REPORTABLE (5)

JUSTICE ALFRED MAVEDZENGE
v
(1) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
(2) CHAIRPERSON - ZIMBABWE ELECTORAL COMMISSION
(3) ATTORNEY GENERAL

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA CJ, GWAUNZA JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC,
MAVANGIRA JCC, UCHENA JCC & ZIYAMBI AJCC
HARARE, 5 JULY 2017 & MAY 31, 2018

T. Musarurwa, for the applicant

O. Zvedi, for the first, & third respondents

T. M. Kanengoni, for the second respondent

GOWORA JCC: This is an application lodged in terms of s 85 (1) of the Constitution. The applicant seeks the following relief:

It is ordered that:

1. The application be and is hereby granted
2. Section 192 (6) of the Electoral Act [*Chapter 2:13*] is declared unconstitutional as it violates ss 235 (1), 235 (3) and 67 (1) (a) of the Constitution of Zimbabwe, 2013 to

the extent that it empowers any person to approve regulations that are made by the second respondent

3. The phrase "approved by the Minister" is immediately expunged from s 192 (6) of the Electoral Act [*Chapter 2:13*].
4. The first respondent to pay costs of suit on a legal practitioner-client scale.

The applicant is a Zimbabwean citizen. He seeks a declaration of constitutional invalidity of s 192 (6) of the Electoral Act [*Chapter 2:13*], on the basis that it violates ss 67 (1) (a), 235 (1)(a), 235 (3) and 134 of the Constitution of Zimbabwe. In consequence, he seeks that this Court strike down or expunge the words "approved by the Minister" from the impugned provision.

The applicant's main contention is that the Minister of Justice Legal and Parliamentary Affairs (the "Minister"), should not have the prerogative to approve regulations made by the Zimbabwe Electoral Commission (ZEC) in terms of s 192(6) of the Electoral Act. The provision is couched in the following manner:

> "**192 Regulatory powers of Commission**
> (1) The Commission may by regulation prescribe all matters which by this Act are required or permitted to be prescribed or which, in its opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act.
> (2) Regulations in terms of subsection (1) may provide for—
> (a) any matter for which it is expressly provided in this Act that regulations may be made;
> (a1) the terms and conditions of service of the employees of the Commission, including the Chief Elections Officer;
> (b) the form of any document to be used in the carrying out of the provisions of this Act;
> (c) the duties of constituency elections officers, presiding officers and polling officers where the electoral officer has made a declaration in terms of subsection (6) of section twenty-one, including the manner of identifying applicants for ballot papers and the questions that may be put to such applicants;

(d) the issue of duplicate voters registration certificates and the fee payable therefor;
(e) such measures to be taken in connection with an election as may be desirable or expedient to ensure
that—
(i) a person does not cast more than one vote; or
(ii) a person who is not eligible to vote does not cast a vote;
(f) measures to be taken by employers to provide their employees with an opportunity to vote in any election;
(g) the access by journalists to, and their conduct at, polling stations and constituency centres;
(g1) facilities enabling electoral officials and other persons who, on polling day in any election are or will be assisting with the conduct of the election, to cast their votes, whether through the medium of postal voting or otherwise;
(g2) the membership and functions of multi-party liaison committees as defined in Part XXIA;
(h) penalties for contraventions thereof, not exceeding a fine of level ten or imprisonment for a period not exceeding one year or both such fine and such imprisonment.
(3) The Commission shall consult the Minister responsible for local government before making regulations in terms of subsection (1) in respect of elections to which Part XVIII applies.
(4) Notwithstanding any other provision of this Act but subject to subsection (5), the Commission may make such statutory instruments as it considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.
(5) Statutory instruments made in terms of subsection (4) may provide for—
(a) altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done;
(b) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from any election;
(c) penalties for contraventions of any such statutory instrument, not exceeding a fine of level ten or imprisonment for a period not exceeding one year or both such fine and such imprisonment.
(6) Regulations made in terms of subsection (1) and statutory instruments made in terms of subsection (4) shall not have effect until they have been approved by the Minister and published in the Gazette.”(Underlining my emphasis)

The applicant’s argument is that the impugned provision empowers the Minister to control and even block the Chairperson of ZEC from executing his regulation making function in preparation for elections. He contends further that the Chairperson of ZEC must be allowed to discharge his or her functions independent of the direction or control of anyone.

The applicant alleges that ZEC has authored draft regulations called Electoral (Voter Registration) Regulations, 2017' and that these are due to be approved by the Minister in terms of s 192 (6) of the Electoral Act. He avers that this exercise is a vicious threat to the fundamental rights conferred on him in s 67 of the Constitution because the Minister is an interested party in the upcoming elections and therefore he cannot be entrusted with the power to approve the regulations.

The application is opposed by the Minister who averred in his opposing affidavit that the assumption that the Chairperson of ZEC may be compromised is far-fetched and unjustified as the applicant has failed to point out exactly in what manner the draft regulations are unfair and compromised. He submitted that the approval of the regulations by himself is done in the exercise of his functions as an administrator of the Electoral Act as he is accountable to Parliament in terms of the Constitution itself as well as the Electoral Act. The Minister also averred that the fact that he is mandated by s 192 (6) of the Electoral Act to approve regulations should not be misconstrued to mean that he has power to direct, control and interfere with the functions of the Chairperson of ZEC.

Thus the question for determination before this Court is whether the statutory requirement for the regulations to be approved by the Minister is unconstitutional.

The applicant's main argument is that the provision in s 192 (6) of the Electoral Act which stipulates that for the regulations made by the second respondent to be valid, they must first be approved by the Minister, undermines the Constitutionally guaranteed independence of

the second respondent to prepare an election that is based on fair regulations and practices. Section 235 of the Constitution provides as follows:

> **235 Independence of Commissions**
> (1) The independent Commissions—
> (a) are independent and are not subject to the direction or control of anyone;
> (b) must act in accordance with this Constitution; and
> (c) must exercise their functions without fear, favour or prejudice; although they are accountable to Parliament for the efficient performance of their functions.
> (2) …
> (3) No person may interfere with the functioning of the independent Commissions.

The applicant's contention is that the requirement for the first respondent to approve the regulations places the second respondent under his "direction and control" and allows him to interfere with the functions of ZEC. The pertinent issue to be determined in this judgment is the interpretation to be accorded the phrase 'direction and control' in relation to the requirement for the first respondent to 'approve' the regulations. In other words, is the 'approval' that is required of the Minister in terms of s 192 (6) of the Electoral Act tantamount to the ZEC being subject to his direction and control?

It is trite that in construing the provisions of the Constitution, the primary rules of statutory interpretation apply. This was highlighted by this Court in *Chihava and Others v Provincial Magistrate and Another* 2015 (2) ZLR 31 (CC) where it stated at page 35:

> "In this respect, it is pertinent to note that a constitution is itself a statute of Parliament. Therefore, any rules of interpretation that are regarded as having particular relevance in relation to constitutional interpretation, can only be additional to the general rules governing the interpretation of statutes …"

The rules of statutory interpretation dictate that the words of a statute must be given their ordinary grammatical meaning unless this would lead to an absurdity. In *Endevour Foundation & Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356 F-G to 357 A, GUBBAY CJ said:

> "The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is as popularly understood, is to be adopted, unless that meaning is at variance with the intention of the legislature as shown by the context, or such other *indicia* as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result. See *Stellenbosch Farmers' Winery Ltd v Distillers' Corp (SA) Ltd & Anor* 1962 (1) SA 458 (A) at 476 E-F. The same notion was expressed in another way by MARGO J in *Loryan (Pvt) Ltd v Solarsh Tea & Coffee (Pvt) Ltd* 1984 (3) SA 834 (W) at 846G-H:
>
> > 'Dictionary definitions of a particular word are very often of fundamental importance in the judicial interpretation of that word in a statute or in a contract or in a will. Nevertheless, the task of interpretation is not always fulfilled by recourse to a dictionary definition, for what must be ascertained is the meaning of that word in its particular context, in the enactment or contract or other document'".

This is buttressed in *ZIMRA & Anor v Murowa Diamonds (Pvt) Ltd* 2009 (2) 213 (S) in which the Supreme Court emphasised:

> "The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further – see *Chegutu Municipality v Manyora* 1996(1) ZLR 262(S) at p 264D-E: *Madoda v Tanganda Tea Company Ltd* 1999 (1) ZLR 374(S) at p 377A-D."

The above authorities illuminate the principle that the ordinary meaning of the words employed in a statute should be strictly adhered to unless that would lead to an absurd result. Black's Law dictionary defines 'direction' as an act of guidance and 'control' as, "To exercise restraining or directing influence over, to regulate, dominate, curb; to hold from action,

to overpower, counteract or govern." The phrase 'direction or control' was defined by the Kenyan Supreme Court in *Re The Matter of the Interim Independent Electoral Commission* [2011] eKLR as follows:

> "While bearing in mind that the various Commissions and independent offices are required to function free of subjection to "*direction or control by any person or authority",* we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit."

The applicant referred the court to the case of *New National Party v Government of the Republic of South Africa and Ors* 1999 (3) SA 191 (CC) in which the South African Constitutional Court described the independence of Commissions as follows:

> "In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act…The second factor, "administrative independence", implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires "to ensure [its] independence, impartiality, dignity and effectiveness". The department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary."

The above authorities amplify the point that for independent commissions to be 'independent' and not under the 'direction or control' of any other party, they ought to be self-regulating and should not be influenced in the due performance of their functions by other organs of the state. The meaning to be ascribed to s 235 (1) of the Constitution is therefore that

independent commissions should not be subject to guidance or regulation by external forces. The crucial question for determination is thus whether the 'approval' that must be sought from the Minister is tantamount to guidance, regulation or influence in the functions of ZEC.

The word 'approve' becomes critical. Approve is a transitive verb which means:

> to have a positive opinion of someone or something - the Cambridge English Dictionary
>
> to accept, pronounce as being satisfactory
>
> to officially agree with a plan, request or to say that something is good enough to be used or is correct-Oxford Advanced Learners Dictionary
>
> To give formal sanction to; to confirm authoritatively –Black's Law Dictionary, 8th ed.

From the above definitions, what is clear is that 'approval' is to sanction an act as correct. In the context of s 192 (6) of the Electoral Act, it means that the regulations cannot be promulgated without first obtaining the sanction of the Minister as to their correctness.

The crux of this application is thus whether the requirement to acquire the sanction of the Minister concerning regulations is tantamount to him regulating or governing the functions of ZEC.

The applicant accepts it as inevitable that when preparing for elections ZEC has to promulgate administrative regulations to deal with various aspects of the elections. Any election demands the active participation of the other arms of the Executive in as much as ZEC cannot operate without the co-operation and assistance of these arms. This then informs the requirement

in the Act that the Minister must approve the regulations. Whilst ZEC has the mandate to conduct elections, in executing this mandate, it has to do so within the confines of existing laws. It must therefore conform not only to its governing law but also the laws that regulate the conduct of the other participants in the process. In this context, it cannot be free to make regulations that are in conflict with public policy and the law.

It is in this context that the Minister's approval of the regulations must be construed. The provision must therefore be given an interpretation that is purposive in order to give a true reflection of the intention of the Legislature in requiring the approval of the Minister before promulgation of any regulations prepared by ZEC. In construing the provision within the context of this debate the word 'approve' must be read as defined in the dictionary to signify satisfaction with or confirming, sanctioning or agreeing with.

In my view, the applicant has not made out a case where the word 'approve' can be construed to mean direct or control as contended before us. To ascribe such a meaning to the word would constitute a fundamental departure from its ordinary meaning.

The applicant needed to show that the regulations fail to meet the standard of impartiality as is required by the Constitution. The applicant does not impugn the regulations themselves. An attack on the lack of or absence of impartiality of the regulations themselves would have in the circumstances of this case gone a long way in laying a foundation to his claim that the need for their approval by the Minister served to impair the independence of ZEC in

their promulgation. The process of promulgation cannot be impugned in the abstract. There needs to be tangible evidence of interference. There is none.

The view that I take is that the requirement for the Minister's approval of the regulations does not give the Minister the power to govern or regulate the functions of the Zimbabwe Electoral Commission, nor does it diminish the power and independence of ZEC to craft regulations that accord with its mandate both in terms of its enabling Act or the Constitution. The purpose of the approval to be sought from the Minister is for him to exercise an Administrative function to ensure that the regulations comply with the law. As correctly stated by the first respondent, he is responsible for reporting to Parliament in terms of s 323 of the Constitution which provides:

> "Every Commission must submit to Parliament, through the responsible Minister, an annual report describing fully its operations and activities, the report being submitted not later than the end of March in the year following the year to which the report relates.
> (2) An Act of Parliament may require a Commission to submit further reports in addition to the annual report specified in subsection (1), and may prescribe the way in which such reports are to be submitted."

Clearly, in terms of this provision, it is incumbent upon ZEC to submit a report concerning its operations to Parliament through the first respondent. This mode of operation enables the first respondent to perform his functions in terms of s 323 of the Constitution. Regulations constitute subsidiary legislation and the responsible Minister is obliged to check their compliance with the law in general, not just the Electoral Act, before they are promulgated. In short, any regulation presented before Parliament must be consistent with the laws of the country, including the common law. It leaps to the mind that ZEC does not have the obligation to

ensure that this is the position. It is not after all, a Law making body. It is only tasked to make regulations for the better performance of its mandate for the conduct of elections.

My reading of the provision is that it is not meant to give the first respondent power to interfere with the ordinary day to day operations of ZEC or to direct how it should perform its functions. Rather, it is an administrative step towards the making of subsidiary legislation which is not in conflict with the Law as a whole.

Regard must also be had to the purpose of ss 235 (1) and (3) of the Constitution which are in essence "independence clauses". The real purpose of the "independence clauses", with regard to Commissions and independent offices established under the Constitution, is to provide a safeguard against undue interference with such Commissions or offices, by other persons or other institutions of government. These provisions were incorporated into the Constitution as a necessary measure to ensure that no organ of the state would usurp power from the Independent Commissions and, in effect, direct the manner in which they operate. These Commissions are set up essentially to ensure that the fundamental rights provided in the bill of rights are protected and given effect to. To that end, the Commissions were entrusted with special governance mandates of critical importance. They are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate in an environment without improper influences, fear or the promise of favour.

It is my view that the requirement for the first respondent to approve the regulations does not undermine the purpose underpinning the need to ensure the independence of

ZEC. As already highlighted, these regulations are promulgated into Law; thus it is important for them to be approved by the relevant Minister to ensure compliance with legislative standards as well as other laws.

The applicant contends that the requirement to seek the approval of the first respondent compromises his right to a free and fair election protected under s 67 (1) (a) of the Constitution. It provides:

> "**67 Political rights**
> (1) Every Zimbabwean citizen has the right—
> (a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law;"

The grammatical formulation of this right shows that it is not limited to the right to 'participate' in a free and fair election. In addition to the right to 'participate' in a free and fair election, a citizen has the right to know that the elections have been or are going to be free and fair.

The applicant alleges that the first respondent is an interested party in the outcome of the elections and the requirement that he should approve the electoral regulations compromises the fairness of the election. *Per contra*, the first respondent contends that the allegation is unfounded because, in terms of s 134 (f) of the Constitution, his functions in terms of the section are subject to scrutiny by Parliament. The section provides:

> "**134 Subsidiary legislation**
> Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but—
> (a) …
> (b) …
> (c) …

(d) …
(e) …
(f) statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny."
(underling my emphasis)

Thus, it is evident that even though the regulations must be placed before the Minister for approval, they are still subject to mandatory scrutiny by Parliament. They cannot be promulgated unless the Parliamentary Committee tasked with their scrutiny and confirmation has been given the opportunity to do so and has confirmed that they are in compliance with the laws of the country and, more importantly, that they are valid under the Constitution. In his opposing papers the Minister made specific reference to the fact that the regulations must in accordance with the Constitution and be placed before a Parliamentary Committee for scrutiny. The applicant did not choose to make any averments on this process. He does not deny the existence of the Committee, its composition, its impartiality or lack thereof or its functionality. He does not challenge its effectiveness. In short, he ignores its very existence.

Assuming that it achieves the purpose for which it is set up under the Constitution, then an attack on the process undertaken by ZEC and the approval of the Minister of that process would place the applicant in an invidious position. In effect, it would leave him without a leg to stand on. He cannot in my view, seek to impugn the process piece meal. Given that the law requires the regulations to be placed before Parliament for scrutiny, the applicant would have to also challenge the process conducted under the aegis of Parliament itself and exhibit that even that process is itself wanting and that it does not ensure that his fundamental right to a free and fair election is at risk notwithstanding the involvement of Parliament at the critical stage. He has not done so.

It seems to me that the allegation that the applicant's right to a free and fair election will be compromised is unfounded and without a basis as there are measures in place to ensure that the process surrounding the making of the regulations is fair and transparent. The applicant ought not to succeed in having a provision of the Electoral Act expunged based on mere unsubstantiated suspicions of bias on the part of the first respondent. It is worth reiterating that the approval that is sought from the Minister is not so that he gives his personal views concerning the substance of the regulations, but it is sought in order for him to exercise his Administrative functions as the lawful Administrator of the Electoral Act.

It is further contended by the applicant that the Minister is in violation of the former's rights because he has failed to put in place the legislative measures contemplated in s 235(2) of the Constitution to facilitate the realignment of electoral laws with the Constitution. Section 235 enshrines the independence of ZEC. There is nowhere in the papers where the lack of independence of this body is addressed. There is no indication that at any stage there was an attempt by the applicant to bring to the attention of the Minister the lack of conformity of any provisions of the Electoral Act with the Constitution.

He alleges that the Minister has failed to re-align s 192(6) of the Act with s 235(1) of the supreme law. This allegation is clearly premised on the issue relating to approval dealt with above and needs no further comment. Other than this allegation, no foundation has been made for an application to have the relief being granted on the allegation of failure to comply with s 235 of the Constitution. No such failure has been established.

In the circumstances, I do not believe that the applicant can claim with any integrity that the process requiring ZEC to promulgate regulations with the approval of the Minister violates his right under s 67, s 235(1) or 235 (2), as alleged. The application lacks merit and must fail.

Accordingly it is ordered as follows:

1. The application is dismissed.
2. There shall be no order as to costs.

MALABA CJ I agree

GWAUNZA JCC I agree

HLATSHWAYO JCC I agree

PATEL JCC I agree

GUVAVA JCC I agree

MAVANGIRA JCC I agree

UCHENA JCC I agree
ZIYAMBI AJCC I agree

Maja & Associates, applicant's legal practitioners

Civil Division of The Attorney General's Office, 1st & 3rd respondent's legal practitioners.

Nyika-Kanengoni & Partners, 2nd respondent's legal practitioners.