IN THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA
FIRST INSTANCE DIVISION

(Yohane B. Masara, PJ; Charles O. Nyawello, DPJ; Charles A. Nyachae, Richard Muhumuza & Richard W. Wejuli, JJ)

REFERENCE NO. 19 OF 2019

LEGAL AND HUMAN RIGHTS CENTRE ..... 1ST APPLICANT
TANGANYIKA LAW SOCIETY ..... 2ND APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE
UNITED REPUBLIC OF TANZANIA ..... RESPONDENT

27TH MARCH 2024

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. This Reference was filed on 29th August 2019 by the Legal and Human Rights Centre and Tanganyika Law Society ("the Applicants") against the Attorney General of the United Republic of Tanzania ("the Respondent"). It challenges the Written Laws (Miscellaneous Amendments) (No.3) Act, 2019 enacted by the Parliament of the United Republic of Tanzania on 27th June 2019 and assented to by the President of the United Republic of Tanzania on 30th June 2019.

2. The Reference was proffered under Articles 6(d),7(2), 8(1)(c), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community ("the Treaty"); Article 16(1) and (5) of the Protocol on the Establishment of the East African Community Common Market ("the Protocol"); and Rules1(2), 24(1), (2), (3), (4) and (5) of the East African Court of Justice Rules of Procedure 2013 ("the Rules").

3. The Applicants are juridical persons. The First Applicant describes itself as an artificial person registered in Tanzania under the Companies Act, Cap. 212, with the Certificate of Registration No. 9075 of 26th September 1995 and a certificate of compliance under the Non-Governmental Organizations Act, Cap. 56. The Second Applicant is the Bar Association of Tanzania Mainland, established under the Tanganyika Law Society Act, Cap. 307. For the purposes of this Reference, the Applicants' address of service is: c/o *Legal Aid Clinic Kinondoni, Justice Mwalusanya House, Isere Street & Law Guards Advocates, Kinondoni, Togo Tower, 2nd Floor, Manyanya Street, Dar es Salaam.*

4. The Respondent is the Attorney General of the United Republic of Tanzania, sued in the capacity of the principal legal advisor of the Government of the United Republic of Tanzania. His address of service for the purposes of this Reference is: c/o *Office of the Solicitor General, 10 Kivukoni Road, P.O. Box 71554, Dar es Salaam.*

B. **REPRESENTATION**

5. At the Hearing, the Applicants were represented by Mr Jebra Kambole and Mr Amani Joachim, learned Advocates. The Respondent was represented by Mr Hangi Chang'a, Principal State Attorney and Ms Vivian Method, Senior State Attorney.

C. **BACKGROUND**

6. In mid-June 2019, the Parliament of the United Republic of Tanzania considered a Bill to amend certain provisions of the Companies Act, Cap. 212; the Non-governmental Organizations Act, Cap. 56; the Trustees Incorporation Act, Cap. 318; the Societies Act, Cap. 337 and the Film and Stage Plays Act, Cap. 230.

7. On 19th June 2019, the Parliament issued a public notice inviting stakeholders to provide comments on the proposed Bill. Such input from the stakeholders was due on 21st and 22nd June 2019.

8. After the expiry of the public participation period above, the Parliament enacted the **Written Laws (Miscellaneous Amendments) (No. 3) Act, 2019**. On 30th June 2019, the President of the United Republic of Tanzania assented to the Act.

D. THE APPLICANTS' CASE

9. The Applicants' case is set out in the Statement of Reference; in the Affidavit of Anna Aloys Henga deponed in Dar es Salaam on 26th August 2019, the Affidavit of Dr Rugemeleza A.K. Nshala deponed in Dar es Salaam on 26th August 2019, the two Affidavits of Abdul Omary Nondo deponed at Dar es Salaam on 19th September 2022 and on 19th October 2022 respectively, and the two Affidavits of Tito Magoti deponed at Dar es Salaam on 19th September 2022 and on 19th October 2022 respectively. The Applicants also filed written submissions and highlighted the same during hearing.

10. The Applicants aver that the provisions of Sections 4, 5, 6, 7, 8,9, 10, 29, 30, 31, 32, 34, 35, 36, 38, 40, 41, 42, 44, 46, 51, 52, 53, 76 of the impugned Act violate the fundamental and operational principles of the Treaty, especially Articles 6(d), 7(2) and 8(1)(c) thereof. They further aver that Sections 20, 21, 22, 24 and 25 of the impugned Act violate Articles 6(d), 7(2), and 8(1)(c) of the Treaty. That those provisions also violate Article 16 of the Protocol, which guarantees free movement of services supplied by nationals of Partner States and dfree movement of service suppliers who are nationals of the Partner States within the Community. That they violate the principle which requires Partner States to progressively remove existing restrictions and to refrain from introducing any new restrictions on the provision of services in the Partner States by nationals of other Partner States except as otherwise provided in the Protocol.

11. On the basis of the foregoing, the Applicants pray for:

    a) **A declaration that the cited provisions of the impugned Act violate the cited provisions of the Treaty and the Protocol;**
    b) **The Respondent be ordered to pay costs; and**
    c) **Any other relief deemed just and equitable.**

E. THE RESPONDENT'S CASE

12. The Respondent's case is set out in the Response to the Statement of Reference, in the Affidavits of Paul Shaidi deponed at Dar es Salaam on 15th October 2019 and the Affidavit of Kause Kilonzo deponed in Dar es Salaam on 12th October 2022. Likewise, the Respondent filed submissions in Reply and highlighted the same during the hearing.

13. The Respondent denies the allegations and claims of the Applicants, and contends that (reproduced verbatim):

    a) **That, prior to the impugned amendments the registration, coordination and regulation of entities established under the stated law were challenging as there was duplication of registration of charity activities and overlapping mandates of entities in different registries which intensified challenges in terms of coordinating and regulating the said entities;**
    b) **That, the said lacuna and challenges thereon necessitated the amendment of the Acts, hence the Amendments;**
    c) **That, the Act redefined entities established under the stated law and distinguished their scope of operations.**

This led to each entity being in its appropriate registry, smoothened regulation, coordination and monitoring of entities so as to embrace the principles of good governance rule of law, transparency as enshrined in the Treaty;

d) **That, the amendments are also in line with the recommendations of the Financial Action Task Force, an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction;**

e) **That, the Respondent State being a member of Eastern and Southern African Anti Money Laundering Group has to comply with the recommendation of FATF stated above and ensure that the operations of the entities under the impugned amendments are consistent with the principles of transparency, rule of law, accountability so as to curb the emerging threat of Terrorism and money laundering.**

14. In the submissions, Mr Chang'a maintained that the impugned amendments are aimed at promoting the operational principles of the EAC, including good governance, accountability, rule of law, transparency, democracy and human rights. On that basis, the Counsel prayed the Court to declare that the impugned provisions do not contravene the Treaty and, therefore, to dismiss the Reference with costs.

F. ISSUES FOR DETERMINATION

15. At the Scheduling Conference held on 7th September 2022, the following issues for determination were agreed:

    i. **Whether Sections 4, 5, 6, 7, 8,9, 10, 29, 30, 31, 32, 34, 35, 36, 38, 40, 41, 42, 44, 46, 51, 52, 53, 76 of the Act are a violation of the cited Articles of the Treaty and the Protocol; and**

    ii. **Whether the parties are entitled to the remedies sought.**

G. COURT'S DETERMINATION

ISSUE 1: **Whether Sections 4, 5, 6, 7, 8, 9, 10, 29, 30, 31, 32, 34, 35, 36, 38, 40, 41, 42, 44, 46, 51, 52, 53, 76 of the Act are a violation of the cited articles of the Treaty and the Protocol**

Applicant's Submissions

16. In his submissions, Mr Kambole faulted the Respondent State for violating the Treaty and the Protocol via the promulgation of the **Written Laws (Miscellaneous Amendments) (No. 3) Act, 2019,** which was enacted under Certificate of Urgency. He asserted that there was no such urgency in the circumstances of the case, as there was no pressing social need for the amendments at that time.

17. Mr Kambole argued that the Act was enacted by the Parliament of the United Republic of Tanzania without wider consultation with the public, and that the time given was not enough for public participation, as the stakeholders were invited to proffer their input on 21st and 22nd June 2019.

18. It is his further submission that the impugned Act is unjustifiably restrictive. In that regard, Counsel for the Applicant went on to specify that Sections 4, 5, 6, 8, and 10 of the Act restrict the formation of companies because the definition of the term 'company' is so narrow as to exclude companies which deal with social issues such as education, human rights and health.

19. That, Sections 20, 21, 22, 24 and 25 of the Act restrict doing business by any foreigner because they impose the requirement that any foreign production company or individual using Tanzania scene, content and location for filming for whole film or part of it has to submit a number of details to the Board, as well as impose upon any such company or person a fine of not less than five per cent of the costs of the production of the film.

20. That, Sections 29, 30, 31, 32, 34, 35 and 36 of the Act restrict the formation of non-governmental organizations (NGOs) because the definition of an NGO is very limited; restrain innovation on account of the exclusion of some NGOs; restrict the right of association in organisations excluded by the definition; and exclude charitable organizations whose crucial aspects are not covered by the definition.

21. That, Sections 38, 39, 40,41, 42, 44, 46, 51, 52 and 53 of the Act restrict the formation of societies; and Section 76 of the Act restricts the formation of Trusts.

22. Counsel for the Applicants further stated that these provisions contain unclear and ambiguous words, and give unfettered power to the Registrars, the Minister and the President. To that extent, in his view, they are in violation of Articles 6(d), 7(2) and 8(1)(c) of the Treaty, and Article 16 of the Protocol.

23. Regarding the application of the three-tier test to the impugned Act, Counsel for the Applicants, while maintaining that the tests are met, referred us to the following cases from the jurisprudence of this Court: **Burundi Journalist Union vs The Attorney General of the Republic of Burundi, EACJ Reference No. 7 of 2013**; **Media Council of Tanzania & 2 Others vs The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 1017**; and **Freeman A. Mbowe and Others vs the Attorney General of the United Republic of Tanzania, EACJ Consolidated Reference No. 3 & 4 of 2022.**

Respondent's Submissions

24. In his submission on this issue, on the other hand, Counsel for the Respondent refuted the averments of the Applicants. He framed his contentions in seven headings; namely, justification for enacting under Certificate of Urgency, relative adequacy of public participation, the pressing need for amendments, the ten-year period of an NGO, clarity of the provisions, Safeguard in relation to powers and redress mechanisms.

25. On the justifications for enacting **the Written Laws (Miscellaneous Amendments) (No. 3) Act of 2019** under Certificate of Urgency, Mr Chang'a admits that the Act was enacted under Certificate of Urgency. It was his submission that the law-making procedure in the United Republic of Tanzania allows tabling a bill in Parliament under Certificate of Urgency. Mr Chang'a added that it is for the Parliament to gauge the rationale behind tabling the proposed bill under the certificate of urgency. This step was in accordance with the Tanzania Parliamentary Standing Orders known in Kiswahili as "Kanuni za

Kudumu za Bunge" of 2016, particularly in Order 80 (4). The reasons for enacting an Act under a Certificate of Urgency are provided to the Parliament for justification under Order 80 (5) and (6) of the said "Kanuni za Kudumu za Bunge". In his view, the Applicants' allegation that failure to state reason for the impugned amendment and certificate of urgency lacks merit.

26. Regarding **public participation,** Counsel for the Respondent pointed out that on 19th June 2019, the Constitutional and Legal Affairs Committee of the Parliament invited the general public to give their recommendations on the Bill, not their opinion. Before the collection of the views from the public on 21st and 22nd June 2019, the said Bill was Gazetted in the Government Gazette of the United Republic of Tanzania, No. 21, Volume 100 dated 1st May 2019, in accordance with the procedure prescribed by the law.

27. The said Government Gazette and the Parliament website gave the general public opportunity to access the Bill and prepare their views to the Standing Committee. So, the public generally was given ample time to give their recommendations and their views. After ascertaining that the general public was aware of the Bill, the Constitutional and Legal Affairs Committee of the Parliament received the views and the comments from the public in accordance with the law.

28. In relation to **the pressing need for the amendments**, Mr Chang'a argued that the enactment of the Act was necessary to address challenges relating to issues of registration, co-ordination and regulation of entities established under the Companies Act, the Societies Act, the Non-Governmental Organizations Act, and the Trustees Incorporation Act. According to Mr Chang'a, one of the

reasons is the need to cure the problems emanating from the overlapping mandates.

29. The other reason is the need to redefine the entities established under the above-mentioned Acts and to delineate the scope of their operations because before the Act, the scope of their operations were in some confusing in one way or the other. He went on to specify that entities were registered under the Companies Act but performed activities which were to be done by those which are registered by the NGO's. Hence, the aim was to distinguish their scope of operation. This has led each entity to belong in its appropriate registry. As a result, he submitted, the impugned provisions have facilitated the regulation, coordination and monitoring of the pertinent entities.

30. Mr Chang'a went on to state that the amendments have established a better legal regime than the one it has replaced. He argues that the amendments have enhanced the principles of good governance and rule of law by placing each entity in its appropriate registry; by facilitating regulation, monitoring and evaluation of the compliance with the laws of the land; and by ensuring accountability of the entities through forcing them to align with the objectives of their establishment. Counsel for the Respondent summed up by maintaining that the amendments complied with the mandatory requirement of the Treaty.

31. It was also Mr Chang'a submission that the amendments align the legal system with the Non-Governmental Policy of 2001, which proposed for a new legislative framework that would address challenges in the registration, coordination and regulation of NGOs in Tanzania. That, given that the Respondent State is a member of

Eastern and Southern African Money Laundering Action, the amendments were necessary to align the Tanzanian system with the approved recommendation of Financial Action Task Force. Mr Chang'a admits that there is a specific Act which deals with money laundering in Tanzania, but that specific Act may not suffice, as those who want to deal with money laundering may use NGOs. Thus, from his perspective, it was very important for the amendment of the NGOs Act and similar legislations to accommodate the issue of money laundering.

32. Concerning **the ten-year period of an NGO,** Counsel for the Respondent avers that the ten (10) years conditions to renew the Certificate of Registration is introduced to ensure compliance with the laws of the land by NGOs. In this regard, Mr Chang'a added that under Section 14 of the NGOs Act, non-renewal can only happen if there is none compliance with the conditions. That there is no possibility of abuse since the said provision sets parameters which the Board can take into consideration when issuing a renewal. That, if renewal is refused, there will be a justification for such refusal.

33. It was also his submission that, given the objectives for the establishment of the NGOs, the amendments were necessary to ensure monitoring in order to protect public interests. That an NGO is established under the NGOs Act for public engagement and, therefore, it carries public interest, in contrast to some companies. The requirement of renewal is just for checks and balance, in particular to ensure that an NGO abides with the laws and the objectives for which it was created. It is for that reason that the law, under Section 14 of the NGOs Act, is very clear on the matter that will be considered for renewal.

34. It was Mr Chang'a's further submission that deregistration by the Registrar was not introduced by the impugned Act. That, even under the previous regime, any entity could be deregistered at any time if it violated the law or conditions given to it. The impugned Act only continues what was under the previous regime. Under the impugned Act, hence, any NGO which violates particular conditions given during its registration can be de-registered by the Registrar. Further, under Section 24 of the NGOs Act, an NGO could be de-registered for failure to file Annual Reports. Also, under Section 21 of the NGOs Act, a Certificate of Registration may be cancelled or suspended for failure to fulfil terms and conditions attached to the certificate. Therefore, Counsel for the Respondent maintains that the Applicants have no reasons to worry about those amendments.

35. On **clarity of the provisions,** Mr Chang'a contended that the words in those amendments are clear and unambiguous. He contended further that in the text of the impugned Act, such words as *investigation*, *law*, *order*, *morality* and *good governance* bear ordinary English meanings and, hence, they do not require special interpretation, as they are used in the same manner in different countries. He continued to state that it is for that reason those words are not even defined in the Treaty. Counsel for the Respondent adds that such terms as *financial transparency* and *accountability* are well explained in the Non-Governmental Organization Code of Conduct, GN No. 363 of 2008, which facilitates self-regulation of NGOs and acts as a guide for the conduct and operation of the NGOs working in Tanzania, including the 1st Applicant in this Reference.

36. **Regarding Safeguard in relation to powers,** Mr Chang'a stated that the powers of the President, Ministers and the Registrars under

the Companies Act, the NGOs Act, the Societies Act and the Films and Stage Plays Act, are not only limited, but are also exercised in accordance with the law. In addition, that the law provides for safeguards against the abuse of those powers by either the President, the Minister, or the Registrar. He went on to specify that Section 8 of the Societies Act has set the parameters under which the President has to act. The President may only declare a society as unlawful if, in his opinion, that society is being used for any purpose prejudicial or incompatible with the maintenance of peace, order and good governance; or is being used for any purpose at variance with its declared objectives. Summing up on this point, Counsel for the Respondent averred that if any person is aggrieved by the decision of the President, that person can file for judicial review through invoking the provisions of the law in the Miscellaneous Provisions Act.

37. On the matter of safeguards in relation to **redress in relation to powers under the impugned Act,** Ms Method points out that the powers of the President can be challenged through judicial review by invoking the provision of the **Law Reforms (Fatal Accidents and Miscellaneous Provisions) Act**, Chapter 310, which is the law governing judicial review. With respect to the safeguards under the NGOs Act, Ms Method submitted that the Registrar is not the final authority under the NGOs Act; he works under close supervision of the NGOs Board to the effect that anything he does, has to be approved by the Board. Ms Method added that under Section 7 of the NGOs Act, the functions of the NGO's Board include registration of the NGOs, cancellation of NGOs and suspension of NGOs, which means the Registrar will only act upon approval of the Board, either to register or to cancel or to suspend an NGO.

38. As to the decision of the Board, Ms Method asserted that the law has provided avenues for challenging the decision of the Board. She gives the hypotheses that if one is aggrieved by the decision of the NGO's Board, one can file the review under the Board or an appeal to the Minister under Section 15 and 16 of the NGOs' Act; if one is not satisfied with the decision of the Minister, one can go to court through judicial review. In concluding this point, Ms Method maintains that those are avenues for challenging the decision of the Board and that any fear in this regard is unfounded.

39. On Safeguards under the Companies Act, Ms Method contended that there is an avenue for redress concerning the decision of the Registrar of Companies. Under the amended provisions of Section 400 Cap. 212, if the Registrar of the Company strikes off the company off the register, a person aggrieved by such decision may appeal to the Court. This is specifically provided under Section 402. Her conclusion on this point is that there is a mechanism against abuse of the powers by the Registrars.

40. The same goes with the powers of the Film Board and Film and Stage Plays Act. It was her submissions that Section 36 of the said Act, a person aggrieved by the decision of the Board may appeal to the Minister.

41. In conclusion, Counsel for the Respondent maintained that all of the stated provisions provide for mechanisms against which an aggrieved person can appeal and find remedy thereto. From her perspective, hence, the submission by the Counsel for the Applicants is baseless since the law has provided for avenues through which one can challenge the powers of the President, the Ministers and Registrars

and the same powers are not only limited, but have to be exercised in accordance with the law.

42. To support this position, Counsel for the Respondent cited a number of decisions and precedents. First is the case of **The School of St. Jude Limited vs The Commissioner General Tanzania Revenue Authority, Civil Appeal No. 21 of 2018** (unreported), where the Court of Appeal of Tanzania held that "the free education that the entity provided was paid by third parties (through donations) and so the surplus she obtained is a profit from business hence chargeable to tax."

43. The second decision is the case of **Julius Ndyanabo vs Attorney General [2017] TLR 14**, cited with approval in the case of ***Media* Council of Tanzania & 2 Others vs The Attorney General of the United Republic of Tanzania, EACJ Reference No. 2 of 1017**; where it was stated that:

> **"Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of state interest."**

44. Counsel also referred to the case of **Rev Mtikila vs The Attorney General [1995] TLR 3**, where it was held that:

> **"The Constitutionality of a statutory provision is not founded in what could happen in its operation but in what it actually provides for; the mere possibility of a statutory provision being abused in actual operation will not make it invalid."**

45. Another decision relied upon by Counsel for the Respondent is the case of **Rwenga Etienne & Other vs Secretary General of EAC, Reference No. 7 of 2015**, where, in paragraph 45, the Court stated:

> **"... Courts require the party that raises a claim or advances a particular contention to establish the elements of fact and of law on which the decision in its favour might be given. Ultimately, it is the litigant that seeks to establish a fact who bears the burden of proving it."**

46. The last decision cited by Counsel is **Bahari Schools Limited vs The Registrar of Companies, Miscellaneous Commercial Cause No. 12 of 2022, High Court of Tanzania, Commercial Division**, where the Applicant challenged the notice of the de-registration of his entity. In its ruling, the Court gave directions, including the order of restoration of *status quo ante*.

Determination of ISSUE 1

47. We have carefully considered the pleadings, evidence and submissions on both sides. The dispute herein relates to the validity of a national legislation against the terms of the Treaty. The Applicants have invoked Articles 6(d), 7(2) and 8(1)(c) of the Treaty; Article 16 of the Protocol and the pertinent jurisprudence.

48. On several occasions, this Court has been invited to consider alleged violation of the Treaty in relation to national legislation. In **Media Council of Tanzania, Legal and Human Rights Centre & Tanzania Human Rights Defenders Coalition vs The Attorney**

General of the United Republic of Tanzania, EACJ Reference No. 2 of 2017, the Court stated the following:

> **"In answering its own question '... What is the test to be applied by this Court in determining whether a National Law ... meets the expectations of the Treaty," and finding no answer in the Treaty itself, the Court adopted the three-part test set out by the Supreme Court of Canada in R. vs Oakes, (1986) ISCR 103. This test, which was adopted by the High Court of Kenya in CORD vs The Republic of Kenya and Others HC Petition No. 628 of 2014, may be paraphrased and broken down these questions as follows:**
>
> a) **Is the limitation one that is prescribed by Law? It must be part of Statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited;**
> b) **Is the objective of the Law pressing and substantial? It must be important to the society; and**
> c) **Has the State, in seeking to achieve its objectives chosen a proportionate way to do so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve.**

49. Further, in **Burundi Journalists Union vs The Attorney General of the Republic of Burundi and Others** (supra), this Court affirmed the three-part test, at paragraph 85, as follows:

> **"Having said so, what is the test to be applied by this Court in determining whether a National Law, such as the Press Law, meets the expectations of the Treaty?**

The Treaty gives no pointer in answer to this question but by reference to other courts, it has generally been held that the tests of reasonability and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of a higher law. In saying so, it is of course beyond peradventure to state that Partner States by dint of Article 8(2) of the Treaty are obligated to enact National Laws to give effect to the Treaty and to that extent, the Treaty is superior law."

50. Just recently, this Court in **Freeman A. Mbowe and 5 Others vs Attorney General of the United Republic of Tanzania**(*supra*) this Court re-affirmed the three-part test as the principle to be applied in cases as to whether the statute in issue is in line with the Treaty.

51. Other regional Courts have also dealt with the subject. In **Konate vs Burkina Faso, App No. 004/2013/(2014)**, the African Court on Human and People's Rights underscored the need for clarity in drafting laws by quoting, with approval, the following passage from the UN Human Rights Committee: *"... to be considered as law, norms have to be drafted with sufficient clarity to enable an individual to adapt his behaviour to the rules and made accessible to the public."*

52. From the preceding decisions, this Court will of necessity apply the three-tier test in determining whether an impugned National Law meets the expectations of the Treaty. Further, it is clear that if any provision of an impugned statute fails to pass any one of the three-tier tests, that failure will constitute a violation of the right or freedom to which it relates. Furthermore, such provision of the statute will

consequently be held to be a violation of the fundamental and operational principles set out in Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

53. Before applying the three-tier test, we revisit the entire Applicants' case to determine the manner in which we will proceed. From the Statement of Reference, we make the following quote:

> " **(ii) ... the provision of sections 4, 5, 6, 7, 8, 9, and 10 of the Act which amend the Companies Act Cap 212 restrict formation of companies, contain unclear ambiguous words, gives unfettered powers to the registrar of companies and the Minister and is in violation of the Respondent's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d), 7(2) and 8(1) (c) of the Treaty;**
>
> **(iii) ... the provision of sections 20, 21, 22, 24 and 25 of the Act, which amends the Films and Stage Plays Act Cap 230 restricts doing business for foreigners, contains unclear ambiguous words, gives unfettered powers to the Film Board and the Minister and is in of the Respondent's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d), 7(2) and 8(1)(c) of the Treaty and Article 16 of the Protocol;**
>
> **(iv) ... the provision of sections 29, 30, 31, 32, 34, 35 and 36 of the Act, which amends The Non-Governmental**

Organizations Act Cap 56 restricts the formation of NGOs and their existence, contains unclear ambiguous words, gives unfettered powers to the registrar of NGOs and the Minister and is in violation of the Respondent's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d), 7(2) and 8(1)(c) of the Treaty; and

(v) **... the provision of sections 38, 39, 40, 41, 42, 44, 46, 51, 52 and 53 of the Act, which amends the Societies Act Cap. 337 restricts the formation of Societies and their existence , contains unclear ambiguous words, gives unfettered powers to the registrar of Societies, the Minister and the President and are in violation of the Respondent's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d), 7(2) and 8(1)(c) of the Treaty."**

54. The quotes specify the sets of sections alongside such themes as restriction, unclear and ambiguous words, unfettered powers of the registrar, the Board, the Minister and the President. In our view, the averments relating to those sections and themes constitute the essence of the Applicants' case.

55. Further, the Applicants' affidavits are phrased in a general manner. The Affidavit of Anna Aloys Henga echoed the restrictions mentioned in the Statement of Reference, but fails to mention any one of the

specific sections stated in the Statement of Reference. The same goes with the rest of the affidavits on the Applicants' side. Hence, the affidavits support only the part of the Statement of Reference which pertains to the alleged restrictive effect of the indicated sections of the impugned Act.

56. However, those affidavits mention such matters as the absence of need for the Amendments, the urgency under which the Act was enacted, the absence of a wider consultation, the insufficiency of time for public participation, the unfettered powers of the registrar, the Board, the Minister and the President.

57. Finally, the Applicants' submissions consist of general averments in that Counsel for the Applicants did not submit on the indicated set of sections separately for the Respondent to respond to the submissions on the sets one after the other. Instead, the submissions were focused on the absence of need for the impugned Amendments, the urgency under which the impugned Act was enacted, the lack of wider public participation, the insufficiency of time for rendering opinion, the restrictiveness of the indicated sections of the impugned Act and the application of the three-tier test to the impugned Act. Hence, the Applicants have chosen to omit submission on the indicated sets of sections and to submit only on the absence of need for the impugned Amendments, the urgency under which the impugned Act was enacted, the lack of wider public participation, the insufficiency of time for rendering opinion, the restrictiveness of the indicated sections of the impugned Act and the application of the three-tier test to the impugned Act.

58. On the basis of that omission on the part of the Applicants, we will not transcend the sphere of the Applicants' case, as delineated by the pleadings, evidence and submission.

59. We therefore subject the **Written Laws (Miscellaneous Amendments) (No. 3) Act 2019** to the three-tier test.

TEST 1: <u>Is the limitation one that is prescribed by Law</u>?

60. This test requires that the limitation forms part of Statute, and must be clear, and accessible to citizens so that they are clear on what is prohibited.

61. In their submissions, the Applicants asserted that the provisions of the enactment are unclear, ambiguous and are subject to interpretation. To illustrate his point, Counsel for the Applicants made reference to such words as *investigation*, *law*, *order*, *morality* and *good governance* from the impugned Act, and went on to state that those words are unclear and ambiguous. In response, Counsel for the Respondent opposed the position of the Applicant. It is his submission that those words are ordinary English words, and that the contexts in which they are used accord them their ordinary meanings. Regarding such technical terms as *financial transparency* and *accountability,* it is his further submission that those terms are well explained in the Non-Governmental Organization Code of Conduct, GN No. 363 of 2008.

62. Taking into consideration the submissions by Counsel as outlined in the previous paragraphs of this Judgement, as well as the impugned Act, we are persuaded by the argument advanced for the Respondent. In nearly every statute, words carry their ordinary

meanings. In each case, this ordinary meaning is imparted by the context of the word itself. However, a word can be made to carry a technical meaning, but that meaning is always specified by the accompanying interpretive part of the legislation. The impugned Act has an interpretive section in which all technical words are defined. Beyond that, any need for interpretation would relate to the provision of a statute, and it is the court to come up with such an interpretation. Therefore, our finding is that the provisions are clear and are in line with the Treaty.

63. Accordingly, the **Written Laws (Miscellaneous Amendments) (No. 3) Act, 2019** passes the first test.

TEST 2: Is the objective of the Law pressing and substantial?

64. In this test, the law in question must be important to the society. On this test, Counsel for the Applicant avers that the impugned Act was enacted under Certificate of Urgency, while there was no pressing need for that urgency. That averment is made only in the context of submissions highlights during the hearing. On his part, Counsel for the Respondent contends that the amendments were prompted by the need to address challenges faced in the registration, co-ordination and regulation of entities; to redefine the entities established under the above-mentioned Acts; to delineate the scope of their operations; to place each entity in its appropriate registry; to enhance the accountability of the entities; and to curb Money Laundering. Counsel for the Respondent sums up by maintaining that as the amendments results in an optimal system, it aligns with the fundamental and operational principles of the Treaty.

65. By comparing the contentions on this point, we find the Applicants contention rather weak. During the oral highlights, Counsel for the Applicants stated that there was no need for urgency under which the impugned Act was enacted, but he offered nothing to support that denial. In contrast, Counsel for the Respondent presented an argument: he asserted the existence of the need for the said urgency and offered further statements in support of his assertions. Hence, we are unable to agree with the averment of the Applicants regarding the urgency in question. In our view, the Respondent demonstrated to our satisfaction that the impugned amendments are important to the society.

66. Thus, it is our finding on test 2, that there was a pressing, substantial need for the Act and for the urgency under which it was promulgated. Accordingly, **the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2o19** passes test 2.

TEST 3: Has the State, in seeking to achieve its objectives chosen a proportionate way to do so?

67. This is the test of proportionality relative to the objectives or purposes it seeks to achieve.

68. It was our observation that during the hearing Counsel for the Applicants made no express averments on the test of proportionality. Moreover, proportionality is not mentioned in the affidavits made on behalf of the Applicants.

69. In his oral submission, however, Mr Kambole asked the Court to apply the three-tier test in its determination of the matter of the instant Reference. We take the basis of that request for the application of the

three-tier test as constituting an implicit submission on the test of proportionality.

70. On the other hand, Counsel for the Respondent made a three-fold submission. It was his submission that the amendments were aimed at curing the effect of problems created by the overlap of mandates, and that the amendments have facilitated the registration, regulation, co-ordination and monitoring of the entities falling under the amended Acts. It was his further submission that the amendments are in line with the Non-Governmental Organization Policy of 2001, which proposed a new legislative framework for addressing challenges in the registration, co-ordination and regulation of the NGOs in Tanzania; and were necessary to align with the recommendation of the Financial Action Task Force of the Eastern and Southern African Money Laundering Action Group. It was his final submission that the amendments were made under the Certificate of Urgency in accordance with law and practice in Tanzania; that there was ample time for public participation, as the Bill was gazetted on 1st May 2019, the public notice of invitation was published on 19th June 2019 and public comments were collected on 21st and 22nd June 2019; and that the amendments have safeguards in the form of redress mechanisms which an aggrieved person can invoke if unsatisfied with the decision of the Registrar, Board, Minister or President.

71. In any system, innovation is always needed once it is found that the existing regime is no longer adequate to address current issues. In the instant Reference, the Respondent State has innovated the pertinent system by promulgating the **Written Laws (Miscellaneous Amendments) (No. 3), 2019** to cure the effects of the problems emanating from the overlap of mandates, to align the system with the

Non-Governmental Organizations Policy of 2001 and to align the system with the recommendation of the Financial Action Task Force. Therefore, it is our finding that, in seeking to achieve its objectives, the Respondent State has chosen a proportionate way to promulgate the **Written Laws (Miscellaneous Amendments) (No. 3), 2019**.

72. Hence, the **Written Laws (Miscellaneous Amendments) (No. 3), 2019** passes the 3rd test as well.

73. Our conclusion on the three-tier test compliance, leads us to determine that the impugned law is in compliance with the Treaty and the Protocol contrary to the assertions made by the Applicants.

74. Consequently, **the Written Laws (Miscellaneous Amendments) (No. 3), 2019** having passed the three-tier test, it is our decision is that the Applicants have failed to prove their case on the balance of probabilities. Hence, we answer Issue **1** in the negative. That is, Sections 4, 5, 6, 7, 8,9, 10, 29, 30, 31, 32, 34, 35, 36, 38, 40, 41, 42, 44, 46, 51, 52, 53, 76 of the impugned Act are not in violation of the cited Articles of the Treaty and the Protocol.

ISSUE 2: Whether the Parties are entitled to the remedies sought:

75. In litigations, parties' entitlement to reliefs sought is predicated upon their success in proving their main claims against their opponents. In the instant Reference, the Applicants have failed to establish their case against the Respondent State on a balance of probabilities. Therefore, it is our finding that the Applicants are not entitled to the reliefs sought. Similarly, we answer this issue in favour of the Respondent State.

76. On costs Rule 127(1) of the Rules provides as follows: "Costs in any proceedings shall follow the event unless the Court shall for good reasons otherwise order."

77. In the instant Reference, where the Applicants have failed to prove their claims, we would be inclined to award costs to the successful party, the Respondent. However, we take this case to be a public interest litigation proffered in good faith. We therefore deem it appropriate to direct that each part bears their own costs.

H. **CONCLUSION**

78. In the result, and for the reasons above, we find that the Applicants have failed to meet the conditions for granting the prayers sought. Accordingly, we issue the following orders:

    a) **The Reference is dismissed; and**
    b) **The parties shall bear their costs**.

79. It is so ordered.

80. **Dated, signed and delivered at Arusha this 27th day of March 2024**.

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Hon. Justice Yohane B. Masara

PRINCIPAL JUDGE

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Hon. Justice Dr Charles O. Nyawello

DEPUTY PRINCIPAL JUDGE

.....

Hon. Justice Charles A. Nyachae*

JUDGE

.....

Hon. Justice Richard Muhumuza

JUDGE

.....

Hon. Justice Richard Wabwire Wejuli

JUDGE

***[Hon. Justice Charles A. Nyachae resigned from the EACJ with effect from 8th January, 2024 but he signed this Judgment in terms of Article 25(3) of the Treaty].**