REPORTABLE (7)

Judgment No. SC 11/08

Constitutional Application No. 77/08

(1) DOCTOR DANIEL SHUMBA
(2) ADVOCATE BRUCE JUSTIN CHIOTA
v

(1) THE ZIMBABWE ELECTORAL COMMISSION
(2) MR MUSHANGWE N.O.

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, ZIYAMBI JA, MALABA JA & GARWE JA
HARARE, MAY 22 & AUGUST 01, 2008

R M Fitches, for the applicants

G C Chikumbirike, for the respondents

CHIDYAUSIKU CJ: The applicants in this case allege that their right to freedom of association, guaranteed by ss 21(1) and 21(2) of the Constitution of Zimbabwe ("the Constitution"), and their right to protection of the law, guaranteed by s 18(1) of the Constitution, were violated by the second respondent, an employee of the first respondent. The alleged violation of the applicants' rights occurred in the course of the second respondent's employment with the first respondent.

THE FACTS

The applicants in this case are leaders of two different political parties. Both applicants wished to contest the Presidential Election conducted on 29 March 2008. The election which the respondents wanted to contest is complete and the outcome has been announced. The applicants are seeking a declaratory order that their rights were

violated. Mr *Fitches*, for the applicants, submitted that the outcome of this application has no bearing on the already completed election. He contends, however, that this application for a declaratory order is more than a mere academic exercise. He contends that a determination by this Court will provide a useful guideline for the future conduct of election officials. Put differently, the completed electoral process will not be affected by the outcome of this case.

15 February 2008 was the nomination day for the Presidential Election conducted on 29 March 2008. All aspiring candidates wishing to contest the 29 March 2008 Presidential Election were required to file their nomination papers by four o'clock on the afternoon of 15 February 2008.

The first applicant avers that on 15 February 2008 he arrived at and entered the nomination court at or about 15.45 hours. This was fifteen minutes before the official closing time for nominations. He submitted his nomination papers to the second respondent who advised him to wait until the official had finished attending to the second applicant. The second applicant at that time was filling in some forms. He sat in the nomination court awaiting his turn to be attended to and to file his own nomination papers. When the second applicant finished filling in his papers, he presented them to the second respondent, only to be told that the nomination court had closed and his nomination papers would not be accepted. When the second applicant was told that his nomination papers could not be accepted, the first applicant moved forward to submit his own nomination papers as he had been advised to wait until the nomination officer had finished attending to the second applicant. The first applicant contends that upon presenting his nomination papers he too was told that his nomination papers could not be accepted as the nomination court had closed. He protested at this turn of events to no avail.

What transpired thereafter is not entirely clear from the affidavits filed by the parties. The first applicant sets out his version of what transpired in para 11 of the founding affidavit, while the first respondent sets out its version of what transpired in para 6 of the opposing affidavit. The two versions do not present a clear chronology of the events which occurred thereafter. Mr *Chikumbirike*, who appeared for the respondents in both the High Court and the Electoral Court proceedings, made certain submissions, which were accepted by the applicants as correct. These submissions, to some extent, clarified what transpired after the rejection of the applicants' nomination papers.

The following appears to have happened. After the rejection of their nomination papers, the applicants launched a Chamber application in the High Court.

The chamber application to the High Court is attached to this application. In terms of the draft order the applicants sought the following relief from the High Court:

"1. The respondent is ordered to accept the applicants' papers.

2. The respondent is ordered to declare the applicants duly nominated for the March 2008 Presidential Elections.

3. That the respondent pays costs of suit."

According to Mr *Chikumbirike*, the matter was argued before GUVAVA J, sitting as a High Court Judge. She dismissed the Chamber application on the basis that the High Court had no jurisdiction to entertain the application and that it was the Electoral Court that had jurisdiction to deal with the matter in terms of s 46(19) of the Electoral Act [*Cap. 2:13*] ("the Act").

Thereafter, the application found its way to the Electoral Court in terms of s 46(19) of the Act. According to Mr *Chikumbirike*, the application was heard by UCHENA J, sitting as a Judge of the Electoral Court. The application was dismissed on the ground that the matter had prescribed. In terms of s 46(19)(b) of the Act, a candidate has a right of appeal against a decision of the nomination officer to a Judge of the Electoral Court. In terms of s 46(19)(c) the right of appeal lapses after four days and the decision of the nomination officer becomes final.

After the dismissal of the appeal by the Electoral Court nothing happened until 15 April 2008 when the present application was launched in this Court. This application is made in terms of s 24(1) of the Constitution. As already stated, the applicants are asking for a *declarator* that does not seek to change the outcome of the already completed election.

THE ISSUES

The averments of the applicants as to what transpired at the nomination court have not been put in issue by the respondents. In particular, the second respondent has not filed an affidavit disputing the allegations made against him relating to his conduct during the nomination court proceedings. Given this situation, this Court has to accept as a fact that the applicants arrived at the nomination court at least fifteen minutes before the closing time on the nomination day. In terms of s 46(7) of the Act, a

candidate who is within the nomination court at close of business is entitled to have his nomination papers accepted by the nomination court.

The proposition that what is not denied in affidavits must be taken as admitted is not disputed by the respondents and is supported by authorities. See *Fawcett Security Operations P/L v Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127F; *Nhidza v Unifreight Ltd* SC-27-99; and *Minister of Lands and Agriculture v Commercial Farmers Union* SC-111-2001 at 60.

Mr *Chikumbirike*, for the second respondent, has raised three defences. Firstly, he argues that the remedy available to the applicants upon the rejection of their nomination papers was an appeal to a Judge of the Electoral Court in terms of s 46(19) of the Act. When the applicants failed to do so timeously the decision of the nomination officer became final in terms of s 46(19)(c) of the Act. An application to this Court in terms of s 24(1), so he submitted, is a disguised appeal against the decision of the Electoral Court or the nomination officer. He argues that this is not permissible. The decision of the nomination officer, if not appealed against in terms of s 46(19)(b) of the Act, becomes final in terms of s 46(19)(c). The applicants, as I understand his argument, failed to avail themselves of the protection of the law by failing to comply with the procedure laid down in s 46 of the Act.

Secondly, Mr *Chikumbirike* submitted that this application should be dismissed on the basis that this matter arose from proceedings in both the High Court and the Electoral Court and therefore can only find its way to the Supreme Court by referral in terms of s 24(2) of the Constitution. He further argued that s 24(3) of the Constitution specifically prohibits the making of an application to this Court in terms of s 24(1) of the Constitution in respect of matters arising from proceedings in the High Court or any subordinate adjudicating authority.

In response, Mr *Fitches*, for the applicants, argued that s 46(19) did not apply to the applicants because their papers were not rejected by the second respondent in terms of s 46(10) or s 46(16) of the Act. The remedy of an appeal to an electoral Judge provided for in s 46(19) of the Act is limited to litigants whose nomination papers are rejected in terms of s 46(10) or s 46(16) of the Act. Mr *Fitches* also submitted that the present application did not arise from proceedings in the High Court or in the Electoral Court and accordingly the applicants are not barred from approaching this Court by s 24(3) of the Constitution.

Mr *Chikumbirike* also raised the issue of citation and submitted that the first respondent was wrongly cited having regard to the provisions of s 18 of the Zimbabwe Electoral Commission Act [*Cap. 2.12*]. This was disputed by Mr *Fitches*.

On the basis of the foregoing, three issues emerge on the papers - (1) Whether or not the first respondent was correctly cited; (2) Whether or not the applicants' nomination papers were rejected in terms of s 46(10) or s 46(16) of the Act, in which case the applicants should have followed the procedures provided in s 46(19) of the Act; and (3) Whether the alleged violation of the applicants' rights in the present application is a question that arose in proceedings in the High Court and/or the Electoral Court.

I will deal with the second issue first:

Does section 46 of the Act apply to the applicants?

The second issue raises the question of the correct interpretation of subss 46 (8), (9), (10) and (19) of the Act.

Subsections 46 (8), (9), (10) and (19) of the Act provide as follows:

> "(8) The nomination officer shall examine every nomination paper lodged with him or her which has not been previously examined by him or her in order to ascertain whether it is in order and shall give any candidate or his or her chief election agent an opportunity to rectify any defect not previously rectified and may adjourn the sitting of the court for that purpose from time to time:
>
> Provided that the sitting shall not be adjourned to any other day that is not a nomination day.
>
> (9) If, on examining a nomination paper which specifies that the candidate concerned is to stand for or be sponsored by a political party, the nomination officer is doubtful that such fact is true, the nomination officer may require the candidate or his or her chief election agent to produce proof as to such fact, and may adjourn the sitting of the court for that purpose from time to time:
>
> Provided that the court shall not be adjourned to any other day that is not a nomination day.
>
> (10) Subject to subsections (8) and (9), the nomination officer in open court shall reject any nomination paper lodged with him or her at any time –
>
> (a) if he or she considers that any symbol or abbreviation specified

therein in terms of paragraph (b) or (c) of subsection (1) –

(i) is indecent or obscene; or

(ii) is too complex or elaborate to be reproduced on a ballot paper; or

(iii) so closely resembles –

A. the symbol of any other candidate contesting the election in the constituency concerned; or

B. the recognised symbol or abbreviation of any political party, other than the political party, if any, for which the candidate concerned is standing or which is sponsoring him or her;

as to be likely to cause confusion; or

(b) if any symbol specified therein in terms of paragraph (b) of subsection (1) is a prohibited symbol; or

(c) if the nomination paper states that the candidate concerned is to stand for or be sponsored by a political party and the nomination officer has reason to believe that that fact is not true; or

(d) if in his or her opinion the nomination paper is for any other reason not in order;

and subsection (19) shall apply. …

(19) If a nomination paper has been rejected in terms of subsection (10) or been regarded as void by virtue of subsection (16) –

(a) the nomination officer shall forthwith notify the candidate or his or her chief election agent, giving reasons for his or her decision; and

(b) the candidate shall have the right of appeal from such decision to a judge of the Electoral Court in chambers and such judge may confirm, vary or reverse the decision of the nomination officer and there shall be no appeal from the decision of that judge; and

(c) 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; and

(d) if an appeal in terms of paragraph (b) is lodged, the judge concerned may –

(i) direct that any further proceedings under this

section in relation to that election shall be suspended, if necessary, pending determination of the appeal; and

(ii) specify a day or days on which any poll in terms of this Part and Part XIII shall be held;

and if he or she does so, the Chief Elections Officer shall cause notice thereof to be published in the *Gazette*."

A proper reading of the above subsections reveals that the applicants' contention that the nomination papers of the applicants were not rejected in terms of subs (10) of s 46 of the Act, cannot but be correct. I, however, come to this conclusion for reasons different from those advanced by the applicants. The applicants contend that s 46 of the Act does not apply to Presidential Elections. It does by reason of the provisions of s 104(3) of the Act. In my view, if the applicants' nomination papers were rejected other than in terms of s 46(10) or s 46(16) of the Act, then the remedy provided for in subs 46(19) was not available to them. Subsection 46(10) clearly states that it is subject to subss 46(8) and 46(9). Put differently, the application of subs (10) is conditional upon the fulfilment of the requirements of subss (8) and (9). Subsections (8) and (9) envisage that nomination papers are submitted to the nomination officer who in turn accepts and examines the nomination papers. It is only after a nomination officer has accepted and examined the nomination papers that he can act or do any of the things provided for in terms of subs (10).

The facts of this case clearly show that the nomination papers of the first applicant were never accepted by the nomination officer. The second applicant's nomination papers were rejected on re-submission. I will proceed on the basis that the second applicant's nomination papers were also rejected. Without first accepting and examining the nomination papers a nomination officer cannot comply with subss (8) and (9) and consequently act in terms of subs (10). It is quite clear on the papers that the nomination papers were rejected for failure to comply with subs 46(7) of the Act, which provides that nomination papers have to be submitted by four o'clock in the afternoon of the nomination day. The second respondent has not filed an affidavit in this case. The inescapable inference from the accepted facts, as deposed to by the applicants, is that the nomination officer rejected the nomination papers because, in his view, the nomination papers were submitted after 4 o'clock on the nomination day. Indeed, that is what the applicants were told by the second respondent.

The applicants, however, contend that they were inside the nomination court by close of nominations and that in terms of the proviso to s 46(7) of the Act their nomination papers should have been accepted and examined by the second respondent.

Section 46(7) of the Act provides:

> "(7) No nomination paper shall be received by the nomination officer in terms of subsection (6) after four o'clock in the afternoon of nomination day or, where there is more than one nomination day for the election concerned, the last such nomination day:

Provided that, if at that time a candidate or his or her chief election agent is present in the court and ready to submit a nomination paper in respect of the candidate, the nomination officer shall give him or her an opportunity to do so."

It is quite clear to me that the applicants' nomination papers were rejected by the second respondent for non-compliance with s 46(7) of the Act, contrary to the explicit provisions of s 46(7) of the Act. On a proper reading of the Act, a candidate whose nomination papers have been wrongfully rejected for non-compliance with s 46(7) of the Act cannot appeal to a Judge of the Electoral Court in terms of s 46(19) of the Act. Indeed the Act does not provide a remedy for such a candidate. This appears to be an oversight by the draftsperson. Where no specific remedy is provided for in the Act the High Court can exercise its inherent jurisdiction of review. It would appear to me therefore that the approach to the High Court in the first instance was correct and, had the cause of action been properly pleaded, the probabilities are that the High Court would have exercised its review jurisdiction and determined the matter. As things stand, the High Court declined to determine the matter on the ground that it had no jurisdiction.

I am satisfied that s 46(10), s 46(16) and s 46(19) of the Act do not apply to the applicants and their contention in this regard succeeds.

Are the allegations of violations of the applicants' rights in the present application questions that arose in proceedings in the High Court and/or the Electoral Court? If so, are the applicants barred from direct approach to this Court?

It is common cause that before launching the present application to this Court the applicants approached the High Court and the Electoral Court. Both courts declined to hear the matter on the ground that they had no jurisdiction. In the case of the High Court the court erroneously ruled that it lacked jurisdiction because this was a matter for determination by the Electoral Court in terms of s 46(19) of the Act. The Electoral Court declined jurisdiction because the matter had prescribed in terms of the Act.

Mr *Chikumbirike's* contention, as I understand it, is that the basis of the applicants' complaint in both the High Court and the Electoral Court was the conduct of the second respondent during nomination proceedings. The same conduct of the second respondent is the basis of the present application. The only difference, he submitted, is that in the High Court and the Electoral Court the applicants categorised the second respondent's conduct as unlawful, while in the present application the applicants categorise the second respondent's conduct as violating the applicants' rights. On this basis, he further argued, the present application is a matter that arose during proceedings in the High Court and the Electoral Court.

The applicants' right to approach this Court in terms of s 24(1) of the Constitution had they not first approached the High Court and/or the Electoral Court cannot be disputed. The issue for determination is: Does the applicants' approach to the High Court and the Electoral Court make this application a matter arising from the proceedings in the High Court or the Electoral Court within the meaning of s 24(2) of the Constitution, thus barring the applicants from directly approaching this Court in terms of s 24(1) of the Constitution?

In the case of *Tsvangirai v Mugabe and Anor* S-84-05 this Court had occasion to consider what constitutes a matter arising from proceedings in the High Court in terms of s 24(2) of the Constitution. The facts of that case were as follows. The applicant was the petitioner in an election petition brought following the Presidential Election held in March 2002. Amongst the grounds on which the petition was based was the allegation that s 158 of the Act and certain statutory instruments enacted thereunder, in terms of which the election was conducted, were constitutionally invalid. Several months after the petition was lodged, and after urging from the applicant, a pre-trial conference was held, at which the parties agreed that the trial of the election petition would deal first with submissions and argument on the constitutional validity of s 158 and the statutory instruments and orders made under its authority. The trial finally commenced about a year later, after the applicant had obtained a writ of *mandamus* compelling the registrar of the High Court to set the matter down for trial. The Judge heard submissions and argument on the constitutional issues and reserved judgment on these issues. Seven months after judgment was reserved, the Judge issued an order, in terms of which the contentions advanced on behalf of the applicant were dismissed. No reasons were given in spite of a promise to do so within two weeks. There was no appeal noted by the applicant against the order within fifteen days of the date it was given, as required by r 30 of the Rules of the Supreme Court. A month later, the resumed trial was set down for a date in September 2004. In August 2004 the applicant asked for a postponement of the trial because it was necessary to examine ballot papers and other election material, the production of which had been ordered by the court. In the meantime, the applicant continued to seek the Judge's reasons for his decision, although it was not until February 2005 that it was made clear that he was seeking the Judge's reasons in order to decide whether or not to appeal. No reasons having been forthcoming by July 2005, the applicant approached the Supreme Court for redress in terms of s 24(1) of the Constitution, alleging that the rights to protection of the law and to

a fair hearing within a reasonable time, guaranteed to him and protected against infringement under ss 18(1) and 18(9) of the Constitution respectively, had been contravened by the High Court. He sought an order setting aside the Judge's order and putting the matter before the Supreme Court for decision. It was argued on behalf of the first respondent that the matter was not properly before the Supreme Court because the constitutional question arose in the proceedings in the High Court and as such the applicant was obliged to comply with the procedure prescribed in s 24(2). The applicant argued that there were no proceedings in the High Court, the only proceedings being the hearing on the constitutional argument, and thus he was not obliged to request the Judge to refer the constitutional issue to the Supreme Court in terms of s 24(2). In addition, as the Judge was accused of being the principal cause of the delay, by reason of his continued failure in the hearing and determination of the election petition by failing to give reasons, he would have become a judge in his own cause in breach of the rules of natural justice.

This Court held:

> "(1) The word 'proceedings' in s 24(2) is a general term, referring to the action or application itself and the formal and significant steps taken by the parties in compliance with procedures laid down by the law for the purpose of arriving at a final judgment on the matter in dispute. There are proceedings in being in the High Court from the moment an action is commenced or an application made until termination of the matter in dispute or withdrawal of the action or application. There was no need to limit the very general words of s 24(2) by saying that the question as to the contravention of the Declaration of Rights arises only when the court is actually sitting. The proceedings in the High Court were still pending. Whilst the request for the reference of the question to the Supreme Court must be made to the Judge whilst he is actually sitting in court, the question itself does not have to arise when the court is sitting. It may arise on the pleadings or from the circumstances of the case. The applicant should have had the application for reference of the question set down for hearing by the Judge. (2) The argument that the Judge would have become a judge in his own cause had the request been made of him to refer the question to the Supreme Court for determination ignores the fact that compliance with the procedure prescribed in s 24(2) is mandatory. If the Judge had, out of selfish interest and in bad faith, held that the raising of the question by the applicant was merely frivolous or vexatious, he would have infringed the applicant's right to the protection of the law guaranteed under s 18(1). The applicant would then have been entitled to apply to the Supreme Court for redress in terms of s 24(1) of the Constitution. He would have discharged his duty to comply with the procedure prescribed in s 24(2)."

Thus, it would appear from *Tsvangirai's* case *supra* that once proceedings are commenced in the High Court or any subordinate court and a constitutional point

arises from the pleadings or circumstances of the case the constitutional point has arisen from proceedings in that court. *In casu*, there is no doubt that an application was made to the High Court and the Electoral Court. The High Court heard submissions from counsel but did not adjudicate on the merits of the matter because it concluded that it had no jurisdiction. Similarly, the matter was commenced in the Electoral Court. The Electoral Court did not adjudicate on the merits of the application because the application or appeal was out of time. On these facts, can it be contended that the constitutional point arose from proceedings in the High Court or the Electoral Court within the meaning of s 24(2) of the Constitution?

The present case is distinguishable from *Tsvangirai's* case *supra* in two significant respects. Firstly, both the High Court and the Electoral Court declined to entertain the matter on the merits on the basis that they had no jurisdiction. Can it be said that there are proceedings in a court that has declined jurisdiction? The court dealing with *Tsvangirai's* case had jurisdiction. Secondly, in respect of *Tsvangirai's* case the High Court proceedings had not concluded. In the present case, the proceedings of both the High Court and the Electoral Court were concluded in the sense that both courts had made a final determination that they had no jurisdiction. Given the facts set out above, can it be said that the application before this Court arose from proceedings in the High Court or the Electoral Court within the meaning of s 24(2) of the Constitution?

There is no doubt that it was open to the applicants to apply to the High Court or the Electoral Court to refer this case to the Supreme Court. I, however, do not think that the mere existence of an opportunity to apply for a referral creates an obligation on the applicants to comply with s 24(2) of the Constitution and bars them from approaching this Court in terms of s 24(1) of the Constitution. Common sense dictates that where a court has declined jurisdiction there cannot be proceedings before it thereafter. It seems to me that one of the objects of s 24(2) and s 24(3) of the Constitution is to prevent parallel proceedings in two courts and the possibility of two conflicting outcomes. Where the one court has concluded that it has no jurisdiction that possibility is eliminated. It also appears to me incongruous to hold that a matter arises from a proceeding in another court when that other court has declined jurisdiction. In *Tsvangirai's* case *supra* the court had yet to determine the matter on the merits. In the

present case, both the High Court and the Electoral Court had made a final determination that they had no jurisdiction. I also find nothing in the language of s 24, and in particular in subs (3), which suggests that the Legislature intended to bar a litigant whose matter cannot be determined on the merits by the High Court or other adjudicating authority because of lack of jurisdiction from approaching this Court directly in terms of s 24(1) of the Constitution.

On the facts of this case, I am satisfied that the applicants can approach this Court in terms of s 24(1) of the Constitution.

In the result, Mr *Chikumbirike's* contention that the applicants are barred from approaching this Court in terms of s 24(3) of the Constitution fails.

Was the first respondent wrongly cited?

Turning to the final point raised, namely that the first respondent was wrongly cited. A perusal of the relevant provisions of the Zimbabwe Electoral Commission Act [*Cap 2:12*] and the State Liabilities Act [*Cap. 8:14*] clearly shows that Mr *Chikumbirike* is correct and the Chairperson of the first respondent should have been cited instead of the first respondent. The relevant provisions provide as follows.

Section 18 of the Zimbabwe Electoral Commission Act provides as follows:

"**18 Legal proceedings against Commission**

"The State Liabilities Act [*Chapter 8:14*] applies with necessary changes to legal proceedings against the Commission, including the substitution of references therein to a Minister by references to the Chairperson of the Commission."

The above provision is fairly explicit. It states quite clearly that

whenever there is a reference to a Minister in the State Liabilities Act the litigant substitutes "Minister" with "Chairperson of the Commission". The Zimbabwe Electoral Commission Act therefore provides that the Chairperson of the Electoral Commission ("the Commission") is to be cited whenever the Electoral Commission is being sued. Failure to cite the Chairperson of the Commission or the citing of the Commission itself instead of the Chairperson constitutes a failure to comply with s 18 of the Zimbabwe Electoral Commission Act. The applicants in this case therefore did not comply with s 18 of the Zimbabwe Electoral Commission Act. That being the case, the issue that falls for determination is what are the legal consequences that flow from the applicants' non-compliance with s 18 of the Zimbabwe Electoral Commission Act. I shall revert to this issue shortly.

The relevant provisions of the State Liabilities Act that are incorporated by s 18 of the Zimbabwe Electoral Commission Act provide as follows:

"**2 Claims against the State cognizable in any competent court**

Any claim against the State which would, if that claim had arisen against a private person, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any officer or employee of the State acting in his capacity and within the scope of his authority as such officer or employee, as the case may be.

3 Proceedings to be taken against Minister of department concerned

In any action or other proceedings which are instituted by virtue of section *two*, the plaintiff, the applicant or the petitioner, as the case may be, <u>may make the Minister</u> to whom the headship of the Ministry or department concerned has been assigned <u>nominal defendant or respondent</u>:

Provided that, where the headship of the Ministry or department concerned has been assigned to a Vice-President, he may be made nominal defendant or respondent."
(the emphasis is mine)

On a proper interpretation of the above sections, the words "may make the Minister" the defendant or the respondent have to be interpreted as directing the plaintiff or the applicant to cite the Minister as the defendant or the respondent. To interpret the above words as conferring on the plaintiff or the applicant unfettered discretion to cite the Minister or any other person of their choice would lead to an obvious absurdity that could not have been intended by the legislature. In the same vein, s 18 of the Zimbabwe Electoral Commission Act directs the applicant to cite the Chairperson of the Commission as the defendant or the respondent.

In my view, the correct interpretation to be ascribed to s 18 of the Electoral Commission Act, as read with the State Liabilities Act, is that whenever an employee of the Commission is being sued and the plaintiff or the applicant wishes to join the Commission, the Chairperson of the Commission and not the Commission itself has to be cited. The same would apply when the Commission alone is being sued for the misconduct of its employees or its own misconduct – the Chairperson is to be cited as representing the Commission.

I therefore do not accept the contention of the applicants that the use of the word "may" in the above provision entitled the applicants to cite whomever they wished in place of the Chairperson of the Commission.

Mr *Chikumbirike* further argued that the applicants' failure to comply with s 18 of the Zimbabwe Electoral Commission Act, as read with ss 2 and 3 of the State Liabilities Act, rendered these proceedings a nullity. In other words, Mr *Chikumbirike's* submission is that s 18 of the Zimbabwe Electoral Commission Act is peremptory and failure to comply with the section renders the proceedings a nullity.

I do not accept the contention that s 18 of the Zimbabwe Electoral Commission Act, as read with the State Liabilities Act, is peremptory for a number of reasons.

In s 18 of the Zimbabwe Electoral Commission Act, as read with the State Liabilities Act, the word "may" as opposed to the word "shall" is used. This is indicative of a directory and not a peremptory intent of the legislature.

It is the generally accepted rule of interpretation that the use of peremptory words such as "shall" as opposed to "may" is indicative of the legislature's intention to make the provision peremptory. The use of the word "may" as opposed to "shall" is construed as indicative of the legislature's intention to make a provision directory. In some instances the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is not fatal. In both of the above instances no difficulty arises. The difficulty usually arises where the legislature has made no specific indication as to whether failure to comply is fatal or not.

In the present case, the consequences of failure to comply with the provisions of s 18 of the Zimbabwe Electoral Commission Act are not explicitly spelt out. In those statutory provisions where the legislature has not specifically provided for the consequences of failure to comply, it has to be assumed that the legislature has left it to the Courts to determine what the consequences of failure to comply should be.

The learned author Francis Bennion in his work *Statutory Interpretation* suggests that the courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He had this to say at pp 21-22:

> "Where a duty arises under a statute, the court, charged with the task of enforcing the statute, needs to decide what consequence Parliament intended should follow from breach of the duty.
>
> This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing 'shall' be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the draftsman is not expressed in the statute. Yet the courts are forced to reach a decision.
>
> It would be draconian to hold that in every case failure to comply with the relevant duty invalidates the thing done. So the courts' answer has been to devise a distinction between mandatory and directory duties. Terms used instead of 'mandatory' include 'absolute', 'obligatory', 'imperative' and 'strict'. In place of 'directory', the term 'permissive' is sometimes used. Use of the term 'directory' in the sense of permissive has been justly criticised. {See Craies *Statute Law* (7th edn, 1971) p 61 n 74.} However it is now firmly rooted.
>
> Where the relevant duty is mandatory, failure to comply with it invalidates the thing done. Where it is merely directory the thing done will be unaffected (though there may be some sanction for disobedience imposed on the person bound). {As to sanctions for breach of statutory duty see s 13 of this Code (criminal sanctions) and s 14 (civil sanctions).}"

Thereafter the learned author sets out some guiding principles for the determination of whether failure to comply with a statutory provision is fatal or a mere irregularity.

One of these guiding principles is the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the

provision is directory.

The purpose of s 18 of the Zimbabwe Electoral Commission Act is to ensure that the Chairperson of the Commission, as an interested party, is not sidelined in litigation against the Commission. He has not been sidelined as he is aware of the proceedings in this matter. He has filed an affidavit. On the facts of this case, to hold that the proceedings are a nullity for failure to comply with s 18 of the Zimbabwe Electoral Commission Act would result in a consequence totally disproportionate to the mischief intended to be remedied.

In the result I hold the view that s 18 of the Zimbabwe Electoral Commission Act is directory and not peremptory.

This is not to say that in a proper case the Court will not dismiss an application or mulct an offending litigant in costs for failure to comply with s 18 of the Zimbabwe Electoral Commission Act. Legal practitioners should stand forewarned that in a proper case the Court may dismiss an application for failure to comply with s 18 of the Zimbabwe Electoral Commission Act.

On the facts of this case, I am satisfied that no prejudice has been caused to any party by the failure to comply with s 18 of the Zimbabwe Electoral Commission Act and that in the interests of bringing speedy finality to litigation the Court should exercise its discretion and condone the applicants' irregularity in this regard. This approach will facilitate a speedy resolution of the substantive issues in this case.

CONCLUSION

In conclusion, on the version of events as stated by the applicants, it is quite clear that the refusal to accept their nomination papers was not in accordance with the law, in particular s 46(7) of the Act. The second respondent's refusal to accept the applicants' nomination papers was therefore null and void. As I have already said, the election in question is complete, having taken place on 29 March 2008, and the applicants

do not seek an order that affects that election. To that extent, this exercise is somewhat academic. However, the application succeeds and an order is made in terms of the draft.

SANDURA JA: I agree

ZIYAMBI JA: I agree

MALABA JA: I agree

GARWE JA: I agree

Chinyama & Associates, applicants' legal practitioners
Civil Division of the Attorney-General's Office, respondents' legal practitioners