FORTUNATE CHIOKOYO
versus
RICHARD NDLOVU
and
CHARLES SIMBI
and
CHIEF ELECTIONS OFFICER (ZEC)
and
REGISTRAR GENERAL OF VOTERS

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 10 April 2014.

Electoral Application

D. Mwonzora, for the applicant.
M. Chivasa, for the 1st respondent.
C Nyika with *T.M. Kanengoni,* for the 3rd respondent
M. Chimombe, for the 4th respondent

UCHENA J: The applicant was an aspiring MDC T candidate for the council by-election for Ward 12 Gweru, which was scheduled for 12 April 2014. He on 10 April 2014 filed an urgent application in the High Court, for an interdict against the holding of that by-election under the conditions which had been communicated to his lawyers by the third respondent.

The first respondent was the aspiring ZANU PF candidate. The second respondent was the aspiring candidate for the National Constitutional Assembly party. The third respondent is the Chief Elections Officer. The fourth respondent is the Registrar General of Voters.

The applicant's application was triggered by the third respondent's reply dated 25 March 2014, to a letter from the applicant's lawyers in which he said';

> "We confirm that those who voted on the 31st July 2013 using voter registration slips will be allowed to use them as the voters roll which is going to be used is the one that closed on the 10th July 2013".

The applicant sought an interim order on the following terms;

1. Interdicting the 3rd respondent from allowing persons other than persons who are on the voters roll or supplementary voters roll for Ward 12 Gweru to vote in the by –election set for Ward 12 Gweru on the 12th of April 2014;
2. Specifically the 3rd Respondent be and is hereby ordered not to allow people to vote using voter registration slips in the by-election in question.
3. 4th respondent be and is hereby ordered to supply the 3rd Respondent with a copy of the updated voters roll.

Mr *Nyika* for the third respondent raised a point in *limine* on the jurisdiction of this court as the Electoral court has exclusive jurisdiction over electoral cases. He referred the Court to s 161 (2) of the Electoral Act which provides as follows;

> "(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;"

Mr *Mwonzora* for the applicant in response relied on ss 2 (1) and 171 of the Zimbabwe Constitution, Amendment (No. 20) Act, 2013, which he submitted invalidates s 161 (2) of the Electoral Act and bestows jurisdiction on this court.

After hearing submissions from the parties, I, in appreciation of the pending by-election, and the possibility of the applicant having to apply to the Electoral Court, briefly adjourned the proceedings. When the proceedings resumed, I ruled that this court has no jurisdiction because the Electoral Court has exclusive jurisdiction and indicated that detailed reasons for my judgment would follow. The following are my reasons for that decision.

Mr *Nyika*'s reliance on s 161 (2) of the Electoral Act is supported by the golden rule of interpretation. Words in a statute must be given their ordinary grammatical meaning. This was stressed by SANDURA JA in the case of *Madoda* v *Tanganda Tea Company Ltd* 1999 (1) ZLR 374 (SC) @ 377 A-D where he said;

> "By adopting that approach to the interpretation of s 7 of the code the learned judge in the court *a quo* departed from the ordinary grammatical meaning of the section and, therefore, erred. As JOUBERT JA said in *Coopers & Lybrand & Ors* v *Bryant* 1995 (3) SA 761 (A) at 767D-F:
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> > 'The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of Constitution are available to ascertain their common intention at the time of concluding the cession. 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 same view was subsequently expressed by my brother McNALLY in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at 264D-E where he said:

> "There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord WENSLEYDALE said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further'."

Section 161 (2) according to the ordinary grammatical meaning of the words used, specifically gives the Electoral Court 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;"

The third respondent's decision was obviously made in terms of the Electoral Act. Therefore any application or review, against it is covered by s 161 (2) of the Electoral Act.

It is true that s 2 (1) of the New Constitution invalidates the provisions of any law which is inconsistent with the provisions of the Constitution which is the supreme law of Zimbabwe. Section 2 (1) provides as follows;

> "(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."

A court should however not lightly invalidate laws in terms of this section. It must first establish, the inconsistence, and its extend, before doing so. A law may be partially inconsistent with the Constitution. In such a case it is the part which is inconsistent which is invalidated leaving the consistent party unaffected.

Mr *Mwonzora* based his attack on s 161 (2) of the Electoral Act on the provisions of s 171 (1) (a) of the Constitution which provides as follows;

> "(1) The High Court—
> *(a)* has original jurisdiction over all civil and criminal matters throughout Zimbabwe."

The dicta in the Madoda case (*supra*) would equally apply to the construction of ss 2 (1) and 171 (1) (a) of the Constitution subject to the contextual interpretation which is a Constitutional requirement.

Mr *Nyika* for the third respondent submitted that the provisions of s 171 (1) (a) should be read and construed together with s 174 (c) which provides for the creation of other courts subordinate to the High Court. He further submitted that the High Court should co-exist with such other courts and defer to their exclusive jurisdiction. Section 174 of the Constitution provides as follows;

> "An Act of Parliament may provide for the establishment, composition and jurisdiction of—
> (*a*) magistrates courts, to adjudicate on civil and criminal cases;
> (*b*) customary law courts whose jurisdiction consists primarily in the application of customary law;
> **(*c*) other courts subordinate to the High Court;** and
> (*d*) tribunals for arbitration, mediation and other forms of alternative dispute resolution."

I agree that the provisions of s 171 (1) (a) of the Constitution should not be read in isolation. That would in fact be unconstitutional as s 46 (1) (d) as read with s 331 of the Constitution provides for the contextual and purposive interpretation of provisions of the Constitution. They provides as follows;

> "**46** (1) (d) When interpreting this Chapter, a court, tribunal, forum or body—
> (*d*) **must pay due regard to all the provisions of this Constitution,** in particular the principles and objectives set out in Chapter 2; and in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.".
>
> "**331 Section 46 applies, with any necessary changes, to the interpretation of this Constitution** apart from Chapter 4." (emphasis added)

It is therefore a Constitutional rule of interpretation that all provisions of the Constitution must be considered in construing a provision of the Constitution. Section 46 makes this rule applicable to Chapter 4 of the Constitution while s 331 makes it applicable to the whole Constitution.

The purpose for which the Constitution provides for various courts and vested in them concurrent civil and criminal jurisdiction with the High Court, should guide the court in establishing whether or not the High Court's original jurisdiction outs other court's civil and criminal jurisdiction. The fact that the Constitution permits the Legislature, to create and confer jurisdiction of its choice, on such courts must also be taken into consideration. It is in-fact trite that the Constitution vests criminal and civil jurisdiction in courts inferior to the High Court in spite of the High Court having original jurisdiction over such cases. See the provisions of section 174 (a) to (d) of the Constitution.

Mr *Mwonzora*'s interpretation of s 171 (1) (a) of the Constitution ignores the Constitutional rule of interpretation imposed by ss 46 and 331. It leads to a meaning which ignores the Constitution's provisions on the creation of other court's which it vests with civil jurisdiction. This means the High Court though vested with original jurisdiction over all civil and criminal matters does not have exclusive jurisdiction over all such matters. This is because the Constitution in s 174, provides for the creation of other courts, by the Legislature which it authorises to determine their composition and jurisdiction.

The fact that the High Court has inherent or original jurisdiction over all civil and criminal cases, does not,therefore, mean that it should crowd out other Courts established in terms of the laws provided for in the Constitution. These courts lawfully exist alongside it to hear and determine specified cases. Where no exclusive jurisdiction is provided for, a litigant can chose whether to litigate in the High Court or the subordinate Court. Where the legislature gives the other Court exclusive jurisdiction as was done by s 161 (2) of the Electoral Act, the High Court though clothed with original jurisdiction can not hear such cases. They were lawfully taken away from it and given to another court of competent jurisdiction. This is confirmed by the provisions of s 162 of the Constitution which provides as follows;

> "Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise—
> (*a*) the Constitutional Court;
> (*b*) the Supreme Court;
> (*c*) the High Court;
> (*d*) the Labour Court;
> (*e*) the Administrative Court;
> (*f*) the magistrates courts;
> (*g*) the customary law courts; and
> **(*h*) other courts established by or under an Act of Parliament."**

Section 162 of the Constitution specifically vests judicial authority in the mentioned courts and those established by or under an Act of Parliament. This clearly means it authorises the creation of such courts and their being conferred with jurisdiction of the Legislature's choice.

In view of the above s 2 (1) of the Constitution does not invalidate s 161 (2) of the Electoral Act. The establishment of the Electoral Court is permissible under ss 162 (h) and 174 (c) of the Constitution. The provisions of s 161 (2) of the Electoral Act are therefore not

inconsistent with the Constitution. They lawfully allocate exclusive jurisdiction over electoral appeals, applications, petitions and reviews to the Electoral Court.

The applicant therefore filed his application in a Court which does not have the necessary jurisdiction to hear it. These therefore are my reasons for finding that this Court has no jurisdiction to hear the applicant's application.

Mwonzora & Associates, applicant's legal practitioners
Nyika Kanengoni & Partners, 3rd respondent's legal practitioners
Attorney General's Civil Division, 4th respondent's legal practitioners