ELISABETH ISABEL VALERIO
versus
PRESIDING OFFICER OF THE NOMINATION COURT
and
CHIEF ELECTIONS OFFICER ZIMBABWE ELECTORAL COMMISSION
and
THE CHAIRMAN ZIMBABWE ELECTORAL COMMISSION
and
ZIMBABWE ELECTORAL COMMISSION
and
EMMERSON DAMBUDZO MNANGAGWA
and
NELSON CHAMISA
and
DOUGLAS TOGARASEI MWONZORA
and
LOVEMORE MADHUKU
and
SAVIOUR KASUKUWERE

ELECTORAL COURT OF ZIMBABWE
DEME J
HARARE, 14 & 19 July 2023

Electoral Appeal

Mr *A Muchadehama* with Mr *A Makoni,* for the appellant
Mr *T M Kanengoni*, for the 1st - 4th respondents
No appearance for the 5th - 9th respondents

DEME J: The appellant approached this court challenging the decision of the nomination court sitting at Harare on 21 June 2023. The nomination court declined to register the appellant as the presidential candidate for the 2023 general election. The appellant's assault of the nomination court's decision is based on the three following grounds:

> "(i) The 1st respondent erred in rejecting appellant's nomination papers when sufficient evidence had been presented that a deposit of the prescribed nomination fee had been paid through a ZWL Bank transfer amounting to ZWL$138 531 528 using the rate of US$1:ZWL$6 926.58 as advised by 3rd respondent.
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> (ii) Even assuming that the funds had not yet reflected in 3rd respondent's account, the 1st respondent erred in rejecting the nomination papers in circumstances

where there had been substantial compliance with the provisions of the nomination requirements in line with section 46(11)(b) of the Electoral Act [*Chapter 2:13*]. This is more-so when the funds have now reflected in 3rd applicant's (sic) account [ZWL$138 000 000 Bank reference SBICP23173A09918, and ZWL$531 528.00 Bank Reference SBICP23173A08195].

(iii) After the 2nd respondent confirmed that the funds paid were cleared in their account, and 3rd respondent issued a press statement on the 22nd of June 2023 noting with concern reports to the effect that prospective candidates were disqualified from lodging their papers on account of difficulties experienced in effecting payments of nomination fees largely due to the current challenges within the banking system, calling upon the affected candidates to approach the respective nomination courts no later than 1600 hours on 22 June 2023, 1st respondent erred in rejecting the appellant's nomination papers."

The appellant prayed for the following relief:

"(i) The decision of the 1st respondent to reject appellant's nomination as a candidate for election to office of president for the purposes of the presidential election to be held on 23 August 2023 be and is hereby set aside.
(ii) Appellant be and is hereby declared as having been validly nominated as a candidate for election to office of president for the purposes of the presidential election to be held on 23 August 2023.
(iii) 1st, 2nd, 3rd and 4th respondent's (sic) be and are hereby ordered to take all necessary steps to ensure that appellant is recorded as a candidate for election to office of president for the purposes of the presidential election to be held on 23 August 2023 and is reflected as such on election day.
(iv) The costs of the appeal shall be borne by the 1st, 2nd, 3rd and 4th respondents."

The majority of the facts in this matter are common cause. It is common cause that the appellant appeared before the nomination court at Mapondera Building on 21 June 2023. It is further common cause that she presented her nomination papers on the same day together with the statement from her bank which bore transfer details of the transaction that she had done at her bank. Reference is made to pp 35 and 36 of the record for the relevant documentation. What is disputed is whether or not transaction documentation amounted to proof of payment. According to the appellant's view the bank documentation was sufficient proof of payment. The first to fourth respondents argued that the banking paperwork did not constitute proof of payment on the nomination day. Mr *Kanengoni* referred to the corresponding provisions on pages 35 and 36 which are as follows:

> "I/We acknowledge that completion as well as submission of this form merely constitutes an application for Stanbic Bank Zimbabwe Limited (the bank) to make a funds transfer on My/Our behalf and not a guarantee in any form that the transfer instruction will be processed, notwithstanding the fact that My/Our count may be sufficiently funded for the amount subject to the instruction. I/We hereby absolve the Bank Its employees, officers and agents of any liability in respect of any loss or damage that I/We or the intended beneficiary of funds subject to the transfer instruction may incur in the event that funds are debited from My/Our account but are not credited to the intended beneficiary's

> account for whatsoever reason including, but not limited to, mistake, error, omission or misinterpretation; unless such failure is due to a negligent or wilful act or omission by the Bank, its officers, employees or agents……. An acknowledgement of receipt of this form by the Bank shall not constitute a confirmation that My/Our account has sufficient funds to cater for the transfer instruction."

The first to fourth respondents, in their response to the first ground of appeal, reacted as follows:

> "2. The appellant attended at nomination court and sought to use the RTGS system of payment for nomination fees.
> 3. She presented an application for transfer of funds to the 4th respondent without the corresponding confirmation whether the application had been effected by her bank."

Mr *Kanengoni* further argued that the forms on pp 35 and 36 were not signed by the bank. This was opposed by Mr *Muchadehama* who referred the court to the forms where the stamp of the bank and the signature of branch manager are appearing. Mr *Muchadehama* further argued that the same forms reflect that once the instruction for transfer has been issued to the bank, it becomes irrevocable. He referred the court to the provisions on the forms on pp 35 and 36 which are as follows:

> "I/We understand that payment instructions which are submitted and processed on the ZETSS platform are irreversible."

It is also common cause that the nomination court did not accept bank transfer documentation on pp 35 and 36 as proof of payment on the nomination day, the 21st June 2023. The amount specified on the documentation was not disputed. It was not disputed that the amount transferred into the fourth respondent's account reflected on the following day, 22 June 2023. The first to fourth respondents tendered proof to this effect. The appellant alleged that the transfer reflected in the fourth respondent bank account in the morning of 22 June 2023 which was not disputed through the submissions of Mr *Kanengoni*.

It is a shared cause that the first respondent issued the press statement on 22 June 2023. The press statement was, by consent, tendered as exhibit before the court. However, there was a disagreement on whether or not the appellant qualified to be a candidate who was affected by the banking challenges experienced on 21 June 2023. Mr *Muchadehama*, on behalf of the appellant, argued that the appellant falls within the category of the affected persons. On the contrary, Mr *Kanengoni* submitted that the appellant does not qualify to be within the contemplated class of the affected candidates. According to Mr *Kanengoni*, the appellant did not produce proof of payment on the nomination day and hence she did not fall

within the intended group. He further maintained that the appellant did not experience banking challenges on 21 June 2023 and therefore was not one of the persons sought to be covered by the press statement. The press statement issued on 22 June 2023 is as follows:

> "The Zimbabwe Electoral Commission has noted with concern reports to the effect that prospective candidates were disqualified from lodging their nomination papers on account of difficulties experienced in effecting payment of nomination fees largely due to the current challenges within the banking system.
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> In view of this, the Commission is calling upon all candidates and parties whose nomination papers had been submitted but had challenges with the Commission's point of sale machines and those who had proof of payments but funds not reflecting in ZEC's account to approach the respective nominations courts wherein their papers were lodged and make the necessary payments or get confirmation of said payment no later than 1700 hrs on 22 June 2023.
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> The overriding mission of ZEC is to be as accommodative and inclusive as possible to enable Zimbabwean voters to exercise their cherished democratic rights."

The appellant's counsel argued that the appellant substantially complied with the provisions of the nomination conditions in line with s 46(11)(b) of the Electoral Act [*Chapter 2:13*] (hereinafter called "the Electoral Act"). This line of argument was opposed by Mr *Kanengoni* who insisted that the provisions of s 46(11)(b) of the Electoral Act do not apply to the production of proof of payment for nomination fees. According to Mr *Kanengoni*, the concept of substantial compliance must narrowly be construed in the context of nomination papers. He further argued that proof of payment is not part of the nomination papers.

The dispute among the parties gives birth to the following issues:

(a) Whether the forms on pages 35 and 36 constitute proof of payment.

(b) Whether or not the appellant falls within the grouping of persons contemplated by the press statement issued on 22 June 2023 by the 2nd respondent.

(c) Whether or not the appellant substantially complied with provisions of the nomination requirements.

In addressing these issues, I shall not follow their order. I will begin by the second issue of whether the appellant qualifies to be within the category contemplated by the press statement. The press statement, in the first paragraph, made reference to the beneficiaries of that statement. It is apparent that the beneficiaries were prospective candidates who were disqualified:

> "from lodging their nomination papers on account of difficulties experienced in effecting payment of nomination fees largely due to the current challenges within the banking system."

The appellant was disqualified on the nomination day. Mr *Kanengoni* argued that the appellant does not fall within this category since the method chosen by the appellant was predictable in that payment may not be cleared on the same day. According to Mr *Kanengoni* the appellant ought to have chosen other methods of payment available. He further argued that she did not face banking challenges. I do not agree with this reasoning especially in light of the concession made by Mr *Kanengoni* that the money paid using the appellant's chosen mode of payment may be cleared on the same day. The failure for the payment to be cleared on the same day can be construed as a banking challenge under such state of affairs, in my opinion.

In the second paragraph the press statement invited:

> "those who had proof of payments but funds not reflecting in ZEC's account to approach the respective nominations courts wherein their papers were lodged and make the necessary payments or get confirmation of said payment no later than 1700 hrs on 22 June 2023."

Mr *Kanengoni* contended that the appellant does not fall within the class of "those who had proof of payments but funds not reflecting in ZEC's account". His line of argument was that the appellant had failed to produce proof of payment on nomination day. Mr *Muchadehama* argued that the forms submitted attached to the record on pp 35 and 36 are sufficient proof of payment.

In the context of the press statement, I find no rationale of distinguishing the appellant from the rest of the persons. The appellant religiously instructed her bank to make the transfer of funds to the fourth respondent's bank account. Documents on pp 35 and 36 are the usual copies generated by the bank when an instruction to make transfer of funds has been made by the client. Asking for more evidence other than those forms on pp 35 and 36 would be unreasonable. No additional documentation is given to the client who has instructed the bank to transfer the funds by way of Real Time Gross Settlement. The first to fourth respondents argued that the appellant ought to have presented:

> "corresponding confirmation whether the application had been effected by her bank."

The nature of the document referred to by this statement is not clear. However, it is apparent that the press statement invited the affected persons to:

> "make the necessary payments or get confirmation of said payment".

What can be deduced from this statement is that there is another group of candidates which was in a situation which was worse than that of the appellant as the appellant had paid on the nomination day through Real Time Gross Settlement. Unlike the other category, her only predicament was that her funds were not reflecting by the end of the nomination day. The duty of the appellant on 22 June 2023 was to approach the fourth respondent and get the confirmation of whether the funds were now reflecting. The other category had tried to make payments on the nomination day without success, according to what can be inferred from the press statement. This category had two duties of initially making payments and thereafter getting the confirmation from the fourth respondent of the payment. It is obvious that this category did not have any proof of payment by the close of the nomination day unlike the appellant who had something to show to the nomination court. Thus the press statement was calling that category to make the necessary payments.

The appellant's transferred funds reflected in the morning of 22 June 2023 before the new deadline specified in the press statement. Upon being advised that her payment had been cleared and was now reflecting in the fourth respondent's bank account, she again approached the nomination court on 22 June 2023. The nomination court, once again, rejected her nomination papers on the basis that she does not fall within the contemplated group.

It is an established principle of statutory interpretation that words must be assigned their grammatical meaning unless this leads to repugnance or absurdity. Reference is made to the case of *Falcon Gold Zimbabwe* v *Pfura Rural District Council*[1], where the Supreme Court opined as follows:

> "The law on the interpretation of statutes and other legal documents is now well established in this jurisdiction. 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 – *Keyter* v *Minister of Agriculture* 1908 NLR 522. This is the golden rule of interpretation which, put otherwise, stipulates that the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnance or inconsistency with the rest of the instrument – *Coopers and Lybrand & Ors* v *Bryant* 1995 (3) SA 761, 767 (A). In *Chegutu Municipality* v *Manyora* 1996 (1) ZLR – 262 (SC) this Court remarked that there is no magic about interpretation and that words must be taken in their context.
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> [19] More recently the Constitutional Court of Zimbabwe in *Chihava* v *The Provincial Magistrate Francis Mapfumo* CCZ 6/15 stated at pp 7-8 of the unreported judgment:
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> > 'The principles set out in the *dicta* cited above can aptly and instructively be summarized as follows:

[1] SC79/21.

i) the Legislature is presumed not to intend an absurdity, ambiguity or repugnancy to arise out of the grammatical and ordinary meaning of the words that it uses in an enactment.
ii) Therefore, in order to ascertain the true purpose and intent of the Legislature, regard is to be had, not only to the literal meaning of the words, but also to their practical effect.'"

In *casu,* the press statement is a legal document, contemplated in the case of *Falcon Gold Zimbabwe* (*supra*) conferring some rights upon the intended group of affected candidates. This legal document must be equally affected by the conventions of interpretation. There is nothing from the press statement which suggests that the appellant may be disqualified from being one of the persons affected by the banking challenges. The interpretation of Mr *Kanengoni* of the press statement is not consistent with the ordinary grammatical signification of the press statement, in my view. Upholding that interpretation would be tantamount to adopting selective interpretation of the press statement and may not be in line with the precepts of equality and non-discrimination provided for by s 56 of the Constitution.

The argument that the appellant did not experience banking challenges on the nomination day, advanced by the counsel for the first to fourth respondents' counsel, would only be a mere assumption or conjecture,

According to my considered view the appellant who was in a better position than others who had failed to make payment on the nomination day must not be treated differently. There is no basis for the differentiation of the candidates under such an environment. Any attempt to draw a line of distinction would be, in my view, a flagrant affront to the appellant's right of equality given the set of circumstances that were prevailing at the material time. Thus, by rejecting the appellant's nomination papers on 22 June 2023, the nomination court ignored the compelling standards and customs of equality that have been incorporated in the national Constitution.

Now turning to the issue of whether or not the forms produced constituted proof of payment, it is apparent that the forms have to be construed in the context of the press statement. In light of the press statement, one may jump into the conclusion that such forms amounted to proof of payment at the material time. The fourth respondent, in consultation with the other relevant authorities, may, in future, have to consider promulgating regulations in order to deal with the modes for the payment of nomination fees. Such regulatory environment will bring clarity on this grey area.

I would have proceeded to make a determination on Mr *Kanengoni*'s argument in the absence of the press statement. Thus the first issue automatically falls away once a finding has been made to the effect that the appellant falls within the contemplated category of persons affected by the banking challenges. A determination of this question is no longer relevant. Equally, the third issue for determination falls away. There is no need for the court to make a determination of whether the appellant substantially complied with the provisions of the nomination requirements against the background of the press statement. In the circumstances, the appeal must succeed as prayed for with the exception of costs. In my view, an order that each party must bear its, his or her own costs is appropriate in the circumstances.

Accordingly it is ordered that:

(a) The appeal be and is hereby allowed.

(b) The decision of the first respondent to reject appellant's nomination as a candidate for election to office of president for the purposes of the presidential election to be held on 23 August 2023 be and is hereby set aside.

(c) Appellant be and is hereby declared as having been validly nominated as a candidate for election to office of president for the purposes of the presidential election to be held on 23 August 2023.

(d) First to fourth respondents be and are hereby ordered to take all necessary steps to ensure that appellant is recorded as a candidate for election to Office of President for the purposes of the presidential election to be held on 23 August 2023 and is reflected as such on election day.

(e) There shall be no order as to costs.

Mbidzo, Muchadehama and Makoni, appellant's legal practitioners
Nyika Kanengoni and Partners, first to fourth respondents' legal practitioners