HH 27-2002

REGISTRAR GENERAL OF ELECTIONS Applicant
versus
COMBINED HARARE RESIDENTS ASSOCIATION lst Respondent
and
DAVID SAMUDZIMU 2nd Respondent

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE, 4 February, 2002

Mr *Majuru* for the applicant
Ms *Mushore* and Miss *Jarvis* for the respondents

CHINHENGO J: On 26 January, 2002 and in case no HC 24/2002, I issued a provisional order whose net effect was that pending the confirmation or discharge of the provisional order, the applicant would publish notices for the nomination of candidates for election of councillors and the mayor of Harare and for the holding of the elections on ll February, 2002 as ordered by the Supreme Court in case no SC 348/2001. The idea was that with the publication of the notices the applicant would be on course to hold the Harare City council and mayoral elections on ll February 2002 assuming that it was found on the return day that the Supreme Court order had to be enforced despite the provisions of the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002 (S.I. 13A of 2002) ("the Notice"). Immanent in this idea was that if the Supreme Court order was found to be unenforceable or no longer operative because of the Notice nothing would have been lost to the applicant and the elections would in terms of the Notice, be held as stipulated therein on 9 and 10 March 2002.

The applicant published the relevant notice on l February 2002 and not on 31 January 2002 as I had ordered. It is significant though, that the notice, has been published. No explanation was given on the papers before me for the failure to

publish the notice on 31 January, 2002.

The respondent raised the point *in limine* that the applicant should not be heard as he was in contempt of the orders of this Court and the Chief Justice's directions to the effect that he should have sought leave to appeal from this Court by 9.00 a.m. today. I gave my reasons for hearing the applicant at the hearing. Its not necessary for me to repeat them here.

It is permissible in terms of the rules of this Court for either party to anticipate the return day of any provisional order issued in any matter. Thus either the applicant or the respondent (except the 3rd respondent in case number HH 24-2002 who did not oppose the application and indicated that it would abide by any decision of the Court) could have anticipated the return day of the provisional order so that a judge of this Court would have determined whether to confirm or discharge the provisional order. I gave an *ex tempore* judgment in Chambers in order to afford the parties ample time to file the necessary papers so that the matter would be heard before the week was out. Neither of them anticipated the return day. Instead the applicant decided to appeal to the Supreme Court against my decision granting the provisional order. In its judgment SC 4/2002 the Supreme Court ordered that the applicant should seek leave to appeal from me. This judgment was brought to my attention well after 10.00 a.m. today.

The basis of the respondents' appeal to the Supreme Court can only be one in my view. It can only be that I erred in finding that the respondents had established a *prima facie* case. That ground of appeal revolves around the question whether the Notice invalidated the Supreme Court order or it did not. Mr *Majuru* for the applicant conceded this as being so. The order against which they are appealing is interlocutory. That much was accepted by the Supreme Court in SC 4/2002. Now in order for the applicants to succeed in this application they must, in my view, fulfil one requirement only. There are other requirements but they are not relevant. The requirement which the applicants must fulfil is that they must show or satisfy the Court that there is a reasonable prospect of success on appeal (*R* v *Baloi* 1949(1) SA 523 (A) at 524). That prospect hinges on whether the Notice is not *ultra vires* the enabling provision of the Electoral Act (Cap 2:01), *in specie* s 158(2) thereof. Section 158(1) of the Electoral Act empowers the President subject to subsection (2) to make such statutory instruments as he considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with or arising out of or resulting from the election. Subsection (2) of section 158 aforementioned provides in the relevant part as follows:

"Statutory instruments made in terms of subsection (1) may provide for -

(a) suspending or amending <u>any provision</u> of this Act or <u>any other law</u> in so far as it applies to any election",

The Notice which is the Statutory Instrument in terms of which the order of the Supreme Court was purportedly rendered inoperative provides that any court order (which in context is a reference to the Supreme Court order) shall be of no effect. The argument made before me was that s 158(2)(a) in reference therein to "any other law" encompasses a Court Order. I was of the *prima facie* view that it does not. I must examine that argument again to determine whether the respondents have any reasonable prospect of success on appeal.

I have searched through the law reports to find cases in which the words "any other law" were given a judicial interpretation in this jurisdiction. My search was not successful, in so far as decided cases in this jurisdiction were concerned. I found some cases which were decided in South Africa. These cases are of persuasive value. They are -*R* v *Mpeta* 1912 AD 414 at 417
-*Bowker* v *Registrar of Deeds* 1939 AD 401 at 407

-*Johannesburg City Council* v *Makaya* 1945 AD 252 at 255
- *Goslar (Pty) Ltd v Garglan* 1949 (3) SA 240 (C) at 242
-*Galant* v *Du Toit* 1946 CPD 247 at 251
-*Torwood Properties (Pty) Ltd* v *South African Reserve Bank* 1996(1) SA 215 (W) at 218 and 226
-*Schuurman & Anor v Motor Insurers' Association of Southern Africa* 1960(4) SA 317 (T) at 318
-*R* v *Kisten & Ors* 1959(1) SA 104 (W) at 109.

I will briefly refer to some of these cases. *R* v *Mpeta (supra*) was to the effect that "any other law" meant any other statutes and any other clauses of the Act under consideration. In *Makaya's* case (*supra*) "any other law" was held not to include the common law. At issue for interpretation was a provision of an insurance statute. In *Galant* (*supra*) the meaning of the words "any other law" was said to be limited to laws of the same kind as the Act under consideration. In *Torwood Properties (supra)* it was held that "any other law" did not include the common law.-

It will be apparent that in none of these cases was the phrase "any other law"

interpreted as amounting to a court order. A judgment is a decision made by the Court upon relief claimed in an action and an order is relief claimed not by action but by motion, petition or other machinery recognised in practice (See the Civil Practice of the Supreme Court of South Africa 4th ed. at p 849 and *Dickinson & Anor* v *Fisher's Executors* 1914 AD 424 at 429).

The Notice was quite specific in its scope. It stated quite clearly that it would apply notwithstanding the Urban Councils Act, Cap 19:15, the Electoral Act "or any other law or order of court". This is in stark contrast to s 158(2)(a) which empowers the President to make statutory instruments which may suspend or amend any provision of the Electoral Act or any provision of "any other law". The words "any provision" qualify the words "this Act" and the words "any other law" of s 158(2)(a). In my view paragraph (a) of s 158(2) empowers the President in addition to suspending or amending any provision in the Act, to suspend or amend "the provisions of any other law". The use of the words "provisions of" is significant. It points to the fact that a statute was in the contemplation of the Legislature and not an order of Court. It would be absurd or, at least in elegant, to refer to the provisions of a court order. I am quite satisfied that the meaning of "any other law" in s 158(2)(a) of the Electoral Act is to be limited to laws of the same kind i.e. to statute law concerned with elections. This interpretation is supported by the fact that the Notice itself had to add the words "or court order". This was done in the full realization that if a court order was not specifically included then it would be excluded from the ambit of the words "any other law" as much as it was excluded by s 158(2)(a) of the Electoral Act. In conclusion I would like to make it clear that to my mind the words "any other law" in s 158(2)(a) do not include, as part of their meaning, a court order. It seems to me that the common law is also not included in "any other law" as there is no common law that applies to elections. To the extent that the notice provides for the suspension or amendment of a court order which is not mentioned in s 158(2)(a), the Notice is *ultra vires* s 158 of the Act. If the Legislature had intended to include a court order it would have quite easily done so as was done in the Notice. As indicated in my judgment in HH 24/2002 s 4 of the Notice is also *ultra vires* the provisions of s 158 of the Electoral Act.

The application for leave to appeal from the order that I issued based as it is on th e submission that s 158(2)(a) empowers the President to suspend a court order cannot succeed. There is no prospect of success on appeal and accordingly leave to appeal is refused.