

A On the appellant's counsel while arguing ground 3 contended that the Magistrate erred in invoking estoppel when the suit was before declaring the proper landlord. He contended that the appellant did not deny any of the respondents to be the landlord; their prayer
B is only to declare the proper landlord. Therefore, the Magistrate should not have applied section 116 of the Evidence Decree.

While the respondent's counsel concluded that the Hon Magistrate cited the section 116 of the Evidence Decree correctly.

C He cited **Sarkar on Evidence** (10 ed) page 1029 and the case of *Patel Kilabai v. Hangaram* (2).

D The appellant cannot deny the landlord title unless after handing over possession.

In my opinion, even if the issue of who is the landlord is to be determined there is no two way about the provision of section 116 of the Evidence Decree, that the tenant (appellant) must hand over
E possession first to the landlord no matter how defective the landlord title is. So the issue of the court determining who the landlord is does not arise until after the handing over. The equitable maxim that where there are equal equities the first in time prevails even though
F one may say that this is not a court of equity. It is a well known fact that the appellant was a tenant of the first defendant, the second defendant came into the picture after the expiration of the tenancy. How did the second landlord come into the scene? This could only
G be determined after hearing evidence.

As rightly stated by counsel to the respondent in his submission on the conduct of the second defendant who never appeared in the trial court below and on appeal after being summoned, shows lack
H of the interest on his part and if he is really the actual landlord he would have definitely appeared.

Tenant who holds over. Therefore as a general principle of law as decided in the case of *Ekoba v. Dayaran* (3), a tenant who wishes
I to dispute his landlord's title must not only see that the tenancy has

come to an end, but also possession which was in him as a tenant
A has been surrendered. Therefore, a tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord has title.

In the final analysis, I allow this appeal in part. I hereby order
B for the dismissed suit (Civil case Number 10 of 1999) to be heard and determined on merit.

MTUMWA SAID HAJI AND 49 OTHERS v. ATTORNEY GENERAL

HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Mapigano, Mackanja and Bubeshi,. JJ)

CIVIL CASE No. 2 OF 1995

*Constitutional Law – Constitution of the United Republic of Tanzania 1977 –
Article 126 – Petition for a declaratory order to summon a Special
Constitutional Court – Whether members of a registered political party
have legal personality to seek the order.*

*Constitutional Law – Articles of the Union – Whether validity expired upon
promulgation of the Union Constitution.*

Constitutional Law – Articles of the Union – Whether unalterable.

*Constitutional Law – Constitutional amendment – Enactment of the 11 Amendment
to the Constitution of the United Republic of Tanzania 1977 – Whether
made unilaterally.*

*Constitutional Law – Interpretation of Constitution – Ordinary prescriptions
not appropriate.*

A *International Law – Law of Treaties – Whether Tanzania Mainland and the Revolutionary Government of Zanzibar have legal capacity to enter into a treaty.*

B *International Law – Law of Treaties – Treaty between Tanganyika and Zanzibar creating the United Republic of Tanzania – Doctrine of fundamental change of circumstances – Whether applicable.*

C The petitioners were members of a registered political party in Tanzania. In their petition to the High Court, they challenged the validity and legality of the 11th Amendment to the Constitution of the United Republic of Tanzania 1977, which had been made pursuant to article 98(1)(a) of that Constitution. Their main contentions were that the Amendment was made unilaterally; that the Amendment violated the Articles of Union, Schedule to Chapter 557; that the articles are unalterable; that the procedure for making the Amendment was not followed; and that circumstances called for a declaratory order that there existed a Constitutional dispute between the United Republic of Tanzania and the Revolutionary Government of Zanzibar that warranted the summoning of the Special Constitutional Court under article 126. The respondent resisted the petition, and counsel who appeared for him expressed the opinion that the validity of the Articles of Union expired upon the promulgation of the Union Constitution in 1977.

F **Held:** (i) The validity of the Articles of the Union did not expire when the Union Constitution was promulgated; the Articles of Union are part of the Constitutional Law of the United Republic.

(ii) The Articles of Union do not override the Union Constitution;

G (iii) The Articles of Union being part and parcel of the Acts of Union may be amended or altered to meet new needs and challenges;

H (iv) Since the Articles of Union form the Schedule to Chapter 557, and as Chapter 557 falls under List One in the Second Schedule to the Constitution to which article 98(i)(a) applies, the procedure laid down in the Constitution, by which Chapter 557 may be altered, equally applies to the articles;

I (v) The 11th Constitutional Amendment that was made under Article 98(1)(a) of the Constitution was procedurally correct;

(vi) There was no evidence of a conflict between the Union Government and the Zanzibar Revolutionary Government; thus there existed no circumstance to warrant the summoning of a Special Constitutional Court; A

(vii) The constituent states of Tanganyika now Tanzania Mainland and Zanzibar have long since lost their legal personality; they cannot negotiate a treaty nor can they negotiate to amend the Treaty of Union. B

Petition dismissed

Cases referred to: C

(1) *Thabit Ngaka v. Regional Planning Officer, Morogoro Region* [1973] LRT n. 24

(2) *Mac Comick v. The Lord Advocate* [1953] Scot Law Times 22 at 262 D

(3) *Bribery Commissioner v. Ramasinge* [1965] AC 172

(4) *Hunter v. Southern Inc.* (1985) II DLR (4) 641 (5CC)

Statutory provisions referred to: E

(1) Act of Union Chapter 557, section 5(c)

(2) Interim Constitution, article 53(2)

(3) Judicial Service Act 1962 (Chapter 508), sections 22, 23 and 24 F

(4) Civil Service Act 1962 (Chapter 509), sections 22, 23 and 24

(5) The Constitution, articles 98(1)(a), 98(1)(b), 26(1) and (2)

Dr. Mvungi, for the Petitioners G

Mr Mwidunda, for the Respondent

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RULING

(Dated 20 April 2000)

B **Mackanja, J.:** Mtumwa Saidi Haji and 49 others have brought this petition for declaratory orders under article 26(1) and (2) of the Constitution of the United Republic of Tanzania and section 6 of the Basic Rights and Duties Enforcement Act 1994 and any other enabling legal provisions. All the petitioners are members of the Civic United Front, one of several political parties that enjoy permanent registration. The petition is supported by a tri-pronged ground as follows:

- D** (i) that the Union Parliament erred in procedure by enacting the 11th Amendment pursuant to article 98(1)(a) instead of article 98(1)(b) of the Union Constitution;
- E** (ii) that the Union Parliament acted *ultra vires* the Articles of Union in effecting amendments to articles 37, 47, 48, 49 and 50 of the Union Constitution, 1977 in the absence of a renegotiated Treaty between Tanganyika and Zanzibar;
- F** (iii) that the aforementioned violations of the basic Constitutional norms of the Tanzania State are in conflict with the basic doctrines of Customary International Law and the National Law, the consequences of which endanger generally the Constitutional order, and the legality of the Union.

G It is alleged that in making the 11th Amendment, the Union Parliament as an organ of state was bound and obliged to comply with the Constitution, in particular, Article 26(1) of the Constitution of the United Republic.

H It is contended by the petitioners that the alleged violation of the Constitution, and the alleged illegality that has been occasioned by the 11th Amendment have aggrieved them; they, therefore, feel duty bound and entitled to the right to protect the Constitution and legality through this petition in accordance with Article 26(2) of the Constitution

I which provides that:

26(2) Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land.

We would say that the institution of this petition may be evidence that the petitioners are among civil spirited individuals who, through their collaborative effort, have decided to fight for a Constitutional order that guarantees compliance with the source of legality for all laws, the Constitution.

The petition is based on facts which are particularized as hereunder:

- (1) that on the 26 April 1964, the People's Republic of Zanzibar, of which the petitioners were citizens, and the Republic of Tanganyika concluded a Bilateral International Treaty that united the two States into one sovereign Republic;
- (2) that the instruments of ratification exchanged on the 27 April 1964 at the Karimjee Hall in Dar es Salaam are matters which this court can take judicial notice of;
- (3) that on the 26 April 1977, the Union Parliament enacted the Constitution of the United Republic of Tanzania, without specifically providing for the juridical existence of Tanganyika and providing as was provided for in the articles of the Union for the Administration of Tanganyika's non-union matters by the Government of the United Republic of Tanzania;
- (4) that in view of what is averred in paragraph 8, that derogation constituted a breach of the Articles of Union;
- (5) that on the 17 January 1995, the President of the United Republic gave his assent to the 11th Amendment passed by the Union Parliament in December 1994;
- (6) that the 11th Amendment amends, *inter alia*, articles 37, 47, 48, 49 and 50 of the Constitution of the United Republic of Tanzania in a manner which substantially and fundamentally violates the Articles of Union in that:

- A (i) article 37 is amended to remove the President of Zanzibar from the list of persons to whom the powers of the President of the United Republic may devolve. This violates article (iii)(b) of the articles of Union that provided that the President of Zanzibar shall be the principal assistant to the President of the United Republic;
- B
- C (ii) that articles 47, 48, 49 and 50 deny the President of Zanzibar his right to become the First Vice President of the Union when the President of the Union hails from Tanganyika and the Second Vice President of the Union when the Union President hails from Zanzibar;
- D (7) that insofar as the Articles of Union envisaged that the President of Zanzibar and not any other Zanzibar, to be the Union Vice President, the amendment of articles 37, 48, 49 and 50 are in conflict with the Articles of Union and, therefore, unConstitutional;
- E (8) that what is averred in paragraph 7, was fatal to the validity and legality of the instrument in so far as it denied the National Assembly the right to exercise its voting power according to the procedure laid down under article 98(1)(b) in a matter which affects the Executive Authority of the President of Zanzibar and the Executive Authority of the United Republic.
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In the penultimate, the petitioners submit that the 11th Amendment fatally violates the Articles of Union and pray for the following declaratory orders:

- G (i) that the 11th Amendment in so far as it is averred in this petition is unConstitutional and therefore null and void;
- H (ii) that there exists a Constitutional dispute between the United Republic of Tanzania and the Revolutionary Government of Zanzibar that warrants the summoning of the Special Constitutional Court;
- (iii) that the costs of this petition be born by the respondent; and
- I (iv) any other orders and remedies that this court may deem fit to grant in the circumstances of this petition.

The petition has been argued by way of written submissions. Dr Sengondo Mvungi, learned advocate, represents the petitioners while Mr Fidel Mwidunda, learned state attorney, advocates for the respondent. Both have made fairly lucid arguments for which we feel we should commend them.

Dr Mvungi set the ball rolling. He concedes the Constitutional powers of the Union Parliament to sit as a Constituent Assembly. By reason of that concession the petitioners do not oppose the legislative power of the Union Parliament to pass and to adopt the Constituent Acts. Later in this ruling these acts will also be cited as the Acts of Union. As indeed it is plain in the Constitution, learned counsel points out that those powers reside in article 98(1)(a) and (b). He goes on to argue, however, that this article does more than merely vesting powers of Constitutional making upon the Union Parliament. It spells out the procedure and conditions for the exercise of such powers. The dispute in this petition, he says, centres on allegations made by the petitioners that the procedure laid down by the Constitution was not followed by Parliament when it passed and adopted the 11th Amendment on 2 December 1994 in Dodoma. So from the petitioners' pleading four issues cry for determination, that is to say:

- (i) whether there are sufficient facts proving that there was violation of the procedure laid down by article 98(1)(b) of the Constitution of the United Republic of Tanzania 1977;
- (ii) whether the contravention, if any, of article 98(1)(b) invalidates the purported 11th Amendment;
- (iii) whether the Union Parliament enjoys powers to effect Constitutional amendments in conflict with the Articles of Union; and
- (iv) whether the two state parties to the Treaty of Union between Tanganyika and Zanzibar are entitled to rely upon the doctrine of fundamental change of circumstances in the case of unilateral amendment of the basic terms of the Articles of Union.

A The four issues were argued *seriatim*. After repeating the first issue learned counsel pointed out ground 4(i) of the petition in which he alleges that the Union Parliament erred in procedure by enacting the 11th Amendment pursuant to article 98(1)(a) instead of article 98(1)(b) of the Union Constitution. As proof for this contention the petitioners rely on the Hansard Report for the Seventeenth Session relating to the Bill that introduced the Eleventh Amendment. The undisputed extract is reproduced below:

C Matokeo Ya Kura

Katibu wa Bunge: Mheshimiwa Spika, naomba kutoa matokeo ya kura rasmi kama ifuatavyo:

D Waliosema hapana ni 5

Waliosema ndiyo ni 186

E Spika: Maana yake ni kwamba waliobaki hawapo, kwa hiyo idadi ya theluthi mbili ya Wabunge wote idadi inayotakiwa kukamilisha matakwa ya Katiba ni Wabunge 167, ndio lazima waafiki, sasa walioafiki wameshinda na muswada umepitishwa kwa mujibu wa Katiba (Vifijo/Makofi).

F Dr Mvungi contends that there is hardly any need to belabour this point. It is an indisputable fact he says, which the Attorney General admits in paragraph 3 of his amended reply to the petition that the Eleventh Amendment was effected in accordance with the provisions of article 98(1)(a), even though the Attorney General makes an alternative argument in the same paragraph 3 that even if the said votes were counted in accordance with the provisions of article 98(1)(b), the votes cast by Zanzibar Members of Parliament were more than half the majority, therefore within the requirements of the article. Learned counsel finds the second leg of the Attorney General's argument to be totally wrong in that the requirement under article 98(1)(b) is two-thirds majority of votes of Mainland Members of Parliament and an identical majority of Zanzibar Members of Parliament, each block voting separately. More than half majority of Zanzibar Members of Parliament is not equivalent to two-thirds majority of Zanzibar

A Members of Parliament and, moreover, nothing is said of the Mainland Members of Parliament. In any event, the respondent having admitted that the procedure adopted was that provided for under article 98(1)(a), learned counsel finds it rather superfluous to consider the theoretical argument that the results can be calculated artificially in order to comply with the requirements of article 98(1)(a). In his opinion what the Constitutional makers intended is that each time Parliament votes on a Constituent Bill it should do so consciously, taking into account the serious consequences of its act.

C The only important question to be answered in relation to the procedure employed by Parliament in effecting the Eleventh Amendments is why these amendments should have been effected in accordance with the provisions of article 98(1)(b) as contended by the petitioners and not under article 98(1)(a) as contended by the respondent. Learned counsel then elaborates on what Parliament should do when applying paragraph (a) or paragraph (b) of sub-article (1) of article 98. Dr Sengondo Mvungi observes that the Acts of Union contain the Articles of Union as their schedule. That it is an accepted position in common law that schedules to acts are part and parcel of such acts. He cites the case of *Thabit Ngaka v. Regional Fisheries Officer, Morogoro Region*, (1) in support of his proposition. The question then is whether the Union Parliament has powers to effect amendment of the entire Acts of Union, including the Schedules to them. To him the answer is no, for the Schedule to the Acts of Union is a treaty between two states and as such it can only be amended by invoking the proper procedure for amendment of treaties in international law. He cites article 39 of the Vienna Convention on the Law of Treaties which provides that:

H A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

I Part II of the Vienna Convention on the Law of Treaties sets out the procedure for concluding treaties and their entry into force. Therefore,

A a National Parliament is devoid of powers to effect amendment to treaties. He makes the observation that even if one were to blindfold one's mind to the requirements of law in international law as pointed out above, the argument that the inclusion of the whole of Chapter B 557 in list one entitles the Union Parliament to effect any changes and/or amendments to that act in accordance with the provisions of article 98(1)(a) without paying regard to other provisions of the Constitution is futile and absurd. List Two of the Second Schedule C clearly singles out matters that are provided for by Chapter 557 but which can only be amended in accordance with the provisions of article 98(1)(b). He contends, after quoting paragraph (b) of sub-article (1) of article 98, that it is clear from that list that the Eleventh D Amendment effected changes touching upon the authority of the Government of the United Republic and the authority of the Revolutionary Government of Zanzibar. That as set out in paragraph 7(1) of the petition, the Eleventh Amendment amended, *inter alia*, article 37 E of the Constitution by removing the President of Zanzibar from the list of persons to whom the powers of President of the United Republic may devolve. For Article 37(3)(a) casts the First Vice President as the first person and the Second Vice President as the second person in the devolution list. Both the Articles of Union (article (iii)(b)) F and the Acts of Union (section 5(c)) specifically provided that the person who is President of Zanzibar shall be the very person who shall be the First Vice President of the Union Government in the case where the President hails from the Mainland. And, further as G set out in paragraph 7(ii) of the petition, the Eleventh Amendment made changes to articles 47, 48, 49 and 50 of the Constitution in a manner which made it possible to have a Vice President of the Union hailing from Zanzibar who is not at the same time President of Zanzibar. H Both the Treaty of Union (article iii)(b)(and Acts of Union (section 5(c)) provide that the President of Zanzibar shall automatically be Vice President of the Union. Thus it is argued that these facts indicate clearly that the changes brought by the Eleventh Amendment affected I both the executive authority of the United Republic since the Vice President of the Union is part and parcel of that authority, and the

executive authority of the Government of Zanzibar since the President of Zanzibar is also part and parcel of that authority. A

Learned counsel having traced the historical development of our Constitution making procedures, submits that at no point in time were the Articles of Union superseded. They constitute the basic norm reflecting the birth of what he terms the grand norm of the B Tanzanian nation. That both the Acts of Union and the subsequent Constitutions derive their legality and validity from this basic norm. He cites a book entitled **The Legal Foundations of the Union in C Tanzania's Union and Zanzibar Constitutions** (DUP. 1990) at page 64 paragraph 3.3 in elaboration of his submissions. He also contends that the Articles of Union are unalterable, citing the British case of *MacComic v. The Lord Advocate* (2) at Page 262. D

Learned counsel has drawn our attention to the doctrine of fundamental change of circumstances as it applies to the Law of Treaties in International Law. He argues that change of circumstances prohibits parties to a treaty from changing the treaty without the consent of the other; E and that breach of this doctrine discharges the other party from its contractual obligations under the treaty. Since the Union Parliament is not a party to the Treaty of Union, it had no power to enact the F Eleventh Amendment without allowing room for the parties to re-negotiate that treaty and that the changes created a situation of conflict between the Union Government and the Revolutionary Government of Zanzibar. It is in these circumstances that the petitioners argue that the situation warrants summoning a Special Constitutional Court. G

On his part, Mr Mwidunda, learned state attorney appearing for the respondent contends that the Eleventh Amendment was legally enacted by the Union Parliament in full compliance with article 98(1)(a) of the Constitution. It is his submission that as provided by article H 98(1) the Union Parliament has Constitutional mandate to enact law for the purpose of effecting changes in the Constitution. In doing so, Parliament is bound by Constitutional procedure as laid down in articles 98(1)(a) and 98(1)(b). He argues that in enacting the Eleventh I

- A Amendment Parliament was not bound to comply with article 98(1)(a). This article, he says, provides for a procedure for effecting changes in respect of matters listed in '*Nyongeza ya Pili*' – *Orodha ya Pili*. For Parliament to change those eight listed matters, he says, the enactment must be approved by two quarters (*sic*) of the counted votes of Members of Parliament from the Mainland and the same number of counted votes of Members of Parliament from the Isles. It is his contention that the contested amendment effected changes in the following matters:
- C
- (i) one Vice President who will be Principal Assistant to the President in Union matters;
 - (ii) period which the Vice President assumes the mandate of the Vice President;
 - (iii) oath of the Vice President; and
 - (iv) tenure of office of the Vice President.
- D
- E He submits that changes effected in articles 47, 48, 49 and 50 are not among the eight matters listed in *Nyongeza ya Pili*, *Orodha ya Pili* as provided in the Constitution. In view of this fact, Parliament in enacting Act Number 34 of 1994 was not bound to comply with provisions of article 98(1)(b) as the petitioners contend. Hence he submits that by adopting the procedure provided for in article 98(1)(a) in enacting Act Number 34 of 1994 Parliament acted properly and legally in terms of article 98(1)(a) of the Constitution of the United Republic. The respondent, therefore, submits that Parliament did not violate any article of the Constitution and that there was no procedural error.
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- G
- H It is the further contention of the respondent that, even if the votes were to be counted, the number of Members of Parliament from Zanzibar supporting the Bill for Act Number 34 of 1994 was more than two quarters (*sic*) of total votes from Members of Parliament hailing from Zanzibar and more than two quarters (*sic*) votes of the Members of Parliament from Mainland. We believe it to be a *lapsus*
- I

linguae when Mr Mwidunda says two quarters instead as two-thirds. Be that as it may; he submits that even if the enactment of Act Number 34 of 1994 was supposed to be done under article 98(1)(b) then Parliament, as a matter of fact complied with article 98(1)(b) of the Constitution. According to learned counsel compliance with article 98(1)(b) is supported by the **Hansard Report** contained in the supplementary list of documents forming part of the petition. In the **Hansard Report** only five Members of Parliament opposed the Bill. These Members of Parliament are listed in Hansard Report as Number 73, 80, 93, 102 and 137. He submits that out of the five Members of Parliament who voted to oppose the Bill three of them were from the Isles. The Members of Parliament who opposed the Bill from the Isles are listed as 73, 80 and 93. The two Members of Parliament from Tanzania Mainland who opposed the Bill are listed in the **Hansard Report** as numbers 102 and 137.

Regarding whether the amendment violated the Treaty of Union when the legislation was passed in the absence of a renegotiated Treaty between Tanganyika and Zanzibar, Mr Mwidunda submits that article 98(1) and (2) of the Constitution gives Parliament mandate to effect any change to the Constitution subject to procedure provided therein. In article 98(2) of the Constitution, it is provided that:

Kwa madhumuni ya ufafanuzi wa masharti ya ibara ndogo ya kubadilisha Katiba au masharti ya sheria maana yake ifahamike kuwa ni pamoja na kurekebisha na kusahihisha masharti haya au kufuta na kuweka masharti mengine badala yake au kusisitiza au kubadilisha matumizi ya masharti hayo.

So Parliament by enacting Act Number 34 of 1994 was repealing and replacing articles 47, 48, 49 and 50 of the Constitution in view of the mandate provided by article 98(2). Thus the averment in paragraph 3(ii) of the petition that Parliament acted *ultra vires* in enacting Act Number 34 of 1994 in the absence of a renegotiated Treaty between Tanganyika and Zanzibar has no legal basis in the Constitution or in any other law.

A The learned state attorney contends that the Articles of Union were meant to subsist with legal force until the enactment of the Union Constitution. He cites Roman (ii) of the Schedule to the Articles of Union which provides that:

B During the period from commencement the Union until the Constituent Assembly provided for in article (vii) shall have met and adopted a Constitution for the United Republic (hereinafter referred to as the Interim Period) the United Republic shall be governed in accordance with the provisions of articles (iii) to (iv).

C It is the respondent's submission that the Articles of Union ceased to have legal force upon adoption of the Union Constitution in 1977.

D The respondent denies that the amendment of articles 47, 48, 49 and 50 of the Constitution violated basic Constitutional norms of the Tanzania State. Nor does the amendment conflict with the basic doctrine of customary international law and the national law as to endanger the Constitutional order and legality of the Union. It is the respondent's submission that Act Number 34 of 1994 now forms part of our Constitution. Therefore, Act Number 34 of 1994 being part of the Constitution cannot be validly challenged on grounds of unConstitutionality. As part of the Constitution the provisions of the Eleventh Amendment are not in any way inconsistent or incompatible with any other part of the Constitution. On the position of the President of Zanzibar as per Articles of Union, the respondent submits that Articles of Union were only a temporary legal arrangement which provided governance during the transitional period pending enactment of the Constitution. He concludes his submissions with the contention that whether or not a conflict exists between the United Republic of Tanzania and the Revolutionary Government of Zanzibar is a question of fact and there is no evidence to that effect. It is also part of respondent's submission that there is no conflict between the two governments to warrant the summoning of the Special Constitutional Court for the purpose of interpreting or execution of any Constitutional matter in dispute between the two governments. In view of the existing

circumstances it is the respondent's submission that there is no legal justification for issuing such an order. A

We now turn to consider the grounds upon which the petition is founded. We propose to determine them *seriatim*. B

It is contended in the first ground that the Eleventh Amendment is null and void and that as a result it has no legal force at all. This ground is based on the contention that when enacting the amendment, the Union Parliament erred in procedure. According to counsel the amendment ought to have been made pursuant to article 98(1)(b) of the Constitution instead of under paragraph (a) of article 98(1). C

It is common ground that the procedure that must be followed when altering any provision of the Constitution is provided for under article 98(1). It provides: D

98(1) Parliament may enact legislation for altering any provision of this Constitution in accordance with the following principles:

(a) A Bill for an act to alter any provision of this Constitution (other than those relating to paragraph (b) of this sub-article or any provision of any law specified in List One of the Second Schedule to this Constitution) shall be supported by the votes of not less than two-thirds of all the Members of Parliament; E F

(b) A Bill for an act to alter the provisions of this Constitution or any provision of any law relating to any of the matters specified in List Two of the Second Schedule to this Constitution shall be passed only if it is supported by the votes of not less than two-thirds of all Members of Parliament from Mainland Tanzania and not less than two-thirds of all Members of Parliament from Tanzania/Zanzibar. G H

According to list one of the second Schedule, the following are the matters that may be altered with the support of at least two-thirds of all Members of Parliament: I

- A 1. the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act 1962, (Chapter 500) sections 3, 17, 18, 23 and 26;
2. the Civil Service Act 1962 (Chapter 509), sections 22, 23 and 24;
- B 3. the Judicial Service Act 1962 (Chapter 508), sections 22, 23 and 24; and
4. the whole Act of Union between Tanganyika and Zanzibar (Chapter 557).

C Matters in List Two, the amendment of which requires to be supported by votes of two-thirds of all Members of Parliament from Mainland Tanzania and a like number of votes of all Members of Parliament from Tanzania Zanzibar, are the following:

- D 1. the existence of the United Republic;
2. the existence of the Office of President of the United Republic;
3. the authority of the Government of the United Republic;
- E 4. the existence of the Parliament of the United Republic;
5. the authority of the Government of Zanzibar;
6. the High Court of Zanzibar;
- F 7. the list of Union matters; and
8. the number of Members of Parliament from Zanzibar.

G There is no controversy whatever that Parliament adopted the procedure under article 98(1)(a) when passing the Bill that ultimately enacted the Eleventh Amendment. Learned counsel for the petitioners argues that Parliament went wrong in so doing. Mr Fidel Mwidunda, learned state attorney, appearing for the respondent, advances a rival proposition.

H He would have us say that the contentious enactment was procedurally proper. Now whether or not Parliament slipped into error, the petitioners must prove that the matters that were legislated on are covered in List Two of the Second Schedule. This, then, brings us to matters

I that were legislated on in the Eleventh Amendment which covers

articles 47, 48, 49, 50 and 102. articles 47, 48, 49 relate to the office of the Vice President of the United Republic. Before the contested amendment the Office of Vice President was provided for under Chapter IV of the Interim Constitution and was adopted in the 1977 Constitution. article 53(2) of the Interim Constitution provides that:

- (2) The head of the Executive for Zanzibar shall be the Vice- President of the United Republic appointed for such purpose, and he shall be styled the President of Zanzibar.

The foregoing provisions trace their origin from article (iii)(b) of the Articles of Union between the Republic of Tanganyika and the Peoples Republic of Zanzibar. The Articles of Union are a Schedule to the Union of Tanganyika and Zanzibar Act Chapter 557. They provide:

- (i) ...
- (ii) ...
- (iii) During the interim period the Constitution of the United Republic shall be the Constitution of Tanganyika so modified as to provide for:
- (a) ...
- (b) the offices of two Vice-Presidents one of whom (being a person normally resident in Zanzibar) shall be the head of the aforesaid executive in and for Zanzibar and shall be the principal assistant of the President of the United Republic in the discharge of his executive functions in relation to Zanzibar ...

The Eleventh Amendment has introduced an entirely new procedure for the accession to the office of Vice President. In difference with the appointive nature in the accession to that office before the Amendment, the Vice Presidency is now an elective office. There is no longer a requirement for two Vice Presidents, one of whom should have come from Zanzibar. The current position as provided for under article 47(1) is this:

A (1) There shall be a Vice President, who shall be the principal assistant to the President in respect of all the matters in the United Republic generally and, in particular, shall:

B (a) assist the President in making a follow-up on the day-to-day implementation of Union matters ...

C We are of the view that the present office of Vice-President has wider powers than the position was before the enactment of the Eleventh Amendment. Whatever powers that may be enjoyed in the portfolio of Vice-President, it is the contention of learned counsel for the petitioners that the procedure through which the Amendment was passed does not conform to the letter and spirit of the Articles of Union.

D At this stage it is opportune to say that we are at one with learned counsel that any legislation, including Constitutional amendments, may be enacted only in such manner and form as is prescribed by the law. If, therefore, an act including the Constitution itself, lays down a specific procedure to be followed before it may be altered, a legislative exercise that will ignore it will not have been passed in the manner and form prescribed by that law. It follows that such legislation cannot be said to be an Act of Parliament. We may draw some authority for this proposition of law, though of a persuasive nature, from the decision of the Privy Council in *Bribery Commissioner v. Ranasinghe* (3). Lord Pearce said this at page 197:

G A Legislature has no power to ignore the conditions of law making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign ...

H Whether or not Parliament erred in procedure or that it ignored its own legislative practice will largely depend on the construction of article 98(1)(a) and (b). It will also depend in part on whether there is evidence that Parliament erred in what transpired during the Parliamentary deliberations as reported in the Hansard. Indeed, in tandem with rules of construction, particular respect must be paid

A to the language that has been employed and the historical background from which the conventional Amendment originates.

B In this regard it seems to us to be quite clear that the architects of the Union and the framers of the Constitution did not intend that certain provisions be amended as easily as other provisions. That explains why article 98 has been made amenable to amendment only by special procedures imposing more difficult and heavier majorities of Members of Parliament who must support any alteration. By the nature of these provisions, ordinary prescriptions of statutory construction C would not be the most appropriate. As Dickson, J., aptly put it in the Canadian case of *Hunter v. Southern Inc* (4) at page 649:

D The task of expounding a Constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and ... Once enacted, its provisions cannot easily be repealed and amended. It must, therefore, E be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The Judiciary is the guardian of the Constitution and must, in interpreting its provisions, F bear these conditions in mind.

G So the interpretation of article 98(1) should be such as it will meet the just demands and aspirations of the people who seek protection under the Constitution. The interpretation, therefore should be a broad one and not narrow and pedantic, so as to give full effect to its spirit. That this should be so is fairly obvious, for as we all know the Constitution is the supreme law of the land. The people own and retain it without forfeiture when electing a new government.

H At this stage, and applying the above principles of Constitutional interpretation, we pause to ask ourselves this question: did Parliament error as alleged by the petitioners? The answer resides in article 98(1). The petitioners contend that the correct provisions are those I contained in paragraph (b) of sub-article (1) of that article which

A relates to a list of matters as they appear in the Second Schedule. There are eight matters that appear in that schedule. Learned counsel for the petitioners, nor do the petitioners themselves, point out which item has been the subject of amendment that has been altered contrary to procedure. As it is plain in the arguments by counsel, the contentious amendment relates to the Articles of Union under which the offices of Vice-Presidents of the United Republic are provided for. The Articles of Union form the Schedule to the Union of Tanganyika and Zanzibar Act Chapter 557. This legislation falls under List One in the Second Schedule to which article 98(1)(a) applies. As Dr Mvungi correctly points out, it is one of the established principles that in construing statutory provisions schedules to Acts are part and parcel of such Acts. It follows, therefore, that the procedure by which the Union of Tanganyika and Zanzibar Act may be altered equally applies to the Articles of Union. In that circumstance we now hold that Parliament acted procedurally correct when it enacted the Eleventh Amendment by which the articles of Union as regards the Offices of Vice-Presidents were altered by abolishing the two Vice-Presidencies and establishing one Vice President in terms of article 47(1) of the Constitution. The first ground would fail as a result.

F It is alleged in the second ground, that the Union Parliament acted outside of its legislative powers in terms of the Articles of Union in effecting amendments to articles 37, 47, 48, 49, 50 and 102 of our Constitution in the absence of a re-negotiated treaty. It is argued in that connection that the Eleventh Amendment effected changes touching upon the authority of the Union Government and that of Zanzibar. In particular, it is contended that the amendment of article 37 was erroneous by removing the President of Zanzibar from the list of persons to whom the powers of President of the United Republic may devolve. That that is so because article 37 casts the First Vice-President as the first person and the Second Vice-President as he second person in the devolution list. True, as learned counsel for the petitioners submits, both article (iii)(b) of the Articles of Union and section 5(c) of the Act of Union, Chapter 557, specifically

provide that the Vice President hailing from Zanzibar shall also be styled as the President of Zanzibar.

On his part Mr Mwidunda, learned state attorney, contends that Parliament acted *intra vires* its powers when it enacted the Eleventh Amendment because article 98(1) and (2) gives it the mandate to do so. Thus it had authority to repeal and to re-enact articles 47, 48, 49 and 50.

Whether or not Parliament acted *ultra vires*, its legislative authority lies in the construction of article 98. We have already held that Parliament had authority to do so. We think Parliament was right because our Constitution, like any other, is an organic document. It must adopt to the times; it must go abreast of the political reality. When the Articles of Union were put in place, the architects of our Union had only a one-party state in mind. So irrespective of whoever was to be in the saddle in Zanzibar, he or she had to be a member of the monolithic party government. We take judicial notice of the introduction of the political multipartism which has long since ushered in plural politics. There is now a real possibility that the political party that may form the Union Government may not necessary get enough electoral support to form the Zanzibar Government. We cannot assume that always one political party will be returned to power in the United Republic and in Zanzibar. If that occurs, and if the Eleventh Amendment was not in place, then we would have the President of the United Republic belonging to one political party while the Vice-President from Zanzibar belong to another political party. We have yet as a nation to undergo some experiment to establish if such an arrangement could be the right Constitutional mechanism through which the national inheritance of state power could devolve to a Vice President who has formed a Government upon his own political platform. So, although the language of the Constitution does not change, changing circumstances of a dynamic society for which it was designed may give rise to new and fuller import to its meaning. And if we are to give effect to the spirit and purpose of our Constitution, the initial arrangement was to ensure that no one particular part of the United Republic shall

A monopolise state power. Thus the Constitutional requirement that the President and the Vice President shall not come from one of the constituent parts of the Union. For these reasons the second ground would fail as well because the changes, if any, did not, affect the executive authority of either the United Republic or of the Zanzibar Revolutionary Government. In reaching this decision we have considered the scholarly opinion of Professor Issa G. Shivji. We are at one with him to the extent that indeed :

C ... the adoption of the 1977 Constitution did not mark a break in legal continuity in Tanzania ...

For it owes its legal force from the Articles of Union which are part and parcel of the Acts of Union.

D Dr Mvungi contends, with nerve and clarity, that the Articles of Union form the treaty that gave birth to the Union. They are, therefore, unalterable. They are immutable, so to speak. He cites the English case of *MacComock v. The Lord Advocate* (2), particularly the following excerpt that appears at page 11 of his written submission:

E ... An Act of Parliament which was inconsistent with the unalterable provisions of the Articles of Union would be not only unlawful but also probably unjustifiable ...

F It is learned counsel's submission that where conflict arises as is the case in this petition, then the Articles of Union should prevail.

G Mr Mwidunda has made very brief submissions regarding the inalterability of the Articles of Union. He contends that they were meant to subsist with legal force until the enactment of the Union Constitution was put in place. He relies on article (iii) of the Articles of Union, appended as a schedule to Chapter 557, which provides that:

H During the period from the commencement of the union until the Constituent Assembly provided for in article (iv) shall have met and adopted a Constitution for the United Republic (hereinafter referred to as the interim period) the United Republic shall be governed in accordance with the provisions of articles (iii) to (vi).

We will reproduce articles (iii) to (v) for ease of reference:

(iii) During the interim period the Constitution of the United Republic shall be the Constitution of Tanganyika so modified as to provide for:

(a) a separate legislature and executive in and for Zanzibar as from time to time constituted in accordance with the existing law of Zanzibar and having exclusive authority within Zanzibar for matters other than those reserved to the Parliament and Executive of the United Republic;

(b) the offices of two Vice-Presidents one of whom (being a person normally resident in Zanzibar) shall be the head of the aforesaid executive in and for Zanzibar and shall be the principal assistant of the President for his executive functions in relation to Zanzibar;

(c) the representation of Zanzibar in the Parliament of the United Republic;

(d) such other matters as may be expedient or desirable to give effect to the United Republic and to these articles.

(iv) There shall be reserved to the Parliament and Executive of the United Republic the following matters-

(a) The Constitution and Government of the United Republic;

(b) External Affairs;

(c) Defence;

(d) Police;

(e) Emergency Powers;

(f) Citizenship;

(g) Immigration;

(h) External trade and borrowing;

(i) The Public Service of the United Republic;

(k) Harbours, Civil Aviation, Posts and Telegraphs.

- A And the said Parliament and Executive shall have exclusive authority in such matters throughout and for the purposes of the United Republic and in addition exclusive authority in respect of all other matters in and for Tanganyika.
- B (v) The existing laws of Tanganyika and of Zanzibar shall remain in force in their respective territories subject:
- C (a) to any provision made hereafter by a competent legislature;
- D (b) to such provision as may be made by order by the President of the United Republic for the extension to Zanzibar of any law relating to any of the matters set out in article (iv), and the revocation of any corresponding Law of Zanzibar;
- E (c) to such amendments as may be expedient or desirable to give effect to the Union and to these articles.

F We have, after hearing both learned counsel, formed the view that Mr Mwidunda's views on the efficacy of the articles of Union are not only untenable, they also lack persuasion. It does not seem to us to be correct to say that validity of the Articles of Union expired upon the promulgation of a Union Constitution. Were it so the framers should have said so quite clearly. We hold, therefore, that the articles of Union are part of the Constitutional Law of the United Republic. In this context we find some logic in Professor Issa G. Shivji's commentary in his book entitled **The Legal Foundations of the Union in Tanzania's Union and Zanzibar**, DUP, 1990, paragraph 3.3 at page 64 where he states that:

G ... The true legal position is that the 1977 Constitution derives its force from the pre-existing Acts of Union which continue to operate ...

H We, however, do not think that they override the Union Constitution as asserts Professor Shivji. The issue here, then, is whether the Articles of Union are unalterable. It is at this stage that we will consider the extent to which *MacComick's case* (2) is relevant to our circumstances.

I *MacComick's case* traces its origin from 1707 when the Parliaments of England and Scotland passed Acts of Union ratifying the Treaty

A of Union and creating the new Parliament of Great Britain. Scholars of English jurisprudence argue that the Acts of Union, also referred to as the constituent Acts, brought into being a new state and a new Parliament: (see Mitchell, **Constitutional Law**, (2 ed) 1968). In Great Britain certain provisions of the Treaty of Union were declared to be fundamental and unalterable. Whether or not such provisions were alterable was one of the main issues in the *MacComick case* (2). After considering the supremacy of Parliament as it applies in Great Britain, Lord Cooper went straight to the legal force in the provisions of the Treaty that brought about their Union. He said that:

D ... the Treaty and the associated legislation, by which the Parliament of Great Britain was brought into being as the successor to the separate Parliaments of Scotland and England, contain some clauses which expressly reserve to the Parliament of Great Britain powers of subsequent modification, and other clauses which neither contain no such power or emphatically exclude subsequent alteration by declarations that the provisions shall be fundamental and unalterable in all time coming...

E We have read that judgment quite carefully but we have not been able to see the sentence appearing in quotes at the bottom of page 11 of the submissions by Dr Mvungi. In fact the English Court did not make any opinion in the manner cited by learned counsel, instead it said this:

G ... Accepting it that there are provisions in the Treaty of Union and associated legislation which are 'fundamental law', and assuming for the moment that something is alleged to have been done – it matters not whether with legislative authority or not – in breach of that fundamental law, the question remains whether such a question is determinable as a justifiable issue in the courts of either Scotland or England, in the same fashion as an issue of Constitutional vires would be cognisable by the Supreme Courts of the United States or South Africa or Australia ... On these matters I express no view ...

I He expressed no view because courts in England declared from long ago that their role is to enforce legislation as they find it, hence the

A latin maxim: *lex Angliae sine Parlamento mutari non potest*. This approach is based on the Diceian theories of the supremacy of Parliament. The position in the United States, South Africa, India and here at home is different. Any legislation may be challenged in courts of law in these countries if it is unconstitutional.

What comes out quite vividly from the British Treaty of Union, unlike our Articles of Union, is that the former contained provisions which were declared to be fundamental and unalterable. We do not have such clauses in our Treaty of Union. To that extent we find nothing in the English case which can assist counsel in his argument that our Articles of Union are unalterable. In any case, since the Articles of Union are, as conceded by both learned counsel, part and parcel of the Acts of Union, they may be amended or altered to meet new needs and challenges of a changing and fast growing society which they were intended to serve.

Thus, in order to meet the needs of a dynamic society such as ours, it is vital that the Articles of Union be modified from time to time by the Union Parliament which took over the functions of the Legislatures of Tanganyika and Zanzibar in the context, scene and setting that exists at the time, and not when they were promulgated otherwise they will cease to be abreast of the Constitutional developments which they heralded. In fact this is what has come to be done in Britain where subsequent history has revealed that provisions that were declared to be unalterable have long since been altered or repealed, for instance the Universities (Scotland) Act 1853 and the Irish Church Act 1869, which have amended or repealed clauses which had been declared fundamental and unalterable.

We now come to the last issue, and that is the doctrine of fundamental change of circumstance. In this behalf Dr Sengondo Mvungi poses the issue whether what he calls the unilateral amendment of the basic terms of the Articles of Union entitles the two state parties to rely upon the doctrine of fundamental change of circumstances. He argues that that doctrine prohibits state parties to a treaty from changing that treaty in a substantive or fundamental way without the consent

of the other. That breach of this doctrine discharges the other party from its treaty obligations. In our case the parties to the Treaty of Union are Tanganyika and Zanzibar. It is his submission, therefore, that the changes to the Articles of Union contained in the Eleventh Amendment were not properly effected. He gives two reasons for his contentions:

- (a) that the amendment was made by the Union Parliament which was not privy to the Treaty of Union; being a third party to the Treaty it had no powers to change the Articles of Union without allowing room for re-negotiation between the contracting parties, namely, Tanzania Mainland and Zanzibar; and
- (b) that the changes have created a situation of conflict between the Union Government and the Revolutionary Government of Zanzibar. It is contended that to-date the question whether the structure of the Union should be changed to allow a federal structure still remains unresolved between Mainland Tanzania and Zanzibar and that the situation warrants the convening of a Special Constitutional Court to resolve this conflict.

In the upshot it is submitted that since the Union between the two states was freely entered into, the two parties to it should be given an opportunity to sit down together and amend the Treaty of Union so that it reflects their best interests and aspirations. If this is done unilaterally by one party then the other party can be discharged from its obligation under the Treaty. Thus if changes to the Treaty of Union it shall continue to be, as he says, struggled into the Constitution in circumvention of procedures laid down by law and the existence of the United Republic shall be endangered. We are, therefore, called upon to valiantly champion the struggle to defend our Constitutional order.

We will begin to consider this issue from the tail. We are being urged to champion the struggle to defend our Constitutional order. We need not participate in any struggle in order to defend our Constitutional order. Our oath of office dictates that it is our duty

- A to defend the Constitution, for the courts are its guardian. We will do so to the best of our energies even without any external urging. Secondly, it is wholly erroneous to argue that the amendment was made unilaterally by one party to the Treaty. The Union Parliament
- B which passed the legislation does not belong to Tanganyika; it belongs to the Union composed of Members from both parts of the Union. Its decisions cannot be unilateral.

- C Now, as regards the second sub-issue, the petitioners have the grave and the unenviable task of proving what they allege. Whether or not there is a conflict between the Union Government and the Zanzibar Revolutionary Government is a question of fact that requires proof by evidence. All that there is before us are statements from
- D the Bar. Such statements cannot stand in for probative evidence. Plainly, as article 126(1) shows, the sole function of the Special Constitutional Court of the United Republic:

- E ... is to hear and give a conciliatory decision over a matter referred to it concerning the interpretation of this Constitution where such interpretation or its application is in dispute between the Government of the United Republic and the Revolutionary Government of Zanzibar.

- F Thus, in order to convene the Special Constitutional Court the following circumstances must be shown to exist:

- (a) that a matter does exist concerning the interpretation of the Constitution; and
- G (b) that such interpretation or its application is in dispute between the Union Government and the Revolutionary Government of Zanzibar.

- H It follows that one of the two Governments must be aggrieved by the interpretation or application of any of the provisions of the Constitution. There is no material before us which shows that either the Revolutionary Government of Zanzibar or the Union Government has a matter to refer to the Special Constitutional Court as by law provided. We consider matters relating to the need for changes in
- I the Constitution as being outside the ambit of article 126(1) unless

such alterations have brought about a contentious interpretation or application of the Constitution. Matters such as the need to re-negotiate the Treaty of Union are purely of a political nature which do not concern the courts. Similar considerations would apply to situations which may bring about the amendment of any provision in the Constitution. Indeed, whether the structure of the Union should be changed or not is another matter that should be pursued as a political agenda.

We are of the strong view that an issue of great importance has been raised by learned counsel regarding the alleged need for re-negotiation of the terms of the treaty of Union. Can really the Union Government and the Revolutionary Government of Zanzibar negotiate and enter into a treaty of any kind? In other words, do they, individually, have capacity to do so? What, really, is a treaty as known in International Law? We understand a treaty to be a most fundamental law of nations. Traditionally and essentially a treaty is an agreement between states or sovereigns binding in virtue of *pacta sunt servanda*. Since a treaty is not only a law but also a contract between two or more sovereign nations, it follows that Tanzania Mainland and Zanzibar do not have capacity to contract. They belong to one nation, the United Republic of Tanzania. The United Republic cannot negotiate a treaty alone and unto itself.

The constituent states of Tanganyika, now Tanzania Mainland, and Zanzibar were extinguished as nations when they merged into the United Republic in terms of the Treaty of Union that was ratified by the associate legislation. They, therefore, cannot negotiate a treaty nor can they negotiate to amend the Treaty of Union. The Treaty of Union as contained in the Articles of Union now forms part of the Acts of Union. The Acts of Union are themselves included in List One of the Second Schedule to the Constitution. It is our view, and we have said so earlier on in this ruling, that only the Union Parliament has the *vires* to amend or modify them. Accordingly the Vienna Convention on the Law of Treaties is inapplicable. These observations take care of the first sub-issue as well.

A Finally, there is the doctrine of fundamental change of circumstances. This doctrine is much wider than learned counsel for the petitioners has put forward to us. It includes termination of a treaty by operation of law, such as a supervening impossibility of performance known to the municipal law of contract which will have the effect of frustrating the execution of the terms of the treaty. A good example would be the merger of two sovereign nations into one sovereign state in which case the emerging state will take over treaty obligations of its constituent states. This must be so because the constituent states lose their legal personality when they merge. It follows that Tanganyika and Zanzibar have long since lost their legal personality. It may be correct to say that the unilateral breach of a treaty has as one of its consequences to absolve the party not in breach of all obligations under the treaty. True, as Jennings argues in his book **The Law and The Constitution**, (5 ed, 1959) at page 170, the British Acts of Union were passed to ratify the Treaties of Union and that the amendments to the treaties were carried out in accordance with the *maxim nobis sic stantibus*, that is, it is a tacit condition attaching to all treaties that they shall cease to be obligatory soon as the state of facts and conditions upon which they were founded has substantially changed. We have given serious consideration to this contention. We are satisfied, however, that although the Eleventh Amendment has introduced changes in the Articles of Union, those changes are founded on the lawful and legitimate exercise of legislative power by Parliament. It follows that no breach of the treaty of Union has been established. Thus, the position here is different from Britain. So whereas the Articles of Union form the treaty of Union and consequently part and parcel of our Constitutional law, and even though they constitute the basic norm reflecting the birth of a new grand-norm for our nation, unlike the position in Britain, they are, as we have already held, justifiable as part of the Acts of Union. It follows, therefore, that the doctrine of fundamental change of circumstances cannot apply in the manner it is being argued here. Accordingly this issue would also fail. Upon the foregoing considerations the petition is dismissed with costs

JAMES FUNKE GWAGILO v. ATTORNEY GENERAL (HCT)

HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Kyando, J.)

CIVIL CASE No. 307 OF 1999

Torts – Elements of the tort of malicious prosecution – Reasonable and probable cause – Plaintiff prosecuted in an Economic Criminal Case – Whether the prosecution was without reasonable and probable cause.

Torts – Elements of the tort of malicious prosecution – Plaintiff prosecuted by the police – Plaintiff fails to disclose specific police officer who bore malice against him – Whether malice proved

Torts – False imprisonment – Plaintiff arrested, detained and prosecuted – Whether detention in police custody was justified.

Torts – Trespass to the person – Whether trespass to the person was justified.

Civil Service – Whether retirement in the public interest is a disciplinary proceeding – Regulation 46(1)(a) of the Civil Service Regulations 1970.

Civil Practice and Procedure – Pleadings – Defence not pleaded in the Written Statement of Defence – Whether court bound to accept the unpleaded defence.

The plaintiff, a civil servant, who had risen to the senior positions of Principal Secretary and Regional Development Director was on 25 April 1988, at Tabora, arrested by the Police and tried with others in (HC) Economic Criminal Case Number 3 of 1989. In a judgment delivered on 17 August 1991 the plaintiff was acquitted of all the offences he was charged with. But before the conclusion of the trial of the economic criminal case the plaintiff was retired from the public service in the public interest. Upon acquittal the plaintiff filed this suit against the defendant claiming damages for false imprisonment, trespass to the person and malicious prosecution. In an effort to justify