

EDSON NYAMAPFENI
versus
THE CONSTITUENCY REGISTRAR MBERENGWA EAST
and
THE ZIMBABWE ELECTORAL COMMISSION
and
THE MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS
and
DOUGLAS MOMBESHORA
and
CLEVER KUGOTI

ELECTORAL COURT OF ZIMBABWE.
UCHENA J
HARARE ,22 February 2008.

Mr *T.R Mugabe*, for the appellant.
Miss *Mabizha*, for the 1st and 3rd respondents.
Mr *G Chikumbirike*, for the 2nd respondent.

Electoral Appeal

UCHENA J: The appellant and the fourth and fifth respondents are aspiring parliamentary candidates. The appellant's nomination papers were rejected while those of the fourth and fifth respondents were accepted by the first respondent. The second respondent is the Electoral Commission responsible for conducting elections in Zimbabwe. The third respondent is the Minister responsible for the administration of the Electoral Act (*Chapter 2:13*) and the Zimbabwe Electoral Commission Act (*Chapter 2:12*), herein after called the Electoral Act and the Zimbabwe Electoral Commission Act.

The brief facts, leading to this appeal are, that the appellant lodged his nomination papers with the first respondent who rejected them because seven of the appellant's nominators' names could not be found on the voters roll. He is aggrieved because his nominator's were registered voters who had according to certificates of registration attached to the appeal registered between the 15th November 2007 and 13th February 2008. The dates of their registration, explains why their names are not on the voters roll. This however does not disentitle a nominator from nominating a candidate

as the proviso to s 46(1) (a) of the Electoral Act entitles the aspiring candidate to prove his nominator's eligibility by producing their voters registration certificates. The appellant believing his nomination to have been unfairly rejected appealed to this court on the 20th February 2008. The nomination court had rejected his papers on the 15th February 2008.

Mr *Chikumbirike* for the second respondent raised two points *in limine*-

- a) That the second respondent was incorrectly cited and
- b) That the appellant's appeal was noted out of time.

In respect of the first point *in limine* Mr *Chikumbirike* submitted that the correct citation of the second respondent should be "The Chairman Zimbabwe Electoral Commission" as provided in s 18 of the Zimbabwe Electoral Commission Act. The first respondent's counsel conceded this point but sought to argue that the incorrect citation is not a fatal irregularity to warrant the dismissal of the appeal.

In respect of the second point *in limine* Mr *Chikumbirike* submitted that an appeal in terms of s 46 (19)(b) of the Electoral Act must be lodged with the Electoral Court within four days of the rejection of the appellant's nomination. He said in this case the appeal should have been lodged by the 19th February 2008. He based his interpretation of s 46(19)(c) of the Electoral Act on s 33(2), (3) and (4) of the Interpretation Act (*Chapter 1:01*) hereinafter referred to as the Interpretation Act.

In his response Mr *Mugabe* for the appellant submitted that the appeal was lodged in time as Saturdays and Sundays should not be included in the reckoning of time. He referred the Court to Order 1 Rule 4A of the High Court Rules. He in the alternative submitted that the ordinary meaning of a day excludes Saturdays Sundays and public holidays.

Mr *Chikumbirike* in response submitted that the ordinary meaning of a day includes Saturdays, Sundays and public holidays, as a day means a day and cannot exclude other days. I agree with Mr *Chikumbirike*'s construction as it accords with the literal meaning of the word 'day'. That is why the name of each day of the week ends with the suffix "day". That construction is supported by case law. In the case of *Ellis & Another v Maceys Stores Ltd* 1983 (2) ZLR 17 (SC) @18G GUBBAY JA said,

“Rule 30 (a) lays down that where leave to appeal is not necessary, as in this case, an appeal is properly entered by serving notice of appeal ‘within twenty-one days of the day of the judgment appealed against’. Does the period include ‘none-business’ days? There is no doubt that it does. First, the ordinary meaning of the word ‘days embraces both business and none-business days. If it were intended to exclude none-business days it would have been a simple matter to have used the expression ‘twenty-one business days’.

In the case of *Kombayi v Berkhout* 1988 (1) ZLR 53 (SC) @ 56B KORSAH JA, referring with approval to the Ellis case said:

“This court has repeated *ad nauseum* that the calculation of time for lodging of appeals was based on ordinary days and not court days”.

Words in a statute should be interpreted in accordance with the definition usually found in the definition or interpretation section of that statute. In the absence of a definition for the words to be interpreted one has to look to the Interpretation Act for assistance in interpreting words in a statute. In relying on the aforementioned one can also invoke the general rules of interpretation provided it would not be inconsistent with the definition provided in the Act or the Interpretation Act. Section 2 of the Interpretation Act provides as follows:-

- “(1) The provisions of this Act shall extend and apply to every enactment as defined in this Act, including this Act which was in force in Zimbabwe immediately before the 1st November 1962, or thereafter comes into force in Zimbabwe, except in so far as any such provisions-
- a) are inconsistent with the intention or object of such enactment;
 - b) would give to any word, expression or provision of such an enactment an interpretation inconsistent with the context; or
 - c) are in such enactment declared not applicable thereto.
- (2) Nothing in this Act shall exclude the application to any enactment of any rule of construction applicable thereto and not inconsistent with this Act.”

The word “enactment” is defined in s 3 of the Interpretation Act and means-

- (a) “any Act
- (b) Any statute included in the revised edition of the laws of Zimbabwe prepared under an Act”

There is no doubt that the Electoral Act falls under this definition and should therefore be construed according to the provisions of the Interpretation Act as the words “day or days” are not defined under the Electoral Act.

Mr *Mugabe*’s submission that the time should be reckoned in terms of the High Court rules could have been premised on the provisions of s 165 (4) of the Electoral Act which provides as follows-

“Until rules of court for the Electoral Court are made in terms of this section, the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction”

It is true that this court can rely on High court rules, but the issue to be determined is whether or not the provisions of r 4A extend to time limits prescribed in an Act of Parliament. Rule 4A provides as follows-

“Unless a contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period.”

The key words in rule 4A are “where anything is required by these rules or in any order of the court to be done within a particular number of days”. This means the rule applies to anything required to be done by any rule in the High Court rules or an order of the court. It does not extend to situations not provided for by the rules or court orders. It therefore does not assist in the construction of s 46 (19)(c) of the Electoral Act, which is not a provision of the High Court rules, but a provision of the Electoral Act.

In this case the words “day” or “days” are not defined in the Electoral Act. They are however provided for in s 33 of the Interpretation Act, which provides as follows:-

- “1. Words in an enactment relating to time, and references therein to a point of time, shall be construed as relating to standard time as used in Zimbabwe, that is to say, two hours in advance of Greenwich Mean Time.
2. Where in an enactment a period of time is expressed to begin on, or to be reckoned from, a particular day, that day shall not be included in the period.

3. Where in an enactment a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period.
4. Where the time limited by an enactment for the doing of any thing expires or falls upon a Saturday, a Sunday or a public holiday, the time so limited shall extend to and the thing may be done on, the first following day that is not a Saturday, a Sunday or a public holiday.”

The clear meaning of s 33(1) to (4) is as follows. Subsection one spells out that section 33 defines any reference to time in any enactment in Zimbabwe. Subsection two excludes the day on which the event triggering the reckoning of time occurred, meaning the reckoning of time starts from the next day. Subsection three includes the last day of the stated period in the reckoning of time. Subsection four extends the period if the last day falls on a Saturday, a Sunday or a public holiday, to the next day which is not a Saturday, a Sunday or a public holiday. The inclusion of subsection four and its providing for extension if the period expires on a Saturday, a Sunday or a public holiday means Saturdays, Sundays and public holidays are included in the reckoning of time. This interpretation is confirmed in the case of *Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S) at 456 E-F where McNALLY JA said:

“It was conceded on the understanding that the period from 10 May to 26 May was less than fourteen days if one excludes Saturdays, Sundays and public holidays.

That may be so, but on what basis does one exclude those days? The Interpretation Act [*Chapter 1:01*] does not allow it. The Labour Relations (Settlement of Disputes) Regulations (SI 30 of 1993) do not authorize it. It is only permitted in matters before the High Court and Supreme Court because the rules of those courts specifically say so (rr 4A and 1 respectively)”.

See also the case of *Ellis supra* at pp 18-19.

When the provisions of s 46 (19)(c) of the Electoral Act are construed in terms of s 33 of the Interpretation Act it becomes clear that the day on which the appellant is advised of the rejection of his nomination papers is not included. The reckoning of the four day period starts on the following day and ends on the fourth day if the fourth day falls on a day other than a Saturday, a Sunday or a public holiday. If the fourth day falls on a Saturday, a Sunday or a public holiday the period then expires on the following day which is not a Saturday, a Sunday or a public holiday. The ordinary meaning of a “day” includes all days. If the legislature had intended the period to only include business days they would have said so.

The provisions of s 33 of the Interpretation Act are consistent with the provisions of s 46 (19) (c) of the Electoral Act. The interpretation in terms of s 33 is also consistent with the contextual meaning of s 46 (19)(c) of the Electoral Act which provides as follows-

“If no appeal in terms of paragraph (b) is lodged within four days after the receipt of notice of the decision of the nomination officer, the right of appeal of the candidate shall lapse and the decision of the nomination officer shall be final”.

Section 46 (19)(b) provides that the decision of a judge of the Electoral Court is final as it shall not be the subject of an appeal. The nomination Court sits to nominate candidates for an election on a date already announced. In this case the elections will be held on the 29th March 2008. The noting of an appeal and its hearing are therefore set within the urgency dictated by the count down towards the election date. Ballot papers must be prepared after the determination of the appeal as the appellant’s name must appear on the ballot papers if his appeal is upheld. That in my view explains why the reckoning of time should include Saturdays, Sundays and public holidays.

In this case the four day period excludes the 15th February 2008 when the appellant was advised of the rejection of his nomination. It starts on Saturday 16 February and ends on Tuesday 19 February 2008. As the last day is a business day there is no room for extension. It must also be stated that the Electoral; Court is a creature of statute. Its jurisdiction is restricted to what is provided in the Electoral Act, which does not provide for condonation. It therefore cannot condone the appellant’s failure to comply with the provisions of s 46 (19)(c) of the Electoral Act .

Electoral cases under the amended Electoral Act call for careful reading on the part of Legal Practitioners handling these cases. The appellant and his lawyers could have genuinely believed that the period excluded week-ends. There will therefore be no order of costs against the appellant.

In the result the appellants appeal is dismissed with no order as to costs.

Attorney-General's Civil Division, 1st and 2nd respondent's legal practitioners
Chikumbirike and Associates, 2nd respondent's legal practitioners