

TINASHE KAMBARAMI
vs
(1) 1893 MTHWAKAZI RESTORATION MOVEMENT TRUST (2)
NOMALANGA DABENGWA (3) CITY OF BULAWAYO (4)
ZIMBABWE ELECTORAL COMMISSION (5) MOVEMENT FOR
DEMOCRATIC CHANGE ALLIANCE

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MATHONSI JA & KUDYA AJA
BULAWAYO, 20 JULY 2020 & 27 MAY 2021

S. M. Hashiti, for the appellant

G. Nyoni, for the first and second respondents

No appearance for the third, fourth and fifth respondents

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Civil Appeal No. SCB 25/19¹

GUVAVA JA:

INTRODUCTION

1. This is an appeal against the whole judgment of the Electoral Court sitting in Bulawayo dated 29 August 2019. The court granted a declaratory order sought by the first and second respondents ('the respondents') that the appellant's election was in contravention of the Electoral Act [*Chapter 2:13*] and as a result set aside the appellant's election as councilor for Ward 3 in Bulawayo.

BACKGROUND FACTS

2. The background to the matter may be summarized as follows: The appellant was elected councilor for Ward 3 Bulawayo. The first respondent is a Trust, established in

terms of the law in Zimbabwe. Its objectives are to promote economic and sound development in Matabeleland and Midlands. The second respondent is a registered voter in Ward 3 Bulawayo. The third respondent is a local authority operating in terms of the Urban Councils Act [*Chapter 29:15*]. The fourth respondent is an independent commission established in terms of s 238 of the Constitution of Zimbabwe. The fifth respondent is an alliance of political parties.

3. On 14 June 2018, following a proclamation by the President of the Republic of Zimbabwe in terms of s 144(2) of the Constitution as read with s 38(1)(c) of the Electoral Act [*Chapter 2:13*] (the Act), the Nomination Court sat and accepted the appellant's nomination papers. This resulted in the appellant being registered as a candidate to contest as a councilor for ward 3 in Bulawayo under the banner of the fifth respondent.

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4. On 27 June 2018, two weeks after the appellant's nomination, he was arraigned before the Bulawayo Magistrates Court. He was charged with the crime of theft as provided for in s 113 of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*]. The appellant pleaded guilty to the offence and was fined US\$80.00 or in default of payment 18 days imprisonment.
5. On 30 July 2018 the elections were held and on 2 August 2018 the appellant was declared the duly elected Councilor for Ward 3 Bulawayo. Following the election, the first and second respondents made an application before the Electoral Court seeking a *declaratur* to set aside the election of the appellant on the ground that he was disqualified from holding office following his conviction.

PROCEEDINGS A QUO

6. The application was opposed by the appellant who argued that the first and second respondents did not have *locus standi* to bring the application before the court and that the first and second respondents had filed a disguised election petition in the name of an application. The appellant also argued that the court did not have jurisdiction to entertain the application as he could only be removed from office in accordance with s 278 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ('the Constitution').
7. In granting the application, the court found that the Electoral Court had the power to grant an application for a *declaratur* as long as the application related to the electoral process. On the argument that the court did not have jurisdiction to set aside the nomination since the respondents had not filed an election petition, the court found that it had the requisite jurisdiction since it was not being **Judgment No. SC 66/21** **Civil Appeal No. SGB 25/193** the appellant from office, but to declare him as a disqualified person to hold office by virtue of his conviction. The court also found that the first and second respondents were interested parties and hence were qualified to bring the application.

In the result the court made the following order:

- “1. It be and is hereby declared that the election of first respondent as councilor for ward 3 in Bulawayo was in contravention of s 119(2)(e) of the Electoral Act [*Chapter 2:13*] following his conviction of the offence of theft at the Bulawayo Magistrates' Court under Criminal Record Book (CRB) number 1981/18 on 27 June 2018, and it is therefore set aside on account of it being null and void and his unsuitability to hold public office.
2. That first respondent pays costs of suit on the ordinary scale.”

Dissatisfied by the decision of the court *a quo* the appellant noted this present appeal under the following grounds:

- “1. The Court *a quo* erred to hear and determine this matter on the basis that the same was not an election petition filed under s 168 of the Electoral Act [*Chapter 2:13*] nor was it at law an appeal application or petition in terms of the same Act.
 2. The Court *a quo* erred as a question of law in failing to hold that the first respondent a Trust had no legal capacity of suing and being sued and more importantly in failing to hold that the same had no *locus standi* or legal basis of bringing the application.
 3. The Court *a quo* erred to hold that the second respondent Nomalanga Dabengwa did not have *locus standi* to approach the court and could only have done so through an election petition in terms of s 168 of the Electoral Act of which the application in the court *a quo* was not won (*sic*).
 4. The Court *a quo* erred in its interpretation of s 119(2) of the Electoral Act.
 5. More importantly the court *a quo* failed in not holding that once a person had been lawfully nominated, such as the appellant he could only be removed from the office in terms of s 278 of the Constitution of Zimbabwe.”
8. Although five grounds were raised the appellant argued the appeal on only one ground which he submitted would resolve the dispute between the parties. The issue was whether or not the electoral court had the jurisdiction to grant the declaratory order sought by the first and second respondents.

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SUBMISSIONS BEFORE THIS COURT

9. At the commencement of the hearing, the appellant placed before the Court a copy of a judgment handed down on 18 June 2020 by Makonese and Mabhikwa JJ under case number HCA 05/19 and judgment number HB 119/20 being an appeal made by the appellant against both his conviction and sentence. The judgment was to the effect that the appeal had been allowed. This resulted in the setting aside of the appellant’s conviction and sentence. I hasten to state that the judgment of the acquittal of the appellant was made part of the record by consent of the parties. However in my view the judgment setting aside the appellants conviction, does not take the appellants case any further as this was only granted after he had been elected into office.

10. Counsel for the appellant, Mr. *Hashiti* submitted in the main that the court *a quo* erred in granting the declaratory order sought by the first and second respondents as it had no power to issue such an order. It was counsel's argument that s 161 of the Electoral Act sets out the powers that the court can exercise. The Electoral Act does not grant the court the power to issue a *declaratur*. It was also his submission that the court erred in resorting to s 14 of the High Court Act [*Chapter 7:06*] ('the High Court Act') in granting the *declaratur* when the application had been made in terms of the Electoral Act.

11. On the other hand, counsel for the respondents, Mr *Nyoni*, argued that the court *a quo* did not misdirect itself when it granted the declaratory order sought by the respondents. It was counsel's argument that s 161 of the Electoral Act gave the court exclusive jurisdiction over all electoral matters. It was also argued that the Electoral Court, in carrying out its functions, could exercise the same powers as the High Court. Thus, it had the power to grant the *declaratur* sought by the respondents. On this basis the respondent submitted that the appeal must be dismissed with costs.

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APPLICATION OF THE LAW TO THE FACTS

12. In finding that it had jurisdiction to deal with the application for a *declaratur* the court *a quo* relied on s 161 (2) of the Act. The court made the following remarks:

“The Electoral Court now has powers similar to those exercised by the High Court and that this Court sitting as it does as a division of the High Court, otherwise known as the Electoral Court, can now properly sit and entertain an application for a Declaratur for as long as, in my view that matter is in relation to the Electoral Act and election processes.”

13. The Electoral Act was promulgated on 1 February 2005 as Act 25/2004. Section 161 of that Act gave the court its jurisdictional powers and provided 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.
- 8. The Electoral Court shall have no jurisdiction to try any criminal case.
- 9. The Electoral Court shall be a court of record.”

14. In 2012 the Electoral Act was amended by Act 3 of 2012. Under the amendment the jurisdictional powers of the court were broadened under s 161. Section 161 now reads as follows:

“161 Establishment and jurisdiction of Electoral Court

- (1) There is hereby established a division of the High Court, to be known as the Electoral Court, which shall be a court of record.
- (2) The Electoral Court shall have exclusive jurisdiction—
 - (a) to hear appeals, applications and petitions in terms of this Act; and
 - (b) to review any decision of the Commission or any other person made or purporting to have been made under this Act; and shall have power to give such judgments, orders and directions in those matters as might be given by the High Court:
Provided that the Electoral Court shall have no jurisdiction to try any criminal case.
- (3) Judgments, orders and directions of the Electoral Court shall be enforceable in the same way as judgments, orders and directions of the High Court.”

15. Section 161 gives the court exclusive power to deal with all issues pertaining to election processes. The court can hear appeals, applications and petitions within the confines of the Act. It can also review decisions of the commission and shall grant such orders, judgments and directions as may be granted by the High Court in such matters. It is a creature of statute and its powers are confined to the four corners of the Act. In discussing the jurisdiction of the Electoral Court UCHENA J (as he then was) in *Mliswa v The Chairperson Zimbabwe Electoral Commission* HH 586-15 stated the following:

“The Electoral Court now has exclusive jurisdiction, which it did not have in 2008. The word “exclusive”, means this court, now has a domain over which, it does not share its jurisdiction with any other court. That domain is marked by s 161 (2) (a) and (b), which caps it all by adding that this court now has powers similar to those exercised by the High Court, when, it determines electoral issues. The combination of exclusive jurisdiction and the addition of powers similar to those exercised by the High Court means this court now enjoys unlimited jurisdiction over all electoral cases, except criminal cases and cases, which have been specifically, allocated to other courts. Applications are now specifically mentioned as falling within the Electoral Court’s jurisdiction. In 2008 they fell under “other matters”. The Electoral Court now has “power to give such judgments, orders and directions in those matters as might be given by the High Court”. The granting to the Electoral Court of exclusive jurisdiction, and power to give such judgments, orders and directions in those matters as might be given by the High Court, is a clear enhancement of the Electoral Court’s jurisdiction after the Makone case (*supra*).”

16. There can be no doubt that the amendment to s 161 of the Electoral Act by Act 3 of 2012 widened the powers of the court. The court is no longer limited to hearing petitions only but can deal with appeals and applications in similar ways as they are dealt with by the High Court. The Electoral Act provides that the court can give judgments orders and directions as may be given by the High Court. The Act however does not specifically state whether or not the court has the power to grant declaratory orders.

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17. Both the Labour Court and Electoral Court share the characteristic of being specialized courts which exercise jurisdiction within the confines of enabling Acts of Parliament. This Court faced with a similar question of whether or not the Labour Court has jurisdiction to grant a declaratory order in *Stylianou and Others v Mubita and Others* SC 7/17 at page 7 to 9 reasoned as follows:

“Section 89 of the Labour Act determines the functions, powers and jurisdiction of the Labour Court. The relevant section is s 89(1)(a) which reads as follows:

‘89 Functions, powers and jurisdiction of Labour Court

(1) The Labour Court shall exercise the following functions—

- (a) hearing and determining applications and appeals in terms of this Act or any other enactment; ...’
- (b)

Turning to the declaratory order granted by the court *a quo*, the same question arises as to whether or not the Labour Court has the jurisdiction to make such orders. Paragraph 4 of the provisional order attached to the urgent chamber application *a quo* read as follows:

- 4. The agreement signed by the works council will be and is hereby declared null and void. (my emphasis)

The same question was deliberated upon by Ziyambi JA in *UZ-UCSF Collaborative Research Programme in Women’s Health v David Shamuyarira* SC 10/10 where she held as follows:

“... nowhere in the Act is the power granted to the Labour Court to grant an order of the nature (declaratory order) sought by the respondents in the court *a quo*, nor have I been referred to any enactment. So, too, in this case, there is no provision in the Act (nor have I been referred to any provision in any other enactment) authorizing the Labour Court to issue the declaratory order sought by the respondent. It is therefore my view that the Labour Court ought to have dismissed the application for want of jurisdiction authorizing the Labour Court to grant such an order. **Judgment No. SC 66/21 Civil Appeal No. SCB 25/198**

It is therefore evident that the court *a quo* acted outside its jurisdiction. Consequently, the declaratory order, like the interdict it granted, was null and void.””

- 18. A reading of s 161 of the Electoral Act has similar wording as found in s 89(1)(a) of the Labour Act [*Chapter 28:01*]. Section 161 clearly states that the court has jurisdiction to hear appeals, applications and petitions in terms of the Act. All matters brought before the court must be over election processes or any matter relating to elections. Likewise all issues brought before the Labour Court must pertain to labour matters only. The only difference between the two provisions which are strikingly similar is on s 161(b).
- 19. Section 161(b) gives the Electoral Court extra power to grant judgments, orders and directions as may be granted by the High Court. A cursory examination of the provision suggests that it is an open ended provision which suggests that the Electoral Court is *at*

par with the High Court as both courts can grant similar judgments, orders and directions.

20. In discussing the principle to be applied by a court in interpreting statute, MALABA CJ in *Zambezi Gas (Pvt) Limited v NR Barber (Pvt) Ltd and Another* SC 3/20 stated the following:

“It is the duty of a court to interpret statutes. Where the language used in a statute is clear and unambiguous, the words ought to be given the ordinary grammatical meaning. However, where the language used is ambiguous and lacks clarity, the court will need to interpret it and give it meaning. There is enough authority for this rule of interpretation. In *Endeavour Foundation and Anor v Commissioner of Taxes* 1995 (1) ZLR 339 (S) at p 356F-G the Supreme Court stated:

‘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.’”

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...

21. In *Chihava and Others v The Provincial Magistrate Francis Mapfumo N.O and Another* 2015 (2) ZLR 31 (CC) at pp 35H-36A the Constitutional Court said:

“The starting point in relation to the interpretation of statutes generally would be what is termed ‘the golden rule’ of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others v Bryant* 1995 (3) SA 761 (A) at 767:

‘According to the “golden rule” of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.’ (the underlining is for emphasis)

22. Applying the above principles, it seems to me that an interpretation of s 161(2)(b) of the Electoral Act requires that I apply the golden rule. As a starting point an examination of the meaning of “applications” envisaged under s 161(2)(a) of the Act is

imperative. Examples of applications envisaged in the Act are set out in Part X111 of the Electoral Act. The main one is an electoral petition. There is also provision for an application made in terms of s 67A of the Act for the extension of the period for counting votes, an application made in terms of s 70(4) where the court may grant leave to any person to open any packet or box containing electoral residue and lastly an application made in terms of s 129(1) of the Act wherein the court can order a runoff of elections to be done on the same day. The case in issue was clearly not an electoral petition nor did it fall under any of the above cited examples.

23. The examples cited above, which are aptly captured in the appellant's heads of argument, serve to show that applications, which may be entertained by the Electoral Court, have a marked difference from those that may be heard by the High Court. This is where, in my view, the court *a quo* fell into error. The High Court is a court with inherent jurisdiction. It has the power to hear all types of applications brought to it in terms of Order 32 of the High Court Rules, 1971. The types of applications that the High Court can hear are not stipulated in the Act as is the position in the Electoral Act. That the High Court has inherent jurisdiction is a common law principle which has been specifically codified by s 176 of the Constitution. The Electoral Act does not have such a provision. Thus, the High Court can grant any order as it may deem fit. This is in complete variance with the applications envisaged under the Electoral Act where there is a set remedy which the court must apply for every application before it. For example under s 67A in an application for the extension of the period for counting votes the court's remedy is that it may for good cause shown extend the period for counting of the votes. Also, in an application made in terms of s 70(4) the court on application can order that a ballot packet be reopened. It is clear that the Electoral Act provides for

situations where the court can exercise its jurisdiction and further provides for the remedies which the court can grant.

24. The net effect is that the nature of the jurisdiction which is granted in the Electoral Act is that the court cannot stray from the provisions of the Act. It is bound to follow the powers set out in the Act. Therefore a proper interpretation of the provision that the Electoral Court can exercise the same powers as the High Court in making judgments, orders and directions in appeals, applications and petitions, can only be that such power is limited to the confines of the Act.

25. The Electoral Act does not provide nor purport to give the court the jurisdiction to grant declaratory orders. A *declaratur* by nature is a special remedy open to any individual who has an interest in any matter who seeks a declaration on existing or future rights. The power of the High Court to grant declaratory orders is entrenched in s 14 of the High Court Act. Section 14 provides as follows:

“14. High Court may determine future or contingent rights
The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

26. It seems to me that s 14 of the High Court Act is a special provision which flows from the fact that the High Court has inherent jurisdiction which the Electoral Court does not have. The remedy of a declaration of rights is a remedy which the High Court grants within its discretion. That is not a remedy which may be shared by a court which has limited jurisdiction.

27. It could not have been the intention of the legislature to give the Electoral Court the power to grant declaratory orders through the amendment of s 161 of the Act. In my view, s 161 of the Act was amended so as to provide the Electoral Court with wider powers so that it is not restricted to dealing only with election petitions as was the position prior to 2012.

28. For the application for a declaratory order made *a quo* by the first and second respondents to have been properly before the court, it must have been provided for in the Act as can be drawn from the remarks by ZIYAMBI JA in *National Railways of Zimbabwe v Zimbabwe Railway Artisans Union and Others* 2005 (1) ZLR 341 (S) wherein the court noted the following at 347.

“Thus, before an application can be entertained by the Labour Court, it must be satisfied that such an application is an application “in terms of the Act or any other enactment”. This necessarily means that the Act specifically provide for applications to the Labour Court, of the type that the applicant seeks to bring.”

Before the court *a quo* could entertain the application before it ought to have been satisfied that the application fell within the confines of the Electoral Act.

29. It should also be observed that the court *a quo*, in invoking s 14 of the High Court Act, applied principles which were not argued before it by the parties. It thus again fell into error by determining a matter based on an issue which had not been placed before it. Clearly, by acting in this manner the court went on a frolic of its own.

DISPOSITION

30. The Electoral Court like the Labour Court does not have jurisdiction to grant declaratory orders. The Electoral Court, being a creature of statute can only deal with issues which are set out in its enabling Act. The court *a quo* thus erred in finding that it had jurisdiction to deal with the application for a declaratory order.
31. The appeal must thus succeed on this basis. In respect to costs, the appellant has been successful and I find no reason why costs should not follow the cause.
32. In the result, it is accordingly ordered as follows:
1. The appeal be and is hereby allowed with costs.
 2. The judgment of the court *a quo* is set aside and substituted with the following:
“The application is dismissed with costs.”

MATHONSI JA

I agree

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KUDYA AJA

I agree

Messrs Samp Mlaudzi and Partners, appellant’s legal practitioners

Messrs Moyo and Nyoni, 1st and 2nd respondents’ legal practitioners