

REPORTABLE (21)

(1) ZIMBABWE ELECTORAL COMMISSION (2) THE
CHAIRPERSON OF THE ZIMBABWE ELECTORAL
COMMISSION
v
THE COMMISSIONER GENERAL ZIMBABWE REPUBLIC POLICE
& 19 ORS

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,
GWAUNZA JA, GARWE JA, GOWORA JA,
HLATSHWAYO JA, PATEL JA, & CHIWESHE AJA
HARARE, JULY 26, 2013 & MARCH 26, 2014

T Kanengoni and *C.Nyika*, for the applicants

F Chimbaru, for the first, second, third, ninth, tenth and eleventh respondents

S Hwacha and *T Zhuwarara*, for the fourth respondent

ZIYAMBI JA: At the end of the hearing of this matter the following order was issued:

“IT IS ORDERED THAT:

1st Applicant takes all the necessary steps to ensure that its officers and officers under the command of the 1st, 2nd, and 3rd Respondents, authorised to cast ballots in terms of section 81 of the Electoral Act [Cap 2:13] who failed to cast their ballots on the 14th and 15th of July 2013 because of the unavailability of ballot papers, be and are hereby allowed to cast their ballots on the 31st of July 2013.”

Below are set out the reasons for this order.

FACTUAL BACKGROUND

On 13 July 2013, the President of Zimbabwe who is the ninth respondent herein issued a proclamation, in terms of s 58 of the Constitution of Zimbabwe, setting the polling date for the 2013 general elections as 31 July 2013. In terms of the proclamation, SI 86/2013, the first applicant was enjoined to set aside two (2) days for the holding of the special voting process provided for in Part XIVA of the Electoral Act [Chapter 2:18] (“the Act”), the last of which must be at least sixteen (16) days before the date set for the holding of the general elections namely, 31 July 2013.

In compliance with the proclamation, the first applicant duly set 14 and 15 July 2013 as the days for the special voting exercise and invited the disciplined forces as well as officers of the first applicant to apply to cast a special vote. A total of 63 268 successful applicants were authorised to cast a special vote. However, due to certain logistical constraints, the first applicant was unable to post the requisite ballot paper to each successful special voter within the time frame fixed for the special vote with the result that 26 160 applicants (representing 41.3% of the successful applicants for the special vote) were unable to cast their special votes.

The applicants averred that, conscious of their duty *inter alia*, to conduct elections efficiently, freely, fairly, transparently and in accordance with the law, they then issued a press statement advising that those who had not been able to cast their special votes would be able to vote in the general elections on 31 July 2013.

The press statement sparked two complaints. The first was from the Secretary General of the fourth respondent, the Movement for Democratic Change– T (“the MDC-T”). He wrote to the second applicant advising that the proposed action would be illegal in that s 81B (2) of the Act disentitles a successful applicant for a special vote from voting in any other manner than by casting a special vote.

The next complaint was from the first respondent, the Commissioner of the Zimbabwe Republic Police. His concern was in respect of members of the police force who were successful applicants for special votes and who had been denied the opportunity to cast their special votes on the days set aside for special voting. His letter read in relevant part:

“The Constitution in section 239(g) places an obligation on Zimbabwe Electoral Commission (ZEC) to design, print and distribute ballot papers, approve the form of and procure ballot boxes and establish and operate polling stations. Quite clearly therefore the failure by the State to put in place the necessary measures as envisaged by sections 155(2)(b) and 239(g) of the Constitution can be deemed an impingement of the right to universal suffrage.

I, on behalf of the officers and members who could not cast their vote, therefore seek in terms of section 239(k) of the Constitution recourse with ZEC. Section 239(k) of the Constitution empowers individuals who have failed to cast their vote on dates specified in line with the Act to seek recourse with ZEC.

On the other hand section 81B(2) of the Electoral Act provides that a voter who has been authorised to cast a special vote shall not be entitled to vote in any other manner than casting a special vote in line with the provisions of the Act. It is trite law that where there is apparent conflict between the Constitution and Ordinary law, the Constitution takes precedence because the Constitution is the grundnorm or master rule against which all other laws are measured for validity.

It is therefore in the spirit of the provisions of section 239(K) of the Constitution and a Public Notice that ZEC put in the press regarding this subject matter that I am appealing to your esteemed office to give us a written commitment that all our officers and members who were unable to cast their vote will be catered for to ensure that they are not disenfranchised.”

The applicants were, so they averred, faced with the dilemma that their compliance with the law and specifically with s 81B (2) of the Act would, in essence, facilitate

the undue deprivation of the rights provided in terms of s 67 of the Constitution to the 26 160 special voters who failed to cast their votes on 14 and 15 July 2013.

THE APPLICATION

Section 239 of the Constitution of Zimbabwe provides:

“239 Functions of Zimbabwe Electoral Commission

The Zimbabwe Electoral Commission has the following functions—

- (a) To prepare for, conduct and supervise—
 - (i) elections to the office of President and to Parliament;
 - (ii) elections to provincial and metropolitan councils and the governing bodies of local authorities;
 - (iii) elections of members of the National Council of Chiefs established by section 285; and
 - (iv) referendums; and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law ...”

It was in view of its mandate set out above and out of due regard for the following provisions of the Constitution, that the applicant has felt constrained to make this application.

“155 Principles of electoral system

- (1)
- (2) The State must take all appropriate measures, including legislative measures, to ensure that effect is given to the principles set out in subsection (1) and, in particular, must—
 - (a) ...
 - (b) ensure that every citizen who is eligible to vote in an election or referendum has an opportunity to cast a vote, and must facilitate voting by persons with disabilities or special needs;”

“67 Political rights

- (1) ...
- (2) ...
- (3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right—
 - (a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret;”

The application was opposed by the fourth respondent. Mr *Hwacha*, while acknowledging the right of the recipients of the special vote to cast their vote, submitted that

consideration was also to be given to the rights of the six (6) million voters who are entitled to free, fair and transparent elections. He submitted that had there been a challenge to s 81B(2) of the Act, the applicant would have been able to argue that the derogation was not justifiable. As it is, the wrong procedure had been adopted by the applicant. He drew the Court's attention to s 81H of the Act which makes it a criminal offence for special voters to vote in a general election.

However, Mr *Kanengoni* expressed surprise that the MDC-T had opposed the application since it was made as a result of consultation with all the political parties involved as to the way forward as far as the special voters were concerned.

It was submitted on behalf of the applicants that for the fundamental right to vote provided for in s 67 of the Constitution to be of any effect, the obligations placed on the applicant in terms of s 239 of the Constitution and the measures highlighted under s 155 of the same Constitution must be met with respect to every election and referendum. Where these standards are not met, the rights of every Zimbabwean citizen enshrined in s 67 of the Constitution will have been violated. Thus the failure by the first applicant, albeit through no fault of its own, to discharge the obligations placed on it by the Constitution, resulted in thousands of potential voters, authorized to cast their ballots on 14 and 15 July 2013, being unable to vote equally through no fault of their own. In terms of s 81B of the Act, these potential voters are prohibited from voting "in any other manner than by a special vote in terms of this Part".

THE SPECIAL VOTE

Section 81B of the Electoral Act provides as follows:

“81B Where special voters must vote; special voters not entitled to vote in any other way

- (1) An electoral officer or member of a disciplined force who is authorized to cast a special vote in terms of this Part must cast his or her vote at the special polling station for the district in which he or she is performing duties away from the constituency in which, or the polling station at which, he or she would ordinarily be required to vote.
- (2) A voter who has been authorized to cast a special vote shall not be entitled to vote in any other manner than by casting a special vote in terms of this Part.”

In view of the failure by the applicants to facilitate the casting of their votes, the effect of s 81B(2) would on the face of it be that the special voters were denied their constitutional right to vote. There is, therefore, on a reading of subs (2), an apparent conflict between s 81B of the Act and s 67(3) of the Constitution. In this connection, the provisions of s 2(1) of the Constitution, set out below, are relevant.

“2 SUPREMACY OF CONSTITUTION

- (1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency”.

THE PRESUMPTION OF CONSTITUTIONALITY

It appears to me however that on a proper construction of s 81B, no conflict exists. One commences the process of interpretation of the provision with the presumption of constitutionality. Every statute is presumed to be constitutional, that is to say, the Legislature is presumed to have acted within the parameters of the Constitution. Thus, where a provision in a statute is capable of two possible interpretations, one contrary to the Constitution and the other in keeping therewith, the Court conducting the inquiry into the constitutionality or otherwise of the provision must adopt the meaning which will give effect to the Constitution.

The presumption of constitutionality was explained thus by GEORGES CJ in *Zimbabwe Township Developers v Lou's Shoes (Pvt) Ltd* 1983(2) ZLR 376 at 381F :

“Arguments have also been addressed at some length on the presumption of constitutionality. It is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution”.

The learned Judge referred to the case of *Attorney General of Trinidad and Tobago v Ramesh Mootoo* (1974) 28 WLR 304 in which the following passage from *Crowell v Benson* (1931) 285 US 22 at 26 (per HUGHES CJ) was quoted with approval:

“when the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”

While I am mindful that no challenge has been raised as to the constitutionality of s 81B(2), the need to ascertain the meaning of the provision has arisen because of the apparent conflict with the Constitution which arises from the interpretation of the section advanced by the respondents, an interpretation which, if adopted, will amount to a violation of the constitutional right of the special voters to vote in the general election. As will be shown below, s 81B(2) is capable of a construction which does not offend against the Constitution.

INTERPRETING THE STATUTORY PROVISIONS

Various rules have been formulated to assist the Court in the interpretation of statutes. One of these often referred to as the cardinal rule of construction, is the literal rule which requires that the words of a statute must be given their ordinary, literal and grammatical meaning.¹

However, the object of such interpretation or construction is to ascertain the intention of the legislature in enacting the provision concerned and, even where the words employed in the statute are clear and unambiguous, a Court may depart from the ordinary effect of the words in order to remove an absurdity and to give effect to the true intention of the legislature “if to do otherwise would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature as shown by the context or by such other considerations as the Court is justified in taking into account.”²

INTENTION OF PARLIAMENT

The task before this Court is therefore to ascertain the intention of Parliament in enacting the provision under scrutiny. Was it intended that in circumstances such as obtain *in casu* the successful applicants for special voting would be denied their constitutional right to vote? For then that would be absurd viewed from the context of the unqualified right to vote conferred upon such persons by the Constitution.

¹ See G.M COCKRAM Interpretation of Statutes 3ed at p 36

² Cockram supra at p 46

The right to vote is absolute. No derogation therefrom is provided for by the Constitution. The Court must proceed from the premise that Parliament intended to act constitutionally and, *in casu*, to respect the sacred right of the special voters to vote. It therefore could not have intended to deprive special voters of their right to vote should the necessary measures not be put in place by the State to enable them to cast their special votes on the dates prescribed.

Another rule of construction, the mischief rule, can be called in aid at this juncture. In order to assist the court in deciding on the true intention of the legislature, the Court may have regard to ‘the mischief’ that the Act was designed to remedy. Thus the Court may look not only at the language of the statute, but also at the surrounding circumstances, and may consider its objects, its mischiefs, and its consequences³. In this regard, in *S v Meredith* 1981(3) SA 29 (ZAD) at 33, BARON JA had this to say:

“It is trite that words and phrases cannot be construed *in vacuo*; their meaning can be discerned only in the context in which they are used. I think it is worth citing the words of Viscount SIMONDS in *Attorney-General v HRH Prince Ernest Augustus of Hanover* (1957) 1 All ER 49 at 53:

“For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy.”⁴

A reading of the provisions relating to the special vote discloses that the mischief designed to be remedied by these provisions was the possibility of double voting by persons authorised to cast a special vote.

³ Cockram supra at p48

⁴ Cockram supra at p49

It appears to me that subs (2) of s 81B was predicated upon a situation where all facilities were available to enable the special voters to vote. Thus s81 of the Act provides for the dates for special voting; the places where the votes may be cast; the form of applications for special voting and requirements therefor; the drawing of lines on the voters' rolls in the constituencies where the names of the special voters appear and marking them "SV"; the conduct of the special poll and the handling of the ballots. It does not, in my view, envisage a state of affairs, such as presently obtains, where the State or the applicants have failed to put in place the necessary measures to ensure that the special voters would be able to cast their ballots upon presentation of themselves at the polling station for that purpose. Indeed, it seems clear that Parliament did not intend that this provision would apply in a case such as the instant one where the special voters attended at the designated polling stations in order to cast their votes and waited all day to do so only to be turned away because the proper measures were not put in place by the State. Such an intention would clearly be contrary to the Constitution.

We are, for the above reasons, of the view that s 81B(2) was intended by Parliament to apply only in circumstances where all measures necessary to enable successful applicants to cast their special votes had been taken by the responsible agents of the State.

There was, therefore, no impediment to the grant of the order sought by the applicants, as amended, so as to cover only those special voters who failed to vote through no fault of their own.

CHIDYAUSIKU CJ: I agree.

MALABA DCJ: I agree.

GWAUNZA JA: I agree.

GARWE JA: I agree.

GOWORA JA: I agree.

HLATSHWAYO JA: I agree.

PATEL JA: I agree

CHIWESHE AJA: I agree.

Nyika Kanengoni & Partners, applicants' legal practitioners

Dube, Manikai &Hwacha, fourth respondent's legal practitioners