The Genius in the Gap

How a masterful draftsman built an anti-circumvention fortress in Government Notice No. 487A of 2025

the law must never be a cul-de-sac

The Business Licensing (Prohibition of Business Activities for Non-Citizens) Order, 2025, and why only a court, not BRELA, may unlock it.

LEGAL COMMENTARY • GOVERNMENT NOTICE NO. 487A OF 2025

I

A Different Lens: Appreciating Before Critiquing

Most commentary on Government Notice No. 487A of 2025 has been uniformly hostile, framing the Order as a blunt instrument of commercial destruction. This article takes a fundamentally different posture. Before one can critique the implementation of the Order, one must first appreciate the legislative craftsmanship embedded within it, because what appears, at first glance, to be a definitional void may in truth be an intentional architectural choice: a deliberate anti-circumvention fortress designed by a draftsman who understood exactly what mischief was being cured and precisely how clever lawyers would attempt to undo it.

The fifteen business activities reserved for Tanzanian citizens in the Schedule to the Order are not chosen arbitrarily. They represent the lifeblood sectors of grassroots Tanzanian entrepreneurship: retail trade, mobile money, phone repair, salon services, cleaning services, small-scale mining, tour guiding, clearing and forwarding, and micro-industry. These are the sectors where the ordinary Tanzanian, the *mama lishe*, the *bodaboda* agent, the phone repair technician, the hair salon owner, competes for survival. The decision to protect these sectors is sound, courageous, and legally defensible.

The problem is not the policy. The problem is not, as we shall argue, even primarily the Order. The problem is the yawning gap between the draftsman’s sophisticated legal architecture and the administrative bluntness with which BRELA has chosen to implement it. To understand why, we must first revisit a doctrine as old as the English common law itself: the mischief rule.

II

The Mischief Rule: The Most Purposive of All Interpretive Tools

A. What is the Mischief Rule?

The mischief rule was authoritatively established in *Heydon's Case* [1584] 3 Co Rep 7a, where the English Court of Exchequer laid down four questions that a court must ask when interpreting a statute:

I What was the common law before the making of the Act?

II What was the mischief and defect for which the common law did not provide?

III What remedy has Parliament resolved and appointed to cure the disease of the Commonwealth?

IV What is the true reason of the remedy?

The mischief rule instructs the interpreter to look beyond the literal words of a statute and to identify the evil the legislation was designed to cure, then to construe the statute in a manner that suppresses that evil and advances the remedy. It is the most purposive of the classical rules of statutory interpretation, and it is the rule most likely to be invoked when a statute's literal text creates ambiguity or apparent gaps.

B. Applying the Mischief Rule to GN 487A of 2025

If one applies Heydon's four questions to the Order, the answers are illuminating:

- **The pre-existing law.** Before the Order, the Business Licensing Act (Cap. 101) contained no sector-specific reservation of business activities for citizens. Any person, citizen or non-citizen, could obtain a licence for any of the now-reserved activities, subject to general immigration and investment rules.

- **The mischief.** The mischief the Order was designed to cure is self-evident: the progressive displacement of Tanzanian citizens from grassroots economic activities by non-citizens who, by virtue of superior capital, networks, and occasionally covert local arrangements, had come to dominate sectors that were meant to sustain the ordinary Tanzanian. In some cases, and this is critical, this displacement operated through corporate structures: a foreign national operating a retail shop, phone repair outlet, or clearing agency through a locally registered company with a compliant Tanzanian nominee shareholder.
- **The remedy.** The Order reserves the listed activities for citizens by prohibiting non-citizens from carrying them out, and by directing licensing authorities not to issue or renew licences for non-citizens to do so.
- **The true reason of the remedy.** To empower Tanzanian citizens with economic agency in sectors that define their daily commercial life, and to prevent the evasion of that empowerment through corporate or other legal structures.

III

The Draftsman's Stroke of Genius: An Intentional Ambiguity

A. Why Reference the Citizenship Act at All?

Section 2 of the Order provides, in its entirety, that "non-citizen" has the meaning ascribed to it under the Tanzania Citizenship Act (Cap. 357). At first reading, this appears to be a routine cross-reference. On deeper analysis, it reveals a masterstroke of legislative draftsmanship.

The draftsman had a choice. The Order could have defined "non-citizen" directly and exhaustively: a natural person who is not a citizen; a body corporate in which the majority of shares are held by non-citizens; a company effectively controlled by non-citizens. Many comparable statutes in other jurisdictions take precisely this approach.

The draftsman chose not to do this. Instead, the Order was deliberately tethered to the Citizenship Act, a statute that affirmatively defines categories of citizens but never explicitly defines "non-citizen." This choice was not accidental. It was architecturally deliberate, and for

very good reason.

B. The Anti-Circumvention Architecture

Consider the problem the draftsman faced. Tanzania's legal community is sophisticated. If the Order had defined "non-citizen" narrowly as a natural person who is not a citizen, the response from corporate lawyers would have been immediate and predictable: structure your client's business as a company incorporated under the Companies Act (Cap. 212). A Tanzanian company is a separate legal person. It has no citizenship under the Citizenship Act. Therefore, it is neither a citizen nor a non-citizen. Result: the Order does not apply.

If, on the other hand, the Order had defined "non-citizen" to include companies with majority foreign shareholding, lawyers would have advised clients to hold 49% foreign equity and 51% nominal Tanzanian equity, while structuring effective economic and operational control in the foreign investor through shareholder agreements, management contracts, and service agreements. The 51% Tanzanian stake would be a paper shield.

The draftsman, by referencing the Citizenship Act without further definition, created an interpretive space that only a court applying the mischief rule can properly inhabit. The gap is not a flaw. It is a trap door, deliberately left unlocked, to be opened by judicial interpretation when the appropriate case presents itself.

THE DRAFTSMAN'S CALCULUS

Why deliberate ambiguity is sometimes the smarter law

A precisely defined statute is easily circumvented by precisely structured transactions. A statute that leaves interpretive space forces the circumventor to litigate, and in litigation, courts apply the mischief rule. A court applying the mischief rule to GN 487A would ask: was this company structure designed to conceal the effective non-citizen operation of a reserved activity? If yes, the mischief rule empowers the court to look through the structure and apply the prohibition. The draftsman built this outcome into the Order from the beginning.

IV

The Citizenship Act's Silence on "Non-Citizen": A Feature, Not a Bug

Critics of the Order have noted, correctly, that the Tanzania Citizenship Act (Cap. 357) does not contain an explicit definition of "non-citizen." The Act defines citizens by birth, by descent, and by naturalisation, but leaves "non-citizen" as a negative implication: anyone who does not qualify as a citizen.

This is indeed the case. But consider what this means in the hands of a court applying the mischief rule. A court is not bound by the four corners of a statutory definition in the way that an administrative agency like BRELA is. A court, tasked with interpreting the Order purposively, can reason as follows:

> *The Order prohibits non-citizens from carrying out the listed activities. The Order borrows "non-citizen" from the Citizenship Act. The Citizenship Act defines citizenship in terms of birth, descent, and naturalisation, concepts that apply to natural persons. However, the mischief this Order was designed to cure includes the use of corporate structures to allow non-citizens to effectively carry on the reserved activities behind a Tanzanian corporate veil. A court interpreting this Order purposively must give effect to the remedy, which requires looking through artificial corporate arrangements to identify the person who effectively carries on the prohibited activity.*

This is not judicial overreach. It is the mischief rule operating exactly as *Heydon's Case* intended. The court is not rewriting the law. It is faithfully giving effect to the legislature's purpose as revealed by the context, the mischief, and the remedy.

This is precisely why the draftsman’s choice to reference Cap. 357 is a stroke of genius rather than an oversight: it preserves this judicial pathway, while preventing the legislature from being locked into a rigid textual definition that lawyers could game.

V

The Fifteen Reserved Sectors: A Sound and Necessary Policy

Before addressing solutions, it bears emphasis that the fifteen business categories reserved by the Order represent a defensible and carefully selected range of economic activities. Each category tells a story of a sector where Tanzanians historically had a strong foothold that was progressively eroded by foreign commercial competition.

- ***Retail and Wholesale Trade***

The proliferation of foreign nationals, particularly from regional trading communities, operating retail and wholesale outlets in Tanzanian towns and cities, often underselling local traders through bulk procurement networks unavailable to smaller local players, was a documented commercial grievance that Parliament and the Executive were right to address.

- ***Mobile Money Transfers***

Mobile money is perhaps the most quintessentially Tanzanian financial innovation, embedded in the daily economic life of millions. Reserving mobile money agency operations for citizens ensures that the commissions and economic participation this sector generates remain in citizen hands.

- ***Clearing and Forwarding***

This is a technical sector that has long been dominated by established players with international connections. The reservation for citizens creates space for Tanzanian logistics professionals who possess the technical knowledge, the language skills, and the local market understanding to build sustainable businesses without competing on an uneven field.

- ***Tour Guiding, Small-Scale Mining, and Micro-Industries***

These sectors are the arteries of rural Tanzanian economic life. Reserving them exclusively for citizens is not protectionism in the pejorative sense. It is the responsible exercise of economic sovereignty, a prerogative that Tanzania shares with virtually every developed nation in the world, each of which maintains reserved sectors for its citizens.

The policy is right. The sectors are well-chosen. What requires correction is not the Order but its administrative implementation.

VI

The Path Forward: From Cul-de-Sac to Constructive Resolution

Dr. Luhende's wisdom, that the law must never be a cul-de-sac, is the animating principle of this section. The Order exists. It is lawful. It serves a legitimate purpose. Companies with existing non-citizen shareholders are a reality. The question is not whether the Order should be complied with, it should, but how compliance is to be achieved without needlessly destroying legitimate businesses that are substantially Tanzanian-owned and operated. The following are concrete, legally grounded solutions.

- ***A. Structured Compliance Pathways for Existing Companies***

For companies that are genuinely non-citizen owned or controlled, the Order is clear: they may not carry on the reserved activities. However, the law should provide structured pathways for compliance rather than abrupt administrative extinction. The Minister should establish, by regulation or administrative guideline, the following mechanisms:

- **A Compliance Transition Period.** Companies that held valid licences before the Order came into force should be granted a defined transition period, not less than twelve months from the date of a Ministerial clarification, within which to restructure their shareholding to achieve citizen-majority ownership, or to transfer the business activity to a qualifying citizen-owned entity.

- **A Share Transfer Facilitation Register.** BRELA should establish a register through which businesses in the reserved sectors that are non-citizen owned can be matched with qualified Tanzanian citizen buyers, facilitating orderly market transfer rather than forced closure.
- **A Beneficial Ownership Declaration.** Rather than a blanket licence refusal based on any foreign shareholding, BRELA should require applicant companies to submit a Beneficial Ownership Declaration, disclosing who effectively controls and operates the business. Licences should be assessed on this substantive basis, not on the bare shareholder register.

- ***B. A Parliamentary Review***

Parliament, through the relevant Committee on Trade, Industry, and Investment, should call BRELA to account, and should consider a legislative amendment to section 14A of Cap. 101 that provides clear guidance on the treatment of corporate entities, prescribes a "substantive control" test for licence assessment, and establishes explicit transition mechanisms for existing licensees. Such an amendment would not undermine the Order's protective purpose. It would strengthen it, by ensuring that the protection reaches its intended beneficiaries: Tanzanian citizens who genuinely own and operate businesses, rather than inadvertently suppressing Tanzanian majority-owned enterprises.

VII

Conclusion: The Genius Must Be Matched by Wisdom in Implementation

This article has argued something that may be counterintuitive to those who have read only the first wave of commentary on Government Notice No. 487A. The Order's apparent definitional gap, the fact that "non-citizen" is borrowed from a Citizenship Act that does not define it and applies only to natural persons, is not an oversight. It is architecture. It is a deliberate space that only a court, applying the mischief rule, can legitimately occupy.

That is genuinely clever drafting. It deserves to be recognised as such. But genius in drafting must be matched by wisdom in implementation. What Tanzania needs now is not a retreat from the Order, but a maturation of its implementation.

The law must never be a cul-de-sac. There is a road forward.