

IGNATIUS ZVIGADZA

Versus

ARCHBORD MUZANENHAMO

ELECTORAL COURT OF ZIMBABWE

MUZOFA J

CHINHOYI 23 October & 6 November 2023

Electoral Petition

J Zuze, for the applicant

J Mangeyi, for the respondent

MUZOFA J

Introduction

The applicant and the respondent were candidates in the Chinhoyi Municipality ward 4 elections held on the 23rd of August 2023. The respondent was declared the duly elected Councillor for the ward on the following day, the 24th.

Dissatisfied with the results, the applicant alleged that the respondent committed certain irregularities and malpractices that had an effect of altering the will of the electorate. More specifically that the respondent personally and through his agents canvassed for votes on the election day within 300 metres of the polling station contrary to s147 of the Electoral Act (Chapter 2:13) 'hereinafter referred to as the Act'.

The Submissions

The applicant has approached the court by ordinary application seeking an order for the nullification of the results, a declaration that the respondent was unduly elected and that the applicant is the duly elected Councillor for Ward 4 of Chinhoyi Constituency. In the alternative, the applicant seeks a re- run of elections in the respective Ward.

The respondent opposed the application and took a point in limine on the jurisdiction of the court to hear the application.

Mr Mangeyi for the respondent submitted that the applicant has pleaded to the jurisdiction of the court. In his founding affidavit the applicant specifically states that he is approaching this court in terms of s168 as read with s166 and 167 of the Act. The provisions relied upon by the applicant do not confer jurisdiction to this court to preside over an electoral petition in respect of a Councillor.

Further to that, this court being a creature of statute it can only deal with matters in terms of the Act according to s161 thereof. He referred to the case of *Kambarami v 1893 Restoration Movement Trust & Others*¹ where the Supreme Court considered whether this court can issue a declaratory order. After examining the import of the expression ‘... applications, appeals or petitions in terms of this Act’, it concluded that the Electoral Court has no jurisdiction to issue a declaratory order. Similarly, the Act does not provide recourse to a Councillor aggrieved by electoral processes.

In opposition, *Mr Zuze* submitted that s167 does not confer jurisdiction but s161 of the Act does confer jurisdiction. He conceded that s167 does not specifically confer any rights to an aggrieved Councillor to approach the Electoral Court. The court was urged to interpret the section in its context having regard to s157 of the Constitution of Zimbabwe² and the Act itself.

It was submitted that, the Act does not specifically define a petitioner but in all the instances that it refers to an election it refers to the election to the three offices of the President, Member of Parliament and Local Authorities. It is thus imperative for the court to interpret s167 in its context otherwise any other interpretation may result in an absurdity. Further to that it was argued that in the *Kambarami* case (supra), the Supreme Court dealt with an electoral challenge in respect of the appointment of a Councillor. This shows that aggrieved Councillors have always been heard in the Electoral Court.

The Issue

The issue for determination is whether s167 of the Act be read to include a councillor. Puts differently the issue is whether the court should read in words into the said section.

¹ SC 66/21

² S157 (f) &(g) of the Constitution

The law

Generally, courts are discouraged from importing words into a statute. Courts have consistently acknowledged the need for the interpretation of legislation to be limited to the task of statutory construction and not legislation. This gives credence to the principle of separation of powers which is one of the fundamental principles of any democratic system, the legislature make the law and the courts interpret the law.

In (1) *Sibanda & Anor v Ncube & Ors* (2) *Khumalo & Anor v Mudimba & Ors*³ the court cited two cases that succinctly captures the position of the law in reading words into statutes. In *Thompson v Gould & Co*⁴, the court had this to say,

‘It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity, it is a wrong thing to do’.

Also in *Vickers, Sons and Maxim Ltd v Evans*⁵ the court noted,

‘We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself’

The two cases show that it is highly undesirable for courts to read words into an enactment. However, the position is not cast in stone, it is not absolute. Words may be read into a statute where from the scheme of the enactment it is necessary to read words into it.

Interpretation of statutes is primarily *inter alia* concerned with giving effect to legislative intention⁶. Reading words into a statutory provision is used by courts to give effect to the purpose or object of the legislation usually to avoid an irrational, absurd or capricious result. This calls upon the court to pay close attention to the dividing line between construction and legislation.

It may be necessary to consider how other jurisdictions have resolved such issues. In Australia more than 40 years ago Lord Diplock, in *Jones v Wrotham Park Settled Estates*⁷

³ 2019 (1) ZLR 19 (E)

⁴ [1910] AC 409 @ 420

⁵ [1910] AC 444 @ 445

⁶ S3A of The Interpretation Act (Chapter 1:01)

(1) When interpreting an enactment—

(a) effect must be given to the intention of the Legislature as expressed by the enactment, subject to the principle of the supremacy of the Constitution as enacted by section 2 of the Constitution;

⁷ [1980] AC 74

when faced with a similar issue whether to read words into a statute or not came up with what are now commonly referred to as the ‘Wrotham Park conditions’. Lumb & Christensen in their article ‘Reading words into statutes: when Homer nods 2014’⁸ discuss the import of reading words into statutes and summarise the Wrotham Park conditions as follows,

1. The court must know the mischief with which the Act was dealing;
2. The court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved;
3. The court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.

It appears that the court must be satisfied that Parliament’s intention was to insert the words and either by draftsmen omission or inadvertence the words were omitted. Commenting on the certainty that the court must have His Lordship said,

‘...any attempt to “repair” an omission in an Act in the absence of satisfying the third condition “crosses the boundary” between construction and legislation; it becomes a usurpation of a function which is constitutionally vested in the legislature to the exclusion of the courts.’

The Australian courts have consistently applied this approach with some variations.

The South African Constitutional Court⁹ approved reading words into the Constitution. In that case although the court had to decide on whether to read into the Constitution certain words to provide a remedy, the guiding principles enunciated in that case are of persuasive value. On paragraph 71 of the *National Coalition of Gay and Lesbian Equality* case (supra) it held that courts do possess the power to read words into statutes where appropriate and referred to a number of jurisdictions where courts have read in words in finding a Constitutional remedy. By parity of reasoning, it therefore follows that even in other enactments, courts can read words in to a statute.

In my view, paragraphs (74) and (75) of the case gives guiding principles on how and when to read words into a statute. First, the court must make sure that the result of the addition must bear true allegiance or be consistent with the fundamental values of the Act, the

⁸ *Australian Law Journal*, 88 (9) pp661-677

⁹ *National Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs & Ors* 2000 (2) SA 1 (CC)

court must endeavour to be faithful as possible to the legislative scheme and a Court should define with sufficient precision how the statute ought to be extended.

The principles in the *National Coalition of Gay and Lesbian Equality* case (supra) do not vary much from the 'Wrotham Park conditions. In summary it appears that, it is permissible for a court to read words into a statute where it is necessary to do so and the words give effect to the legislative intention.

Application of the law to the facts

The Wrotham Park conditions provide a systematic guidance in coming to a decision in this case.

The first condition is that the Court must be clear of the mischief that the Act seeks to deal with. The preamble to the Act sets out its purpose. The purpose of the Act is to regulate national electoral processes in Zimbabwe for the three offices of the President, members of Parliament and local authorities. It also provides a dispute resolution mechanism on all issues arising from the elections. The Electoral Court being established to exclusively deal with such cases.

The legislative intention in coming up with the Act was to have all disputes as defined in the Act to be dealt with by one Court. The Electoral Court is a specialised Court created to deal with electoral disputes in respect of the three offices.

In casu, the issue before the court relates to the election of a Councillor which falls within the ambit of what the Act seeks to regulate and provide for. The first consideration is satisfied.

The second consideration is whether there was an omission which must be addressed if the objects of the Act have to be fulfilled. This second leg of the considerations calls upon the court to consider the context within which s167 was promulgated. It is a well-established principle of statutory interpretation that a provision of a statute must be construed not in isolation but as a unitary whole and in a purposive manner having regard to the overall objects of the statute¹⁰.

The genesis of electoral processes is s157 of the Constitution which provides for the promulgation of an Act of Parliament to regulate electoral processes. The section provides,

¹⁰ *City of Harare v Mushoriwa* SC 54/18

‘157 Electoral Law

(1) An Act of Parliament must provide for the conduct of elections and referendums to which this Constitution applies, and in particular for the following matters—

(a)

(f) the conduct of elections to provincial and metropolitan councils and local authorities;

(g) Challenges to election results’

In line with that provision the Act was promulgated to provide inter alia for elections in local authorities and challenges thereto. The Act in its formulation has consistently referred to the election of the President, members of Parliament and local authorities. I demonstrate the point herein.

The purpose of the Act is to provide among other things for ‘election of candidates to and the filling in of vacancies in Parliament; to provide for elections to the office of the President; to provide for local authority elections; ... to make provision for the hearing and determination of election petitions; and to provide for matters connected with or incidental to the foregoing’

A reading of the preamble shows that the legislative intention was to regulate electoral processes in respect of the office of the President, members of Parliament and local authorities.

It applies to,

‘(a) the election of members of Parliament and elections to the office of President for the purposes of the Constitution; and

(b) elections to provincial councils and the governing bodies of councils for the purposes of the Rural District Councils Act [*Chapter 29:13*] and the Urban Councils Act [*Chapter 29:15*]¹¹.

Section 4 which is the definition section defines elections with reference and include the office of a councillor, the following are examples,

¹¹ Section 2 of the Act

“by-election” means an election to fill a casual vacancy in the membership of the Senate or the National Assembly or in the governing body of a local authority;

‘General election’ means a general election of the President, Vice-Presidents, members of Parliament and councillors of local authorities...’

Part XXIII deals with Electoral Petitions. Section 166 defines a respondent to an election petition as a President, a Member of Parliament or a Councillor whose election is complained of. This invariably means litigation can be instituted where the appointment of a Councillor is heard in the Electoral Court under this Part and the appointed Councillor is the respondent. It defies logic that the Act creates a ‘respondent Councillor’ yet there is no ‘applicant or petitioner Councillor’. A straitjacket interpretation would surely defeat the legislative intention. As properly submitted by both legal practitioners s166 is beset with ambiguities. It also includes a President as a respondent yet an electoral challenge in respect of the President is made under Part s111 and not under Part XXIII.

Having had regard of the precursor provisions to s167 which defines a petitioner, could it be the legislative intention to exclude a Councillor from petitioning this court on any electoral issues? It is highly unlikely. It is the court’s firm view that by some inadvertence Parliament overlooked including a Councillor as a petitioner to achieve the purpose of the Act. There is a patent omission that requires this court to read in words to give effect to the true legislative intention.

It appears that s167 has been unconsciously read by litigants to include a Councillor even though that has not been specifically provided under the section. For instance, this court has dealt with a number of electoral petitions pitting prospective Councillors. One such case that comes to mind is the *Kambarami* case (supra) that went up to the Supreme Court. However even if such a case has been heard it does not necessarily follow that Councillors must be heard as advanced for the applicant. The issue did not arise before the Supreme Court and the Court did not exercise its mind on the issue. I also had opportunity to read an article by Veritas ¹². The article deals with electoral petitions and it includes information on who can lodge an election petition and it opines,

¹² Veritas : Election Watch 40/2018 Challenging Parliamentary and Council Results issued on 15 August 2018

‘Only an unsuccessful candidate for the parliamentary or council seat concerned may lodge an election petition [*Electoral Act, section 167*]. Political parties and members of the public cannot do so’

In the absence of a clear mention of ‘a Councillor’ in s167 of the Act it escaped the authors of the article that a Councillor is not included in the section. This may point to the necessity to have ‘a Councillor’ included. In my view its addition has no negative effect except to enhance the efficacy of the Act.

From the forgoing the second condition has been satisfied.

The third condition is whether the court is able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect. Indeed the court is certain of the words that must be used. The omission can only be rectified by reading in the words, ‘a Councillor’ in s167. Excluding the words may result in an absurdity where an aggrieved Councillor is out of the Electoral Court which was perchance created to deal with electoral disputes. It would lead to fragmentation of electoral challenges in different courts which defeats the intention of the legislature.

The third condition is also satisfied.

Disposition

Regard being had to the purpose of the Act to deal with electoral issues for the three offices of the President, members of Parliament and local authorities and how the Act has consistently referred to these offices in its body, it was the legislative intention to include a Councillor as a petitioner under s167 of the Act. There is no doubt that s161 of the Act being the jurisdictional section requires that the Court deals with appeals, applications and petitions in terms of this Act. A petition in respect of a councillor cannot be made in terms of this Act in the absence of an inclusion of a Councillor in s167. The court’s finding is that, by necessity, the words ‘a councillor’ must be read into s167 thereby making litigation in all electoral challenges to the office of a Councillor be in consonant with s161 of the Act.

Accordingly, the preliminary point is dismissed. This court has jurisdiction to hear electoral challenges in respect of an election of a Councillor.

Costs be in the cause.

Mangwana and Partners, the petitioner's legal practitioners.

Mangeyi Law Chambers, the respondent's legal practitioners.