IAN MUTETO MAKONE
and
THE MOVEMENT FOR DEMOCRATIC CHANGE (MDC)
versus
THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION.
and
THE REGISTRAR-GENERAL OF VOTERS

ELECTORAL COURT OF ZIMBABWE.
UCHENA J
HARARE 10,11and 13 March 2008

B W Elliot, for the applicants
G Chikumbirike, for the respondents

Urgent Chamber Application

UCHENA J: The first applicant is a nominated parliamentary candidate for the Movement For Democratic Change, the ("MDC"). He will stand for the Goromonzi West House of Assembly constituency seat in Mashonaland East Province. The second applicant is the Movement for Democratic Change a political party which fielded candidates for the presidential, parliamentary, senatorial and local council elections.

The first respondent is the Chairman of the Zimbabwe Electoral Commission, which is responsible for the conducting of elections in Zimbabwe. The second respondent is the Registrar-General of Voters, responsible for the registration of voters, though he does so, under the control and supervision of the first respondent.
The brief facts leading to this application are as follows:

The applicants exercising their right under s 21(4) of the Electoral Act [*Cap2:13*], which I will refer to as the Electoral Act in this judgment, requested the respondents to supply them with electronic copies of the voters roll. They supplied the respondents with compact disks onto which the voters roll was to be copied. The applicants have since been given fifty compact disks, with voters rolls copied onto them but in a format not acceptable to the applicants. They were advised that other disks could not presently be copied because of the break down of the respondents' computers. The applicants being spurred by the approaching

election day on 29 March 2008, urgently want the Voters roll, hence the filing of an Urgent Application. They seek an order compelling the respondents to give them electronic copies of the voters roll in a format they have specified.

Mr *Chikumbirike*, for the respondents, raised a point in *limine*. He submitted that this court being a creature of statute does not have jurisdiction to determine issues arising from the provisions of s 21 of the Electoral Act as that section does not confer jurisdiction on the Electoral court. He submitted that this court can only exercise jurisdiction, in cases were the Electoral Act specifically confers jurisdiction on it. He further submitted that the Act specifies instances when the court has jurisdiction, meaning in instances where jurisdiction is not specifically conferred the legislature did not intend to confer jurisdiction. He relied on the *expressio unius est exclusio alterius* rule of interpretation. Mr *Elliot* in response submitted that this court was created to deal with electoral matters and therefore has jurisdiction to hear and determine matters arising from failure to comply with any provisions of the Electoral Act. He submitted that the use of the words "and other matters in terms of this Act", means and other cases arising from this Act confers jurisdiction on this court in instances where the legislature did not specifically do so. He summed up by saying the Electoral court was created to hear and determine electoral cases. He pointed out various provisions in which various officials are required to act in one way or the other and asked what would happen if they did not comply. He submitted that this court should intervene and order the officials to comply as should be done in this case.

Mr *Chikumbirike* for the respondents in reply submitted that the applicants are not left without remedy as they can apply to the High Court which has inherent jurisdiction and can hear and determine matters for which the Electoral court has no jurisdiction

Creature of Statute

This court was created in terms of s161 (1) of the Electoral Act. There is no doubt that it is a creature of statute. As a creature of statute it can only exercise the jurisdiction conferred on it by the statute which created it. Its powers are confined within the provisions of the creating Act. In the case of *Venges*ai *& Ors* v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H) at 598F GILLESPIE J said:

> "The concept of the rule of practice is peculiarly appropriate only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creature of statute and bound by the four corners of its enabling legislation".

See also the cases of *Chairman, Public Service Commission And Ors* v *Zimbabwe Teachers Association & Ors* 1996 (1) ZLR 637 (S) at 656D and 661G, *Harare City* v *TA Prop (Pvt) Ltd* 1994 (2) ZLR 82 (S) at 84E, and *Gwalazimba* v *PG Merchandising Ltd and Anor* 1993 (2) ZLR 215 (S) at 216C-D where MCNALLY JA said:

> "This submission is undoubtedly correct. The Tribunal is a creature of statute and can only hear appeals as provided in the Labour Relations Act 16 of 1985".

In the case of *PTC* v *Mahachi* 1997 (2) ZLR 71(H) at 73E CHATIKOBO J commenting on the powers of a court created by statute said:

> "The Tribunal was established by s 83 (1) of the Labour Relations Act [*Cap 28:01*] ("the Act"). Being a creature of statute, the Tribunal has no powers other than those conferred upon it by the legislature either expressly or by necessary implication".

The important observation made by CHATIKOBO J which I respectfully agree with is that the Act which confers jurisdiction on the creature of statute can do so expressly or by necessary implication. This means the enabling Act must be analysed to determine whether or not the implied jurisdiction which in this case, Mr *Elliot* seems to rely on was conferred. The implied jurisdiction must be discovered from the provisions of the Electoral Act.

The provision in dispute

Section 161 (1) of the Electoral Act, provides as follows:

> "(1) There is hereby established a court to be known as the Electoral court, for the purpose of hearing and determining election petitions and other matters in terms of this Act".

There is no dispute on the meaning of the part of s 161 (1) which establishes the Electoral Court. It is common cause that this court has jurisdiction to hear and determine election petitions.

The dispute arises from the interpretation of the later part of s 161 (1) namely the words "and other matters in terms of this Act". Most of the words in that phrase present no difficulties as their meanings are obvious. They are not ambiguous as they admit of no other

meanings besides their ordinary grammatical meanings. It is the word "terms" which the parties rely on in arriving at their respective constructions of the phrase in question.

Construction of the phrase

The meaning of the phrase "and other matters in terms of this Act" can be discovered by assigning an ordinary, literal or grammatical meaning to every word in the phrase. In *Keyter* v *Minister of Agriculture* 1908 NLR 522 at p 523-524 BALE CJ said:

> "It is the duty of the court to give effect to every word which is used in a statute unless necessity or absolute intractability of the language employed compels the Court to treat the words as not written. (*Salmon* v *Duncombe & Ors*, 7 NLR, 182).
>
> Another cardinal rule in ascertaining the meaning of a statute is that in construing the words used we are to ascertain the meaning from the words themselves, and not from what we imagine to have been the intention of the legislature".

In the case of *The Queen* v *Bishop of Oxford* 4 QBD 261, it was said a statute:

> "should, be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant".

In the case of *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (SC) at 264 MCNALLY JA said:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234, "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 the absurdity and inconsistency, but no further".

In this case the word "and" in the phrase is a conjunction joining the other matters which this court can hear and determine, to petitions which are agreed can be heard and be determined by this court. The word "other" simply means other than the petitions already referred to. The word "matters" means other cases which can be heard and determined along side the petitions which it is common cause can be heard by this court. The word "in" directs the inquirer to the source from which he or she can look for the "other matters" which can be heard and determined by this court. The word "terms" refers to what qualifies a matter to be

heard and determined by this court. It is the word whose true meaning has to be construed to determine whether or not this court has jurisdiction to hear this case. I will consider its construction later in this judgment. The remaining words "of this Act" directs the inquirer to look within the Electoral Act for the other cases or matters which can be heard and determined by the Electoral Court.

In this case the key word is "terms". Its interpretation should be based on its ordinary, literal, grammatical meaning. In the case of *Expedite Haulage* (*Pvt*) *Ltd* v *Scotfin Ltd* 2000 (2) ZLR 113 (HC) at 115 H to 116 A CHATIKOBO J said:

> "On the face of it, the contention advanced by Mr *de Bourbon* seems to be closer to the wording of the statute than that advanced by Mr *Colgrave*, and of course the cardinal rule of construction is that the words of a statute must be given their ordinary, literal, grammatical meaning, unless to do so would lead to a glaring absurdity".

The same principles were expressed by the Supreme Court in the case of *Endevour Foundation & Anor* v *Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356 F-G to 357 A where 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:
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> > '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'".

The inquiry according to these cases must encompass the following rules of interpretation:

a) The literal rule, to establish the ordinary, literal, grammatical or dictionary meaning of the word;
b) Intention of the legislature to determine the contextual meaning of the word as guided by the clear intention of the legislature; and

c) Other *indicia* or rules of interpretation to confirm the presence or absence of anomalies and absurdity in the resultant meaning established through the use of the above mentioned.

The literal interpretation

It is trite that a court can rely on a dictionary meaning in the construction of statutes. See the cases of *Endevour Foundation supra* and *Chegutu Municipality supra*.

The ordinary grammatical meaning of the word "terms" according to the "Shorter Oxford English Dictionary means:

(i) "a limit in space, duration, etc, that which limits the extent of anything; a limit, extremity, boundary, bound (b) Utmost or extreme limit, end (c) That to which movement or action is directed or tends, as its object, end or goal
(ii) 'A limit in time; a space of time.'
(iii) Limiting conditions pl. Conditions or stipulations limiting, what is proposed to be granted or done."

The dominant meaning of the word "term" clearly has something to do with limiting conditioning, bounding, and directing, whatever is to be done. In the context of this case this means the jurisdiction of this court, is as is limited, conditioned, bound and directed by the Electoral Act. In simple language the jurisdiction of the Electoral court, is as is provided by the Electoral Act.

The word "term" has acquired a well known judicial meaning. In the law of contract when one refers to the terms of a contract the clear meaning is the conditions on which the contract is premised. In a will it means as is provided by the testator in the will. Similarly in an enactment it means as is provided by the provisions of the enactment.

In the result the literal, ordinary, plain and technical meaning of the word "terms" as used in s 161, and in the context of the Electoral Act means as stipulated, limited or provided by the Electoral Act.

The Intention of the Legislature

Mr *Elliot* took this court through the various sections of the Electoral Act for which no court is vested with jurisdiction to enforce compliance in the event, the officer who is required to act does not do so. He argued that in such situations the Electoral Court has jurisdiction. He obviously had in mind the implied intention of the legislature referred to in the PTC case *supra*, or the assumed or imagined intention of the legislature, referred to in the Keyter case

supra. Mr *Chikumbirike* argued that in such circumstances the aggrieved party should apply to the High Court which has inherent jurisdiction. He referred to s 13 of the High Court Act [*Cap 7:06*]. It is correct that the High Court has inherent jurisdiction and can hear such cases, but the issue is does the Electoral Court have jurisdiction to hear such cases as submitted by Mr *Elliot*. This can be determined by ascertaining the expressed or implied intention of the Legislature from the construction of the sections which confer jurisdiction on the Electoral Court and a careful study and construction of the scheme of the Electoral Act. This calls for an analysis of the sections conferring jurisdiction on this court and other courts.

In Part V of the Act aggrieved parties are in terms of s 25 (6) referred to a designated magistrate for the province in which the affected constituency is situated for redress in the case of a dispute over claims for transfer of registration.

In Part VI ss 27 (3) (a) and (b), 28 (3) (b) and 29 of the Electoral Act confers jurisdiction on a designated magistrate to hear appeals against objections by the constituency registrar or a voter. Section 30 (1) to (4) provides for the submission of a stated case by the designated magistrate to a judge of the High court for his opinion.

In Part X s 44 (7) confers jurisdiction on the Electoral court to hear and determine petitions against the decision of the presiding officer over the election of the Council Of Chiefs and of President and Deputy President of the Council of Chiefs and other Senator Chiefs.

In Part XI s 46 (19) (b) and (c) confers jurisdiction on the Electoral court to hear and determine appeals from the nomination court.

In Part XIII s 66 (2) provides for the presence of an Electoral court Judge, at the drawing of lots to determine the winning candidate. Section 66 (4) confers jurisdiction on the Electoral Court to hear and determine a petition against the decision of the Chief Elections Officer. Section 70 (3) (b), (4), (5), and (8) confers jurisdiction on the Electoral court to determine issues and make orders in relation to the destruction or preservation of electoral documents.

In Part XIV s 81 confers jurisdiction on the High Court to, on convicting a person for inducing any person to obtain a ballot paper and influencing him or her to vote in favour of a particular candidate, to declare the convicted person disqualified from voting in any election for a period not exceeding five years.

In Part XVII s 111 confers jurisdiction on the Electoral court, to hear and determine petitions on an undue return or an undue election of a person to the office of President, while s 112A as read with the fifth schedule, confers jurisdiction on the Chief Justice to preside over, the electoral college, for the election of a President.

In Part XVIII A in ss 133E and 138 confers jurisdiction on the High Court, to impose additional punishment, of a civil nature to a person it will have, convicted for intimidatory practices. The same jurisdiction is conferred on the High Court in terms of s 150. Identical jurisdiction is conferred on the Electoral Court by s 155 but after the hearing of a petition after the election. It is clear the legislature conferred jurisdiction on two different courts on this aspect. The High Court deals with intimidatory and illegal practices, before the elections, while the Electoral Court deals with the same situations and can impose the same additional penalties after the elections.

In Part XXI ss 155 to s 158 confer jurisdiction on the Electoral court to hear and determine petitions and applications and make appropriate orders specified in the various sections.

In Part XXII s 161 establishes the Electoral court and in subs (1) and (2) specifies what it can or can not do.

In Part XXIII s 167 provides for the presentation of election petitions to the Electoral court. Section 170 (1) confers jurisdiction on the Electoral court to hear and determine objections on the sufficiency of the security provided by an applicant to an election petition. Section 171 (1) confers jurisdiction on the Electoral Court to hear and determine election petitions. Sections 177, 179, 180, and 181 provide for the other powers the Electoral court may exercise in the hearing of petitions.

In Part XXIV s 183 confers jurisdiction on the Electoral court to hear and determine applications by persons convicted on perjured or false evidence, for the removal of the incapacity imposed at the time of conviction.

An examination of the sections conferring jurisdiction on the various courts clearly demonstrates the legislature's deliberate intention as to which court it intended to deal with which situation. There is no doubt in my mind that where the legislature intended to confer jurisdiction on this court it did so by conferring it through a specific provision in the Act. There is clearly no room for the conferring of jurisdiction by implication. The legislature's specific mention of the instances where this court has jurisdiction means where it did not

confer jurisdiction it intended not to confer jurisdiction. This would support Mr *Chikumbirike*'s submission that the application of the *expressio unius est exclusio alterius* rule to the specific conferring of jurisdiction in some instances means this court has no jurisdiction where it is not specifically conferred. In the case of *Nkomo & Anor* v *Attorney-General & Ors* 1993 (2) ZLR 422 (SC) at 434D-E GUBBAY CJ said:

> "To ascribe a sensible meaning to subs (5) and to avoid superfluity necessitates the legitimate recourse of construing the general words "any sentence" in subs (6) as excluding the specific reference to "a sentence of death" in subs (5). This is no more than an application of the rule embodied in the maxim "*expressio unius exclusio alterius*". It draws attention to the fairly obvious linguistic point that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded. See Maxwell on The Interpretation of Statutes 12 ed at p 293".

In the case of *Eagle Insurance Co Ltd* v *Grant* 1989 (3) ZLR 278 (SC) at 280F KORSAH JA commenting on the operation of the maxim said:

> "A rule which is variably resorted to in the interpretation of statutes the *expressio unius* rule – is that the mention of one or more things of a particular class may be regarded as silently excluding all other members of the class".

The use of the words "may be regarded as silently excluding", leaves room for the inapplicability of the rule in some cases. This is confirmed in the case of *Chivinge* v *Mushayakarara & Anor* 1998 (2) ZLR 500 (SC) at p 506E-F GUBBAY CJ said:

> "The same result is arrived at, so it seems to me, by a cautious application of the maxim *expressio unius est exclusio alterus*. See *Taylor* v *Prime Minister & Anor* 1954 SR 94 at 165; 1954 (3) SA 956 (SR) at 965B-D; *R* v *Ndhlovu* (1) 1980 ZLR 96 (G) at 100A-D; *Hewlett* v *Minister of Finance & Anor* 1981 ZLR 571 (S) at 596C-E; *National Automobile & Allied Workers Union* v *Borg-Warner* 1994 (3) SA 15 (A) at 26 H – I. The specific mention of the instances of permissible discharge, of termination on notice by a permanent employee, to my mind leads to the unavoidable inference that it was not the intention of the parties to the contract to allow termination on notice of a permanent employee".

The need to exercise caution before relying on the *expressio unius* rule is because a conclusion based on it is a product of a logical deduction inferred from the specific mention of the other thing being an implied exclusion of that which was not mentioned. In the case of

Commissioner of Taxes v *F Kristiansten (Pvt) Ltd* 1994 (1) ZLR 412 (SC) at 419H the Supreme Court commenting on the nature of the rule said:

> "It may be that one cannot rely on that uncertain principle of interpretation known as the '*expressio unius exclusio alterius*' in this situation"

The uncertainty of the *expressio unius est exclusio alterius* rule was again commented on by the Supreme Court in the case of Davies and Ors v Minister of Lands, Agriculture & Water Development 1996 (1) ZLR 681 (SC) at 687G where GUBBAY CJ said:

> "Mr Anderson's counter to this argument was that the principle *expressio unius est exclusio alterius* was one of limited application to be applied with great caution. This is of course true but whereas here something which is not on the face of it acquisition is specifically stated so to be, there is a strong indication that acquisition is to otherwise be given its ordinary meaning."

In the present case a careful reading of the sections of the Electoral Act, conferring jurisdiction on this court and other courts together with s 161 of the Act whose interpretation restricts the search for jurisdiction within the Act, the express mention of the instances where this court has jurisdiction is a clear indication that where no jurisdiction was specifically conferred the legislature did not intent to confer jurisdiction on this court. In the context of the whole Act the words "and other matters in terms of this Act" means and other maters in which jurisdiction has been conferred by provisions of this Act.

Other indicia

Mr *Elliot* for the applicants referred this court to s 157 of the Electoral Act and submitted that reference in it to "petitions and applications" when no specific jurisdiction in terms of the Act is conferred on this court to hear and determine petitions means applications such as the applicant's are the "other matters" which can be heard and be determined by this court. This tends, to suggest, that the literal meaning as established above should include applications as provided in s 157. The *expressio unius est exclusio alterius* rule would not be applicable as the mentioning of applications without providing for them in any specific sections of the Act would leave this court with jurisdiction in circumstances mentioned by Mr *Elliot*. That would not be consistent with the plain meaning of the phrase "and other matters in terms of this Act". It would entitle this court to depart from the plain, literal and grammatical

meaning to avoid the inconsistency or the absurdity. See the case of *Chegutu Municipality supra*.

Mr *Chikumbirike* for the first respondent submitted that the word "application" means petition. He therefore argued that its being mentioned in s 157 is of no significance. He relied on s 15 (2) of the Interpretation Act [*Cap 1: 01*], which provides as follows:

> "Any reference in an enactment to a petition to a court shall be construed as a reference to an application to the court or to a judge, magistrate or other judicial officer of the court, made in accordance with rules of the court".

Mr *Chikumbirike*'s submission is persuasive but does not explain why the legislature would convey the same concept using two different words of the same meaning in succession. This would suggest that one of the words is superfluous. If the use of both words was out of caution then why would the legislature use the word "or" between them suggesting that it should be one or, the other. A careful reading of s 157 is called for. It provides:

> "(1) When it appears to the Electoral Court, either on application or upon an election petition, that –
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> a) any act or omission of a candidate at an election or of his or her chief election agent or of another agent or person, which but for this section would be an illegal practice, has been done or made in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature; and
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> b) by reason of the circumstances it would be just that the candidate or his or her chief election agent or other agent or person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission;
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> the Electoral Court, may make an order allowing the act or omission to be an exception from the provisions of this Act which would otherwise make the act or omission an illegal practice, and thereupon the candidate, agent or person shall not be subject to any of the consequences under this Act of the said act or omission.
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> (2) Where application, is made for relief in terms of subs (1), the Electoral Court, before hearing the application, shall be satisfied that reasonable notice of the application has been given in the constituency or area in which the election was held".

The clear meaning of s 157 is that the Electoral court may during the hearing of a petition or when an application is made to it in terms of subs (2), make an order allowing an

otherwise illegal practice an exception to the provisions of the Act. The provisions of s 15 of the Interpretation Act are therefore not applicable in this case. Subsection (2) specifically provides for the making of an application to the Electoral Court, and confers jurisdiction on it to hear and determine such applications. I, with respect, do not agree with both Mr *Elliot* for the applicants and Mr *Chikumbirike* for the respondents' respective interpretations of s 157 of the Electoral Act. Therefore the interpretation of the words "and other matters in terms of this Act" as discussed above remains unaffected by the provisions of s 157. Even if subs (2) of s 157 had not clarified the issue, there are other sections of the Electoral Act, which confer jurisdiction on this court to hear and determine applications. Section 179 (2) provides for an application for substitution of a petitioner. Section 183 provides for an application to the Electoral court for the removal of any incapacity imposed upon conviction based on perjured or false evidence.

It is therefore beyond doubt that the instances in which this court has jurisdiction to hear and determine applications are specifically provided for in the Act. As already indicated that means all the instances in which the legislature intended to confer jurisdiction on this court are specified leaving no room for this court to assume jurisdiction in circumstances referred to by Mr *Elliot*.

Mr *Chikumbirike* sought costs on the legal practitioner and client scale against the applicants on the basis that his clients were unnecessarily dragged to a court which does not have jurisdiction to hear the application. It is true that with careful reading of the Electoral Act the applicants should have known that they were suing the respondent in a court which did not have jurisdiction. It is however apparent from Mr *Chikumbirike*'s own failure to appreciate that the Act confers jurisdiction on this court to hear applications that the Electoral Act as recently amended is still to be fully understood by legal practitioners especially those who infrequently appear before this court. There is need for guidance through the judgments of this court. I can therefore not grant punitive costs in circumstances which clearly call for the guidance of this court.

In the result the applicant's application is dismissed with costs.

Coghlan, Welsh & Guest, applicants' legal practitioners
Chikumbirike & Associates, respondents' legal practitioners