. On 10 March 2016, the Examinations Council of Zambia (Examinations Council), a statutory body that administers school examinations and awards certificates to successful candidates,⁴⁹ issued a media statement interpreting the meaning of the expressions “grade twelve certificate or its equivalent” as a “minimum academic qualification” to run for public office. The statement indicated that the term “minimum” implied that a grade twelve certificate was the “lowest” acceptable academic qualification,

43 See *Zambia Sugar Plc v Nanzaluka SCZ* appeal 82/2001; *Attorney General v Clarke* (2008) ZR 38 vol 1.

44 Adopted 10 December 1948, specifically art 21.

45 *Malembeka*, above at note 10 at 35–36.

46 *Zulu*, above at note 16.

47 Practice Direction 1 of 2016.

48 *Nkunika v Nyirenda and Another* 2019/CCZ/005 (10 March 2021).

49 Examinations Council of Zambia Act 1983, sec 8.

while “its equivalent” meant qualifications “comparable” to a grade twelve certificate.⁵⁰ On the meaning of a “grade twelve certificate”, the statement explained that it was an academic qualification awarded to a person who at *one and the same sitting* of grade twelve examinations had obtained passes at least in either: six subjects including English language, with one of them graded credit or better; or five subjects including English language, with two of them graded credit or better.⁵¹ The statement further indicated that the “real name” for the grade twelve certificate required by the Constitution was “school certificate”.⁵²

Zulu did not have a grade twelve certificate that met the grading standard for a school certificate, as defined by the Examinations Council. She did, however, have a general certificate of education (GCE) issued by the Examinations Council, indicating that she had sat for grade twelve examinations. She also had a professional diploma. Zulu feared that the Examinations Council’s interpretation of the Constitution would render her ineligible to run for election as an MP or ward councillor. This is what prompted Zulu to file an action in the High Court against the ECZ and the Attorney General to obtain a more authoritative interpretation of the requirement. Dominic Y Sichinga J heard the matter and delivered his judgment on 10 May 2016.

In his judgment, Sichinga J observed that the Constitution did not elaborate on how the requirement would be satisfied. He therefore looked elsewhere to ascertain the meaning of the requirement.⁵³ In this regard, Sichinga J referred to two constitutional review reports and found that the requirement was proposed by stakeholders during the consultative process that culminated in the adoption of the 2016 constitutional amendments. Based on his reading of those reports, Sichinga J rejected the Examinations Council’s interpretation of the meaning of “grade twelve certificate”. He opined that the grade twelve certificate required under the Constitution was a certificate attesting that a person had completed an academic programme in the 12th grade at high school or secondary school level, regardless of the academic standard achieved by that person in specific subjects. According to Sichinga J, “the legislature did not set a rigid standard or a qualification based on passes and failures”.⁵⁴

Sichinga J gave two reasons for holding this opinion. First, he observed that the Constitution did not set such a high standard as had been suggested by the Examinations Council nor did the Constitution leave room for the legislature to prescribe any such standard through statute, thereby establishing the right to run for election to be a constitutional, rather than a mere statutory, right. He also noted the need to adopt a liberal approach to the interpretation of the requirement, in keeping with the principles of democracy and equality set out

50 *Zulu*, above at note 16 at 12.

51 *Id* at 12–13.

52 *Id* at 13.

53 *Id* at 16.

54 *Id* at 18.

in the preamble to the Constitution.⁵⁵ Secondly, Sichinga J noted that the suggestion by the Examinations Council that a pass in English language was mandatory to satisfy the requirement was inconsistent with article 258 of the Constitution. That article declares English to be the official language of Zambia but goes on to state that a language other than English “may be used as a medium of instruction in educational institutions or for legislative, administrative or judicial purposes”.⁵⁶ Sichinga J thus opined that it would be absurd if the Constitution required a pass in English language as a condition to become an MP while at the same time providing that a language other than English may be used for legislative purposes.⁵⁷ He accordingly concluded that a person who had a GCE that did not meet the grading standard for the award of a school certificate would satisfy the requirement of a “grade twelve certificate”.⁵⁸

Turning to “its equivalent”, Sichinga J took the view that any certification that was equal in “value” or “effect” to a grade twelve certificate would satisfy the requirement.⁵⁹ In his opinion, the drafters had in mind those aspiring political candidates who might not have sat for grade twelve examinations but had otherwise acquired relevant training of equivalent value.⁶⁰ He gave an example of those who might have opted for vocational training or apprenticeship because their parents lacked the means to send them to school.⁶¹ According to Sichinga J, a certificate attesting such training would either “correspond to” or even “be higher than” a grade twelve certificate.⁶²

On the import of the term “minimum” that the Constitution uses in prescribing the requirement, Sichinga J took the view that a grade twelve certificate or its equivalent represented the “lowest threshold” for satisfying that requirement.⁶³ He thus held that a qualification higher than a grade twelve certificate or its equivalent would render “a person eligible to contest elective office under ... the Constitution”.⁶⁴ It was his further considered view that any certification awarded by a tertiary or educational institution offering skills training was by definition higher than a grade twelve certificate or its equivalent and would therefore satisfy the requirement.⁶⁵

In conclusion, Sichinga J held that the Examinations Council’s interpretation of the requirement, as contained in its statement of 10 March 2016, was arbitrary and inconsistent with the values and principles of the

55 Id at 21.

56 Constitution, art 258(2).

57 *Zulu*, above at note 16 at 20.

58 Id at 22.

59 Ibid.

60 Ibid.

61 Id at 23.

62 Id at 22.

63 Id at 24.

64 Id at 25.

65 Ibid.

Constitution, and he therefore declared it unconstitutional.⁶⁶ He also gave Zulu a clean bill of health, declaring that she had satisfied the requirement, not only by virtue of her professional diploma but also her GCE, which attested that she had completed secondary school education albeit not meeting the grading standard for the award of a school certificate.⁶⁷

The *Nkunika* case

The dispute in *Nkunika* arose in the aftermath of the 2016 general election. Nkunika and Nyirenda, among others, stood as parliamentary candidates for the Lundazi Central constituency. Nyirenda emerged victorious in the election. Nkunika then filed a petition in the Constitutional Court citing Nyirenda and the ECZ. His allegation was that Nyirenda was constitutionally unqualified to be elected and hold office as an MP because he did not have a grade twelve certificate or its equivalent. Nkunika thus asserted that the ECZ had contravened the Constitution by allowing Nyirenda to contest the Lundazi Central parliamentary seat and by failing to take appropriate action against Nyirenda. Nkunika asked the court to declare the Lundazi Central seat vacant and to direct the ECZ to hold a by-election within 90 days.

According to the evidence on record, Nyirenda first sat for grade twelve examinations in 1990 and failed all nine subjects that he took. It was also accepted that Nyirenda sat for GCE examinations in 2013, obtained a pass in one subject and was awarded a GCE. Apart from that GCE, Nyirenda had four tertiary qualifications at the time he was nominated to contest the 2016 election. The Constitutional Court thus found that, for the purpose of Nyirenda's candidature in that election, the ECZ had accepted that Nyirenda's tertiary qualifications were "equivalent" to a grade twelve certificate on the authority of the High Court's judgment in *Zulu*.⁶⁸

It was also not in dispute that, in 2018, after his election as MP, Nyirenda acquired a university degree. The record further indicates that, in 2019, during the pendency of the dispute before the Constitutional Court, Nyirenda resat his GCE examinations. This time, Nyirenda upgraded his GCE with passes in four subjects.

The dispute was determined by a 3:2 majority judgment delivered on 10 March 2021. Martin Musaluke JC delivered the majority judgment on his own behalf and on behalf of Anne Mwewa Sitali JC and Mugeni Siwale Mulenga JC. In its judgment, the majority declined to consider the qualifications that Nyirenda had acquired after the 2016 electoral nomination period. The majority took the view that those qualifications were inconsequential to the determination of the dispute because the import of the words "has obtained" used in the Constitution was that a candidate must have the

66 Id at 28.

67 Id at 27–28.

68 *Nkunika*, above at note 48, para 8.39.

relevant qualifications at the time of nomination, not after election.⁶⁹ Having found that Nyirenda's candidature had been accepted on the authority of the judgment in *Zulu*, the majority found that both Nyirenda and the ECZ had acted within the law as interpreted by the High Court at the material time. It therefore ruled that neither Nyirenda nor the ECZ had contravened the Constitution.⁷⁰

The majority also seized the opportunity to examine whether the High Court in *Zulu* had correctly interpreted the requirement. In seeking to establish the meaning of the requirement, like Sickinga J, the majority relied on the final report of the technical committee that drafted the 2016 amendments to the Constitution to ascertain the "intention" of the legislature. The majority thus held that the requirement was introduced "to ensure that persons elected into [sic] Parliament debate effectively and make meaningful contributions on behalf of the people they represent".⁷¹

In determining what constituted a grade twelve certificate and its equivalent, the majority relied on the testimony given by the director of the Examinations Council, whom it described as an "expert witness". That witness evidence was largely a rehash of the interpretation given by the Examinations Council in its media statement of 10 March 2016, which the High Court declared unconstitutional in *Zulu*. The witness echoed the assertion that the "real" or "actual and official name" for a grade twelve certificate was a school certificate.⁷² Based on that assertion, the majority held that the term "grade twelve certificate" used in the Constitution was "synonymous" with "school certificate".⁷³ The majority also accepted the witness's assertion regarding the very grading criteria for a grade twelve certificate that Sickinga J had rejected in *Zulu*.⁷⁴

On the meaning of the expression "its equivalent", the majority adopted a literal interpretation, as Sickinga J had done. It was the majority's view that only academic qualifications, whether obtained in Zambia or from another jurisdiction, that were "comparable" and "neither inferior nor superior" to a school certificate would be equivalent to a grade twelve certificate.⁷⁵ According to the majority, a tertiary, vocational, craft, trade or apprenticeship certificate would not be equivalent to a grade twelve certificate as these were not "comparable in value, amount, meaning and functions" to a grade twelve certificate.⁷⁶ Interestingly, the majority further suggested in its judgment that a person holding a higher qualification would not satisfy the requirement, because such a qualification would not be equivalent to a grade twelve

69 Id, paras 8.7 and 8.15.

70 Id, para 8.40.

71 Id, para 8.60.

72 Id, para 8.51.

73 Id, para 9.2.

74 Id, para 8.55.

75 Id, para 9.3.

76 Id, para 9.5.

certificate. The majority added that a GCE would be equivalent to a grade twelve certificate only if the number of subjects passed and the grades obtained satisfied the requirements for the award of a school certificate.⁷⁷

The upshot of the majority judgement was that Nyirenda did not satisfy the requirement, even though he had a GCE and four other tertiary certifications at the material time. Nevertheless, the majority maintained that neither Nyirenda nor the ECZ could be faulted for the “slip up” that had seen Nyirenda elected as an MP, because the High Court’s interpretation was good law at the time Nyirenda was adopted as a candidate to contest the 2016 election. For this reason, the majority declined Nkunika’s prayer to have Nyirenda’s election nullified, holding that its re-interpretation of the requirement could not apply retrospectively.⁷⁸

In their respective dissenting opinions, both Hildah Chibomba PC and Palan Mulonda JC agreed with the majority’s interpretation of the requirement. They only took exception to the majority’s exoneration of Nyirenda and the ECZ based on the High Court’s judgment in *Zulu*.

EXAMINATION OF THE REQUIREMENT AND ITS JUDICIAL INTERPRETATION

As alluded to in the second section of this article, the preamble to the Constitution and its article 4(3) decree that Zambia is a democratic state. It was further noted in that section that Zambia’s electoral democracy is primarily predicated on articles 45 and 46 of the Constitution, which enjoin the powers that be to ensure that citizens are free to exercise their political rights through, inter alia, “free and fair” elections, which imply two individual rights: the right to vote and the right to run for election. Also, article 267(1) of the Constitution directs relevant authorities to interpret and apply the Constitution “in accordance with the Bill of Rights and in a manner that ... promotes its purposes, values and principles”. How, then, can the values and principles of democracy, equality and non-discrimination, as collectively reflected in the preamble and in articles 4(3), 8, 23, 45 and 46 of the Constitution, be reconciled with the requirement, which excludes, based on academic qualifications, a section of the citizenry from participating in the conduct of public affairs by seeking elective public office? In any event, has the judiciary interpreted that requirement in accordance with the Bill of Rights and in a manner that promotes these constitutional values and principles as required by article 267?

Initial limitation of rights by the Constitution

Before the 2016 constitutional amendments, the Constitution did not require a person to have any academic qualification to run for public office. As noted

77 Id, para 9.4.

78 Id, para 8.66.

in the two judgments discussed above, the drafters of the 2016 amendments explained that the requirement was introduced to ensure that people elected to public office were able to “debate effectively and make meaningful contributions” in Parliament.⁷⁹ However, quite apart from the general criticism often levelled against such competency requirements as indicated in the second section of this article, this explanation is less than satisfactory. A requirement of proficiency in the official language would perhaps be a more reasonable means of attaining the purported objective.⁸⁰ As Sichinga J pointed out in *Zulu*, however, even such a requirement would be difficult to reconcile with article 258(2) of the Constitution, which provides that a language other than English may be used for legislative purposes.⁸¹ The requirement, in any case, not only seems irreconcilable with the values and principles of the Constitution, it also seems to be completely unwarranted.

To begin with, it is common knowledge that high school learners in Zambia are not taught how to “debate effectively and make meaningful contributions” in Parliament as part of the requirements for the award of a “grade twelve certificate or its equivalent”, however defined. What does it mean to “debate effectively and make meaningful contributions” anyway? Who determines what amounts to “effective debate” and “meaningful contribution”? What criteria are used to make such a determination? In any event, there is no empirical evidence indicating that citizens who have a “grade twelve certificate or its equivalent” tend to debate more effectively or make more meaningful contributions in Parliament. Nor is there empirical evidence that parliamentarians with a “grade twelve certificate or its equivalent” have generated superior political outcomes in the interest of the people they represent. Why then should Zambian women and men themselves not be allowed to decide who should represent them? To be sure, this sort of paternalism is difficult to justify in a democratic state. Only the voters themselves should be the arbiters of the suitability of candidates for public office.⁸²

Recall, moreover, that the rationale put forward by the drafters for the requirement applies only to parliamentary candidates. However, the same requirement also applies to those seeking election as president, vice-president, mayor / council chairperson and ward councillor. Except for the president and the vice-president who constitute an integral part of Parliament,⁸³ the purported rationale does not apply to ward councillors or mayors / council chairpersons as they do not participate in parliamentary business. It is

79 *Final Report* (13 December 2013, Technical Committee on Drafting the Zambian Constitution) at 374.

80 See for example, *Podkolzina v Latvia*, above at note 18.

81 See also M Callagy “‘My English is good enough’ for San Luis: Adopting a two-pronged approach for Arizona’s English fluency requirements for candidates in public office” (2013) 22 *Journal of Law & Policy* 305.

82 *Green v McKeon* 468 F2d 883 at 885 (6th cir 1972).

83 Constitution, arts 62 and 74(1).

therefore unclear why the Constitution extends the application of the requirement to these political representatives at local government level.

Whatever its rationale may be, the requirement restricts the right to run for election. By the same token, the requirement narrows “the field of candidates from which voters might choose”,⁸⁴ thereby potentially denying voters an opportunity for effective political representation. As already noted above, the right to run for election is intertwined with the rights of voters. A person who suffers exclusion due to a lack of relevant academic qualifications might as well vote for others, as there is no corresponding requirement for the exercise of the right to vote. However, such exclusion could deprive the country of resourceful political leadership that such a person might otherwise provide. In that instance, the people cannot be said to have been “free to exercise their political rights” under article 45 of the Constitution. Nor can the election be said to have been “free and fair” in terms of that article. The ultimate effect is also to undermine the right to vote enshrined in article 46 of the Constitution.

The requirement is even harder to justify when the relevant context is considered. It is an open secret that many Zambians do not have a “grade twelve certificate or its equivalent”, however defined. A recent empirical study revealed that many school-aged children in Zambia, especially in rural areas, were out of school.⁸⁵ The study attributed this state of affairs not only to the individual economic circumstances of parents and guardians, but also to socio-cultural factors and other supply-side factors, such as the lack, or poor quality, of accessible educational services and facilities. This means that many citizens are unable to acquire formal education, not by design but due to their natal circumstances. Excluding all such citizens from participating in the government of their country by taking up elective public office detracts from the Constitution’s own principle of equality declared in the preamble and echoed in article 8.

It is also difficult to reconcile the requirement with article 23 of the Constitution, under the Bill of Rights, which prohibits discrimination. As noted above, the High Court held in *Brotherton* that article 23 prohibits discrimination of any kind.⁸⁶ Under article 23(5) of the Constitution, the requirement can be deemed to be non-discriminatory only if it can be shown that it makes “reasonable” provision with respect to qualifications for service in a public office or in a local government authority. However, that requirement does not appear to have any reasonable justification. This is particularly true with respect to those seeking elective office at local government level, as the purported rationale for the requirement does not even apply to them.

84 *Bullock v Carter* 405 US 134 at 142–43 (1972).

85 “Global initiative on out-of-school children: Zambia” (November 2014, Ministry of Education, Science, Vocational Training and Early Education and UNICEF).

86 See above at note 25.

In any event, the requirement cannot pass muster at international law. As noted above, in the *Legal Resources Foundation* case, the ACHPR found a similar but less restrictive requirement to have violated the principles of non-discrimination and equality, and the right to participate freely in the government of the country as enshrined in articles 2, 3(1) and 13 of the African Charter.⁸⁷ The constitutional provision impugned in that case would only affect those seeking the highest political office, but the ACHPR had no difficulty in finding a violation of international law. The second section of this article also noted that the HRC has specifically stated that “individuals who are otherwise eligible to stand for election should not be excluded by *unreasonable* or *discriminatory requirements such as education*”.⁸⁸ It therefore seems likely that any international tribunal would find that the requirement violates not only the right to run for election but also the principles of equality and non-discrimination.

Given that the validity of the Constitution cannot be challenged, however, there is little that can be done. For the time being, the onus is on those charged with responsibility for interpreting the Constitution to ensure that the requirement is applied in a manner that is reasonably proportionate to the purpose of ensuring that people elected to public office are able to “debate effectively and make meaningful contributions” in Parliament. Under article 267 of the Constitution, this also calls for the courts to interpret that requirement in the light of the electoral rights of citizens and of the democratic principles of equality and non-discrimination.

Further limitation of rights by judicial fiat

In the wake of the judgment in *Nkunika*, the ECZ advised all persons seeking to contest the 12 August 2021 general election that it would not “separately” accept tertiary qualifications during the nomination of candidates.⁸⁹ The ECZ based its decision on the court’s judgment to the effect that higher qualifications would not satisfy the requirement as they were not equivalent to a grade twelve certificate. The Constitutional Court endorsed the ECZ’s decision when it dismissed preliminarily a subsequent action brought by a former MP and deputy minister (the applicant).⁹⁰ The applicant sought to challenge the ECZ’s decision by arguing that a person like himself who had no grade twelve certificate but had a higher qualification would satisfy the requirement. His assertion was that, during his time as an MP and deputy minister, no one had ever said that he had not been debating well in Parliament because he

87 See above at note 32.

88 HRC General Comment 25, above at note 23, para 15 (emphasis added).

89 O Samboko “‘No tertiary qualifications’... ECZ will abide by ConCourt ruling on G12 certificate” (18 March 2021) *Daily Nation* (Lusaka) at 2.

90 *Zulu v Electoral Commission of Zambia and Another* 2021/CCZ/0015 (14 May 2021).

did not have a grade twelve certificate.⁹¹ However, the court dismissed the case without considering its merits, holding that the issues raised had already been settled in *Nkunika*.

It is true that a *higher* qualification cannot be said to be equivalent to a grade twelve certificate. However, it is something of a mystery as to how the Constitutional Court concluded that such a qualification would not satisfy the requirement. The Constitution expressly states that a grade twelve certificate or its equivalent is required as a “minimum” academic qualification to run for public office.⁹² One cannot therefore take issue with the holding in *Zulu* to the effect that a grade twelve certificate or its equivalent is the *lowest* academic qualification required by the Constitution. It follows that a higher academic qualification should automatically satisfy the requirement.

Recall that the Constitutional Court made a finding of fact that the rationale for that requirement was to ensure that people elected to public office were able to debate effectively and make meaningful contributions in Parliament. Syllogistically, the Constitutional Court is telling us that a person who holds a higher qualification cannot debate effectively or make meaningful contributions in Parliament unless that person also holds a grade twelve certificate or its equivalent. This, of course, is counterintuitive. There is no reasonable basis for one to believe that a grade twelve certificate holder as such would be a more effective parliamentarian than a university graduate or an experienced professional. As already noted, high school education that culminates in the award of a grade twelve certificate or its equivalent does not include training people how to debate effectively or make meaningful contributions in Parliament, at least not as a specific subject.

Even context does not support the Constitutional Court’s restrictive interpretation of the Constitution. There are many university graduates and skilled Zambian women and men who might aspire for public office but do not have a grade twelve certificate or its equivalent. *Zulu*, *Nkunika* and the case that was filed in the wake of the court’s judgment in *Nkunika* are indicative of the status quo. As alluded to in the introduction to this article, there are many other citizens, including former MPs, councillors and government ministers, who do not have a grade twelve certificate or its equivalent but have higher academic and professional qualifications. All of them have been disqualified from running for public office by judicial fiat.

The Constitutional Court’s interpretation of what constitutes a “grade twelve certificate” further narrows the field of potential political candidates. Indeed, political parties had difficulty finding aspiring candidates with that qualification as defined by the Constitutional Court to contest the 12

91 M Ndawa “I was deputy minister, none said you are not debating well as you don’t have a grade 12 certificate” (18 May 2021) *The Zambian Observer*, available at: <<https://www.zambianobserver.com/i-was-deputy-minister-none-said-you-are-not-debating-well-as-you-dont-have-a-grade-12-certificate/>> (last accessed 6 June 2022).

92 Constitution, arts 100(1)(e), 110(2), 70(1)(d) and 153(4)(c).

August 2021 general election, especially at ward level.⁹³ Unlike the generous interpretation adopted in *Zulu*, a grade twelve certificate is now defined according to stringent academic standards of achievement based on the number of passes and grades achieved in particular subjects. One would not expect the Constitutional Court, as the guardian of the Constitution, to interpret the Constitution in a manner that puts academic achievement ahead of constitutional rights without providing a compelling justification. But that is exactly what happened in *Nkunika*.

It would appear that the Constitutional Court misdirected itself to that restrictive interpretation of the Constitution, based on the testimony by the director of the Examinations Council whom it mistook for an expert witness. That witness was clearly not a *constitutional* expert witness. By his own admission, the Examinations Council does not award grade twelve certificates. If, as the witness stated, the “real” or “actual and official name” for a grade twelve certificate is school certificate, why did the drafters use an “unreal” or an “unactual and unofficial name” in the Constitution?⁹⁴ Surely, as experts themselves and given that the Constitution is an official document, the drafters could have used the “real” or “actual and official name” in the Constitution. When the relevant context and the constitutional rights at stake are considered, one would be justified for believing that the drafters intentionally avoided using the term “school certificate” to ensure that as many citizens as possible were able to run for public office. This resonates with the holding in *Zulu*. To hold otherwise would be to undermine further the democratic principles of equality and non-discrimination that article 267(1) enjoins the courts to uphold when interpreting the Constitution.

In interpreting what amounts to the “equivalent” of a grade twelve certificate, both the High Court and the Constitutional Court relied on the literal meaning of that term. The difference in the two judgments is based wholly on their respective interpretation of what constitutes a grade twelve certificate. The Constitutional Court’s rigid interpretation of the “grade twelve certificate” requirement was simply extrapolated to its interpretation of “its equivalent”, hence maintaining the rigidity. In a democratic state that values principles of equality and non-discrimination, such rigidity is obviously unwarranted. This is even more so in the Zambian context, as formal education is not readily accessible to all.

One would have expected to see these concerns raised in at least one of the two dissenting opinions in *Nkunika*. In any event, the court should have taken judicial notice of the notorious fact that there are many citizens who do not have school certificates or certificates of an equivalent standard and that the

93 See for example, N Sakala “It’ll be hard to find councillor aspirants with G12 certificates, laments UPND” (19 March 2021) *News Diggers*, available at: <<https://diggers.news/local/2021/03/19/itll-be-hard-to-find-councillor-aspirants-with-g12-certificates-laments-upnd/>> (last accessed 6 June 2022).

94 *Nkunika*, above at note 48, para 8.51.

status quo is likely to persist for as long as education remains a privilege rather than a right. However, the whole Constitutional Court bench seems to have completely overlooked the contextual ramifications of its judgment on the rights of citizens to run for election and to choose their political representatives according to their own preferences. It is particularly staggering that none of the five judges found it worthwhile to put the relevant context in writing, to show that it was at least considered in arriving at the decision. Indeed, the Constitutional Court's decision in *Nkunika* is so indifferent about context that it has prompted one commentator to wonder whether those who made it were "operating on the moon".⁹⁵

Article 13 of the African Charter and article 25 of the ICCPR, which protect the right of citizens to participate in the government of their country, including through the right to vote and the right to run for election, should also have been considered. This is not too much to expect. As noted above, the Constitutional Court did just that in *Malembeka* when considering the right to vote in respect of persons in lawful custody. Moreover, as pointed out above, article 23 of the Constitution considers differential treatment of citizens based on academic qualifications to be discriminatory. The only relevant exception here is to the extent to which it can be shown that such differentiation "makes reasonable provision" with respect to qualifications for service in public office or in a local government authority. The Constitutional Court should therefore have contextually interrogated the reasonableness of the High Court's interpretation before overturning it. Constitutional rights should never be restricted so easily without offering any reasonable justification in the light of the principle of proportionality.

CONCLUSION

The state's interest in ensuring competent political candidates in democratic elections is generally suspect. In principle, voters themselves as adults should be allowed to make their own judgment in this regard through the ballot. This article argues that the requirement for academic qualifications as an eligibility criterion to run for public office as contained in the 2016 amendments to the Constitution detracts from the Constitution's own democratic principles of equality and non-discrimination with respect to the right to run for election. The purported rationale for that requirement is unconvincing. However, given that the validity of constitutional provisions cannot be challenged before any forum, it behoves the courts to interpret the requirement generously. The restrictive interpretation adopted in *Nkunika* is misguided. That interpretation not only further undermines the right to run for public office, it also further

95 U Nkomesha "Some court rulings make me wonder if judges are operating on the moon - Nawakwi" (31 March 2021) *News Diggers*, available at: <<https://diggers.news/local/2021/03/31/some-court-rulings-make-me-wonder-if-judges-are-operating-on-the-moon-nawakwi/>> (last accessed 6 June 2022).

narrows, paternalistically, the field of candidates from which citizens may select their political representatives. The Constitutional Court's decision to overturn the High Court's initial interpretation of the requirement cannot be justified in constitutional jurisprudence, not least when the relevant context is properly considered.

The Constitutional Court should, at the earliest opportunity, reverse its decision. Article 267 of the Constitution, which enjoins the courts to interpret the Constitution in a manner that promotes the development of the law, provides sufficient latitude for the Constitutional Court to revisit its interpretation.⁹⁶ Better still, unless it can be shown empirically that the requirement adds value to Zambia's electoral democracy, the legislature would do well to repeal it. This can be done under article 79 of the Constitution with relative ease. Despite being controversial, that article empowers Parliament to alter any part of the Constitution, except for article 79 itself and the Bill of Rights, which can only be altered with the approval of the people in a national referendum.⁹⁷

CONFLICTS OF INTEREST

None

96 See also, by analogy, C Phiri "A curious decision by Zambia's highest court: Six years imprisonment for civil contempt?" (2019) 12/2 *African Journal of Legal Studies* 115 at 130–31.

97 See *Zambia Democratic Congress v Attorney General* SCZ judgment 37 of 1999.