REPORTABLE (13)

Judgment No. S.C. 20/02

Const. Application No. 76/02

MORGAN TSVANGIRAI v

(1) REGISTRAR GENERAL OF ELECTIONS

(2) THE MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

(3) THE PRESIDENT OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, MARCH 8 & APRIL 4, 2002

A P de Bourbon SC, for the applicant

Miss Machaka, for the respondents

CHIDYAUSIKU CJ: The applicant in this matter has approached this Court in terms of s 24(1) of the Constitution seeking an order that s 158 of the Electoral Act be declared to be inconsistent with the Constitution and therefore invalid. Alternatively, that Statutory Instrument 41D of 2002,(the statutory instrument), be declared to be *ultra vires* s 158 and therefore invalid.

Various other orders were sought against the Registrar General of Elections. These shall be dealt with later in this judgment.

The application was opposed by the respondents, the first respondent averring that the applicant has no *locus standi in judicio* to approach this Court in terms of s 24(1) of the Constitution.

LOCUS STANDI

Section 24(1) of the Constitution provides:

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him … then, without prejudice to any other action with respect to the same matter which is lawfully available, that person … may… apply to the Supreme Court for redress".

The applicant alleged that "there has been and there continues to be serious breaches of the Declaration of Rights as set out in the Constitution of Zimbabwe in respect of myself and all the considerable amount of people in Zimbabwe who regard me as their political leader". He alleged further that "section 158 of the Electoral Act violates the Declaration of Rights contained in the Constitution of Zimbabwe in respect of myself and those considerable amount of persons who support me in my presidential campaign. Alternatively, it was alleged that "the Electoral Act (Modification) Notice 2002 (IS 41D of 2002) violates the Declaration of Rights as contained in the Constitution of Zimbabwe in respect of myself and those who support me in my Presidential campaign".

The preliminary issue to be decided is whether these allegations satisfy the requirements of section 24(1) for *locus standi in judicio* justifying the approach by the applicant to this Court for redress. The first observation to be made is that a bald, unsubstantiated allegation will not satisfy the requirements of the section. The applicant must aver in his founding affidavit facts, which if proved, would establish that a fundamental right enshrined in the Declaration of Rights has been contravened in respect of himself as opposed to some other person.

THE RIGHT ALLEGED TO BE INFRINGED

The applicant alleged in his founding affidavit that the first respondent in the organisation of the forthcoming general election "has repeatedly been heavily biased in favour of the third respondent and against me and that this has resulted in serious breaches of the Declaration of Rights of myself and my supporters".

As against the third respondent it was alleged that "the third respondent has all the State personnel and machinery at his disposal in order to assist him in his campaign". In addition, the third respondent has the "very considerable powers vested in him as set out in section 158 of the Electoral Act in relation to the manner in which the election is conducted, all of which he is using to his own advantage and to my disadvantage". He went on to list the following complaints -

1. That in terms of s 4 of the Electoral (Presidential Election) Notice 2002 (IS 3A of 2002) the voters' roll was regarded as closed with effect from 10 January 2002 "for the purposes of accepting the registration of voters who may vote at the election of a President". However on 27 January and again on 3 March further Notices were issued declaring the voters roll closed. During the period 10 January to 3 March certain persons continued to register as voters until 3 March 2002. It was alleged that these persons were supporters of the ruling party and that the first respondent had "secretly and substantially extended the voters' registration exercise for the total benefit of the third respondent". It was further alleged that the alleged extensions were

made on the instructions of the third respondent and that the effect of them is to put the third respondent at a major unfair advantage over him in the forthcoming election and so "seriously violate my rights as set out in the Declaration of Rights"; and

2. That the Electoral Act (Modification) Notice, 2002, (SI 41D of 2002) violates the Declaration of Rights as contained in the Constitution in respect of "myself and those who support me in my presidential campaign" and for this reason the Notice is invalid and of no legal force.

No specific fundamental right was alleged in his founding affidavit but in his heads of argument, Mr *de Bourbon*, who appeared for the applicant, submitted that the rights infringed were those enshrined in ss 18 and 20 of the Constitution. These sections provide as follows:

Section 18(1)

"18 (1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

Section 20(1):

"20 (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference

with his correspondence".

SECTION 18: RIGHT TO PROTECTION OF THE LAW

This right has been held to embrace the right to due process of the law. Thus in *Biti & Anor v Minister of Justice & Anor* S-10-02 the applicant's right as a member of Parliament to have Parliament follow its own laws in enacting legislation entitled him to approach this court for redress. And in *Chavunduka & Anor v Minister of Home Affairs & Anor* 2000 (1) ZLR 552 (S), the applicants, who were aggrieved by the failure of the police to investigate a crime committed against them, were entitled to approach this Court for the enforcement of their fundamental right to the protection of the law.

In the present case, however, the applicant has not shown that his right to protection of the law has been infringed by the enactments which he seeks to impugn, namely s 158 of the Electoral Act and the statutory instrument. What he has averred is that the members of the electorate who might vote for him were denied the right to register as voters after 10 January 2001, while those who supported the third respondent's party were allowed to register right up to 3 March. It might be that this last allegation, if shown to be true, would entitle those persons who were denied the right to register to approach this Court for redress in terms of s 24(1) but the applicant may not approach this Court on their behalf unless they are detained. He cannot be a torch bearer for them. See *United Parties v Minister of Justice* 1997 (2) ZLR 254 (S).

SECTION 20: THE RIGHT TO FREEDOM OF EXPRESSION

The order sought is for a declaration that the statute, alternatively the statutory instrument, is invalid. The applicant's papers must allege that the effect of the impugned legislation is to contravene a constitutional right in respect of himself. *In casu* he must allege that his fundamental right to freedom of expression has been contravened by the enactments in question.

> "A constitutional right that invalidates a law may be invoked by a person affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law."

See *Retrofit (Pvt) Ltd v Posts & Telecommunications Corporation & Anor* 1995 (2) ZLR 199 (S) at 207G-H.

The question arises whether the applicant has shown that his right to freedom of expression has been affected by the legislation sought to be impugned. None of the jumbled and vague allegations made in the applicant's affidavit satisfy this Court that the applicant's fundamental right to freedom of expression has been, or is likely to be, contravened. It seems that it has become the practice of legal practitioners to throw in whatever information is available in the applicant's founding affidavit with little regard to the relevance of the allegations or the requirements of s 24(1). What must clearly be set out in the applicant's affidavit is that a fundamental right enshrined in the Declaration of Rights has been or is likely to be infringed in respect of him as well as the material facts which establish this allegation.

The applicant took issue with s 4 of the statutory instrument which provides:

> "4 (1) Notwithstanding Part XV of the Act, no voter shall be entitled to receive a postal ballot paper unless his absence from his constituency or inability to attend a polling station, as the case may be, is or will be occasioned by –
>
> (a) duty as a member of a disciplined force or as a constituency registrar, presiding officer, polling officer or counting officer; or
>
> (b) absence from Zimbabwe in the service of the Government of Zimbabwe; or
>
> (c) being a spouse of a person referred to in paragraph (a) or (b) who accompanies that person outside Zimbabwe."

He attached to his affidavit a newspaper article telling of the "manner in which the disciplined forces were voting" and an affidavit by one John Stewart Matthews who alleged that he had tried unsuccessfully to obtain a postal vote as officials of the first respondent's office advised him that he ought to have applied ten days before polling and that his application was out of time. In order to establish an infringement of his right to freedom expression one would have expected the applicant to allege that he had applied to the first respondent for a postal ballot and was denied because of the provisions of s 4 of the statutory instrument which restrict postal ballots to members of the disciplined forces or some similar allegation. In the absence of any allegation establishing the infringement of a fundamental right of the applicant he has no *locus standi in judicio* to impugn the statutory instrument

THE OTHER ORDERS SOUGHT

These are orders directing the first respondent as to the manner in

which he should execute the duty assigned to him by the Electoral Act of conducting the Elections. Section 15 of the Act provides that in the exercise of his functions conferred "by or under this Act" the first respondent "shall not be subject to the direction or control of any person or authority other than the Electoral Directorate …". Thus, however desirable the remedies sought might appear to be, this Court has no power to grant them as to do so would be contrary to the provisions of the Act. The applicant's remedy in this regard would lie in review proceedings before the High Court.

JOINDER

At the hearing, Mr *de Bourbon* made an application for joinder of the deponents of three affidavits which he tendered to the Court. There was no prior service on the respondents of the affidavits and Miss *Machaka* objected to the joinder on the grounds that the respondents had had no opportunity to respond to the allegations made therein and, insofar as Paul Themba Nyathi was concerned, his affidavit contained allegations not made in the founding affidavit and which altered the character of the application served on the respondents. Mr *de Bourbon*, in answer to a question from the Court, advised the Court that these affidavits were produced so that this Court would not decline jurisdiction. However, this Court having declined jurisdiction in respect of the main application, the applications for joinder must necessarily fall away.

Accordingly the application fails on the preliminary issue and it is therefore unnecessary to decide the question of the validity of the enactments in question.

COSTS

There will be no order as to costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

SANDURA JA: I have read the judgment prepared by CHIDYAUSIKU CJ but respectfully disagree with the conclusion that the applicant did not have the *locus standi* to bring this urgent application in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution").

In the application, which was filed in this Court on 7 March 2002 and was heard on the following day, i.e. 8 March 2002, the day before the commencement of the 2002 presidential election, the applicant sought the following relief, *inter alia*:

"IT IS DECLARED THAT:

1. Section 158 of the Electoral Act [*Chapter 2:01*] is invalid and of no legal force, and accordingly the Electoral Act (Modification) Notice, 2002, published in SI 41D of 2002 on 5 March 2002, is invalid and of no legal force.

Alternatively, the Electoral Act (Modification) Notice, 2002, published in SI 41D of 2002 on 5 March 2002, is invalid and of no legal force …".

The background facts are as follows. The applicant is the President of the Movement for Democratic Change ("the MDC"), the main opposition party in Zimbabwe. At the relevant time, he was the principal challenger to the third respondent in the 2002 presidential election due to be held on 9 and 10 March 2002.

On 5 March 2002 the third respondent, acting in terms of s 158 of the Electoral Act [*Chapter 2:01*], promulgated the Electoral Act (Modification) Notice, 2002, published in Statutory Instrument 41D of 2002 ("the Notice").

The Notice was issued three days before the presidential election commenced and dealt with vital and important issues relating to the manner in which the election was to be conducted. It altered the provisions of the Electoral Act in material respects and, consequently, the conditions under which the election was to be conducted.

The applicant was aggrieved by the provisions in the Notice because he believed that they gave the third respondent an unfair advantage over him in the election. Accordingly, acting in terms of s 24(1) of the Constitution, he brought this urgent application directly to this Court challenging the constitutionality of s 158 of the Electoral Act and the Notice.

The issue which arises for consideration is whether the applicant had the *locus standi* to bring this application in terms of s 24(1) of the Constitution. That section reads as follows:

> "24 (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress."

In paras 9, 10, 12 and 19 of his founding affidavit the applicant averred as follows:

> "9. It is my respectful submission that section 158 of the Electoral Act violates the Declaration of Rights contained in the Constitution of Zimbabwe in respect of myself and those considerable amount of persons who support me in my Presidential campaign. I therefore respectfully submit that section 158 of the Electoral Act is invalid and of no legal force.

10. Alternatively, it is my respectful submission that the Electoral Act (Modification) Notice 2002 (SI 41D of 2002) violates the Declaration of Rights as contained in the Constitution of Zimbabwe in respect of myself and those who support me in my Presidential campaign. I therefore respectfully submit that the Notice is invalid and of no legal force on that basis as well.

12. However, I humbly request this Honourable Court, as a citizen of Zimbabwe and as a candidate at the forthcoming Presidential election, to safeguard the Declaration of Rights as set out in the Constitution of Zimbabwe for myself and my

supporters.

19. In addition, the third respondent has the very considerable powers vested in him as set out in section 158 of the Electoral Act in relation to the manner in which the election is conducted, all of which he is using to his own advantage and to my disadvantage."

Although in his founding affidavit the applicant did not specify which section of the Declaration of Rights was contravened by s 158 of the Electoral Act, I do not think that the failure to do so was fatal. However, the omission was remedied by the heads of argument filed by counsel for the applicant and by the oral argument advanced by counsel in support of the application. It was made clear that the provisions of the Declaration of Rights allegedly contravened by s 158 of the Electoral Act were s 18(1) and s 20(1).

Before dealing with the relevant provisions of the Declaration of Rights I would like to refer to s 158 of the Electoral Act. It reads as follows:

> "158 (1) Notwithstanding any other provision of this Act but subject to subsection (2), the President may make such statutory instruments as he considers necessary or desirable to ensure that any election is properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the election.
>
> (2) Statutory instruments made in terms of subsection (1) may provide for –

(a) suspending or amending any provision of this Act or any other law insofar as it applies to any election;

(b) altering any period specified in this Act within which anything connected with, arising out of or resulting from any election must be done;

(c) validating anything done in connection with, arising out of or resulting from any election in contravention of any provision of this Act or any other law;

(d) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from any election;

(e) penalties for contraventions of any such statutory instrument, not exceeding the maximum penalty referred to in section *one hundred and fifty-five*."

It was the applicant's contention that the section gave the third respondent immense powers in terms of which he had radically altered the Electoral law passed by Parliament and, consequently, the conditions under which the election was to be held, thereby giving the third respondent an unfair advantage over him in what was supposed to be a fair election.

In other words, the applicant's contention was that the election should be conducted in terms of the Electoral Law passed by Parliament (i.e. the Electoral Act), as required by s 28(4) of the Constitution, and not in terms of regulations promulgated by the third respondent under s 158 of the Electoral Act.

In this regard, the relevant provisions of s 28 of the Constitution, which deal with the election of the President, read as follows:

> "(1) …
>
> (2) The President shall be elected by voters registered on the common roll.
>
> (3) …
>
> (4) The procedure for the nomination of candidates for election in terms of subsection (2) and the election of the President shall be as prescribed in the Electoral Law."

"Electoral Law" is defined in s 113 of the Constitution as follows:

> "'Electoral Law' means the Act of Parliament having effect for the purposes of section 58(4) which is for the time being in force."

Section 58(4) of the Constitution, referred to in the definition of "Electoral Law", reads as follows:

> "An Act of Parliament shall make provision for the election of members of Parliament, including elections for the purpose of filling casual vacancies."

What all this means is that the legislation which comprises the Electoral Law must be an Act of Parliament. That Act of Parliament is the Electoral Act [*Chapter 2:01*].

In the circumstances, it was submitted by counsel for the applicant that in terms of the Constitution Parliament did not have the power to delegate to any person its constitutional function to make the Electoral Law, and that the power given by Parliament to the President to amend the Electoral Law by regulations in terms of s 158 of the Electoral Act was unconstitutional. I think there is merit in counsel's submission. However, that is not an issue to be determined at this stage as I am only concerned with the question of the applicant's *locus standi*.

In this regard, it was further submitted that s 158 of the Electoral Act contravened s 18(1) of the Constitution, which reads as follows:

> "18 (1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

It is well established that the right to the protection of the law enshrined in s 18(1) of the Constitution includes the right to due process of the law. See: *Marumahoko v Chairman of the Public Service Commission & Anor* 1991 (1) ZLR 27 (HC) at 42-44; and *Tendai Laxton Biti & Anor v The Minister of Justice, Legal and Parliamentary Affairs & Anor* SC-10-2002 at p 5 of the cyclostyled judgment.

Quite clearly, the entitlement of every person to the protection of the law, which is proclaimed in s 18(1) of the Constitution, embraces the right to require the legislature, which in terms of s 32(1) of the Constitution consists of the President and Parliament, to pass laws which are consistent with the Constitution.

If, therefore, the legislature passes a law which is inconsistent with the Declaration of Rights any person who is adversely affected by such a law has the *locus standi* to challenge the constitutionality of that law by bringing an application directly to this Court in terms of s 24(1) of the Constitution.

Thus, in the present case, the applicant had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by Parliament as required by s 28(4) of the Constitution. In the circumstances, he had the right to approach this Court directly in terms of s 24(1) of the Constitution and had the *locus standi* to file the application.

Finally, I wish to say that in the past this Court has taken a broad view of "*locus standi*" in applications of this nature in order to determine the real issues raised where the applicant has a real and substantial interest in the matter. See, for example, *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General & Ors* 1993 (1) ZLR 242 (S) at 250 A-E; and *Law Society of Zimbabwe & Ors v Minister of Finance* 1999 (2) ZLR 231 (S) at 233G-234G.

In the circumstances, as the applicant had *locus standi*, the Court should have determined the real issues raised in this application before the presidential election was held.

Gill, Godlonton & Gerrans, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners