1. **CITIZENS COALITION FOR CHANGE** **EC 03/23**

Versus

ZIMBABWE ELECTORAL COMMISSION

And

SONENI MOYO

And

DINGILIZWE TSHUMA

And

ALBERT MHLANGA

2. **CITIZENS COALITION FOR CHANGE** **EC 04/23**

Versus

ZIMBABWE ELECTORAL COMMISSION

And

MBUSO SISO

And

FIKIZWENI NYONI

And

SIBONISO MOYO

And

METHUSELI BHEBHE

And

ASHTON MHLANGA

And

MILDERED NCUBE

And

MKHALIPHI SIBANDA

3. CITIZENS COALITION FOR CHANGE EC 05/23

Versus

ZIMBABWE ELECTORAL COMMISSION

And

BUSANI SITHOLE

And

MANDLENKOSI TSHUMA

And

CEPHAS NCUBE

And

LOVEMORE BANDA

And

SAMBULO MAPHOSA

And

ONE NCUBE

ELECTORAL COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 26 July 2023 & 28 July 2023

Electoral Appeal

Ms. *Ndlovu*, for the appellant in all the appeals
T.M. Kanengoni, for the 1st respondent in all the appeals
T. Tavengwa, for the 2nd to 8th respondents' legal in EC 04/23 & 2nd – 7th respondents in EC 05/23
B. Ndove, for the 2nd – 4th respondents in EC 03/23

DUBE-BANDA J:

Introduction

[1] There are three appeals before court. In Case No. EC 03/23 the appellant is Citizens Coalition for Change ("CCC"). The first respondent is Zimbabwe Electoral Commission ("ZEC"); the second respondent is Soneni Moyo; the third respondent is Dingilizwe Tshuma and the fourth respondent is Albert Mhlanga ("Respondents"). The second to the fourth respondents have been declared duly nominated candidates for various constituencies representing CCC in the forthcoming 23 August 2023 general elections.

[2] In Case No. EC 04/23 the appellant is CCC. The first respondent is ZEC; the second respondent is Mbuso Siso; the third respondent is Fikizweni Nyoni; the fourth respondent is Siboniso Moyo; the fifth respondent is Methuseli Bhebhe; the sixth respondent is Ashton Mhlanga; the seventh respondent is Mildred Ncube; and the eighth respondent is Mkhaliphi Sibanda. The second to the eighth respondents have been declared duly nominated candidates for various wards representing CCC in the Bulawayo City Council in the forthcoming 23 August 2023 general elections.

[3] In case No. EC 05/23 the appellant is CCC. The first respondent is ZEC; the second respondent is Busani Sithole; the third respondent is Mandlenkosi Tshuma; the fourth respondent is Cephas Ncube; the fifth respondent is Lovemore Banda; the sixth respondent is Sambulo Maphosa; and the seventh respondent is One Ncube. The second to the seventh respondents have been declared duly nominated candidates for various wards representing CCC in the Nkayi RDC in the forthcoming 23 general elections.

[4] The appeals are against the decisions of the Nomination Courts declaring the respondents duly nominated candidates for various constituencies and wards representing CCC. At a case management meeting it was consented to by all the parties that the three matters be consolidated. The consolidation was premised on the following: the matters are pending in the same court, before the same judge and the issues for determination raise the same or similar questions of fact and law.

[5] For convenience and ease of reference and where the context permits, the appellant shall be referred to as "CCC", the first respondent shall be referred to as "ZEC", and the other respondents shall be referred as the "respondents".

Background facts

[6] The background to this matter is that Zimbabwe will hold general elections on 23 August 2023. On 21 June 2023 the Nomination Courts sat for the nomination of candidates for the president, constituencies and wards all over the country. The Nomination Courts declared the respondents duly nominated candidates representing CCC. The appellant contends that the respondents are not its candidates and do not stand for it, and that the decision of the Nomination Courts has created double candidates to its prejudice. The appellant wrote a letter ZEC disowning the respondents. No corrective action was taken by ZEC.

[7] It is against the decision of the Nomination Courts that the appellant has noted the appeals on the following grounds:

i. The presiding officer erred in law in declaring 2nd to 4th respondents to have been duly nominated on behalf of the appellant when their names were not put forward by the appellant, more specifically in that:
   a. Their nomination court papers had in actual fact not been signed for by the two designated office bearers of the appellant.
   b. The signatures on the nomination papers of the 2nd to 4th respondents as those of the designated office bearers were forged and do not comport to the specimen signature given first respondent (*sic*) by appellant.
   c. The symbol used on the nomination papers was forged and is not that of the appellant as was given to first respondent.

ii. A *fortiori* and in the circumstances of the matter considered, the presiding officer erred in not proceeding in terms of section 46(9) of the Electoral Act [Chapter 2:13].

iii. The nomination papers presented by 2nd to 4th respondents having been fraudulent, presiding officer erred in coming to the conclusion that such

nomination papers were presented in terms of the law and had been validly completed.

[8] Other than resisting the relief sought on the merits, ZEC took a preliminary point. Mr. *Kanengoni* counsel for ZEC submitted that the appeals are fatally and incurably defective as they were filed contrary to the provisions of s 46(19) of the Electoral Act [Chapter 2:13]. It was contended that s 46(19) affords a right of appeal to a candidate whose nomination papers have been rejected by a nomination officer. The appellant is not a candidate whose nomination papers have been rejected by a nomination officer and therefore has no right of appeal in terms of s 46(19) of the Electoral Act.

[9] On the merits Mr *Kanengoni* argued that the nomination officer had no cause to doubt that the respondents were duly sponsored by the appellant. And that the letter requesting corrective measures is dated 22 June 2023, a day after the sitting of the nomination courts at which point the nomination courts were *functus officio*. Mr *Ndove* and Mr *Tavengwa* counsel for the respondents associated themselves with the submissions made by Mr *Kanengoni*.

[10] At the commencement of the hearing of the matter on 26 July 2023 I informed the parties that I will hear submissions on the preliminary point taken by the respondents, and if it is upheld the matter will end at that point. However, if the preliminary point is dismissed, I will hear the parties on the merits of the appeal on a date to be allocated by the Registrar.

Respondents' submissions

[11] Mr. *Kanengoni* submitted that the appeals have been noted in terms of r 11 of the Electoral (Applications, Appeals & Petitions) Rules (the Rules), and r 11 appears in Part IV of the Rules. Rule 10 provides a definition of an appeal, it says: '"In this Part - "appeal" means an appeal by a candidate in terms of subsection (19) of section 38 of the Act, and "appellant" shall be construed accordingly."' Counsel submitted that r 10 is footnoted to indicate that s 38(19) is now s 46 (19) of the Electoral Court Act. And s 46(19)(b) provides four parameters or circumstances that must exist contemporaneously for one to profit from the right of appeal it creates. These are: a rejection of a nomination paper or a finding that it is void; such rejection or finding of voidness must be in terms of either subsection (10) or (16) respectively; a challenge by a candidate whose nomination paper has been rejected or deemed void, against

the decision of the nomination officer; and such challenge being made to a judge of the Electoral Court in chambers.

[12] Counsel argued that in the absence of any one of the four circumstances indicated in s 46 (19)(b) one cannot properly pursue an appeal in terms of s 46(19) (b) of the Electoral Act. Counsel argued further that the appellant does not allege a rejection of a nomination paper, it says there was an improper acceptance of nomination papers. It was argued that the appellant does not allege a rejection either in terms of s 46(10) or s 46(16) of the Act. Counsel submitted that CCC is not a candidate. It submitted no nomination papers in terms of s 46 of the Act. And that none of the jurisdictional parameters exist to engage the appellate jurisdiction of the court. Counsel submitted that the appellant has no right of appeal.

[13] Mr *Kanengoni* submitted further that the contention by the appellant that the appeals are in terms of s 46(15) of the Act is incorrect. The appeals show that they are in terms of r 11 of the Rules, not s 46(15) of the Act. Counsel argued that in any event s 46(15) of the Act does not create a right of appeal. Counsel submitted that the appeals are fatally and incurably defective and ought to be struck off the roll, with no order as to costs.

Appellant's submissions

[14] In the written heads of argument, the appellant contends that s 46(15) of the Act gives jurisdictional power to the Electoral Court, which has exclusive jurisdiction to deal with issues pertaining to electoral issues, to make a determination that a particular candidate has not been validly nominated. It was argued that a determination made by the nomination court at the close of its sitting is a matter wholly within the jurisdiction of the Electoral Court. It is contended further that s 46(15) of the Act does not define the nature of the proceedings that must be taken by a party wishing to activate the jurisdiction of the court. The nature of the proceedings is an issue that must be resolved by two considerations.

[15] It was argued that the first consideration is that the Electoral Court being a specialised division of the High Court, has inherent jurisdiction by both the common law and s 176 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ("Constitution"). The second consideration is that the Electoral Court at any rate has appeal powers in terms of the Act as

well as in terms of its rules. It was contended further that the decisions of the nomination courts are appealable to the Electoral Court, i.e., the Electoral Court has general appellate jurisdiction in nomination matters. It was argued further that the position taken by the respondents that the appellate jurisdiction can only be exercised in terms of section 46(19) of the Act is wrong. At any rate, the appellant does not approach the court in terms of s 46(19) of the Act. It was argued that the court has subject matter jurisdiction as well as a procedural mechanism by which its powers can be exercised, i.e., in terms of the Rules. It was submitted that the Electoral Court has jurisdiction to relate to these appeals.

[16] Ms. *Ndlovu* counsel for the appellant submitted that the respondents have mischaracterized the nature of the powers of the Electoral Court as provided in section 161 of the Electoral Act. Counsel argued that s 161 gives the Electoral Court exclusive power to deal with all issues pertaining to election processes. Counsel argued further that the Electoral Court has exclusive jurisdiction to deal with each and every issue that arises out of the Electoral Act. Counsel submitted that the form over substance approach taken by the respondents is not only unfortunate but misleading. The court was urged to employ a purposive interpretation in the adjudication of this matter. Counsel argued further that the issue of sponsorship by a political party is highlighted in the Act, and must be given effect to by the court. And that electoral rights are conferred to the appellant as a political party, and the appellant has a right of appeal. The court was urged to find the court has jurisdiction to hear the appeals and dismiss the preliminary point taken by the respondents so that the appeal may be determined on the merits.

The Law

[17] 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."

[18] Section 161 gives the Electoral 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. In *Kambarami v 1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21 GUVAVA JA said the Electoral Court "is a creature of statute and its powers are confined to the four corners of the Act." Put differently, it can only do that which the Act permits it to do, and no more. It is not a court with inherent jurisdiction. In *Kambarami* (*supra)* GUVAVA JA said @ p 10 – 11 of the cyclostyled judgment said:

> 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.

[19] Therefore, the established jurisprudence is that the jurisdiction and the competence of the Electoral Court is prescribed by the Electoral Court Act and the Rules. These appeals were filed in terms of r 11 of the Rules. Part IV of the Rules relates to appeals regarding nomination of candidates. Rule 10 says: "In this Part - "appeal" means an appeal by a candidate in terms of subsection (19) of section 38 of the Act, and "appellant" shall be construed accordingly." The rule is footnoted to indicate that s 38 (19) is now s 46(19) of the Electoral Court Act.

[20] The empowering rule prescribes a party that may file an appeal in terms of r 11, and that party is a candidate. Further s 46(1)(b) of the Electoral Act prescribes the jurisdictional requirements to be met by a candidate who files an appeal in terms of r 11. These are: a rejection of a nomination paper or a finding that it was void; such rejection or finding of voidness must be in terms s 46(10) or 46(16) respectively; a challenge by a candidate whose nomination paper has been rejected or deemed void, against the decision of the nomination officer; and such challenge being made to a judge of the Electoral Court in chambers. The remedy of an appeal

provided in Part VI of the Rules is not a free for all, as it were, it is only available to a candidate who meets the jurisdictional requirements set out in s 46 (19) of the Act.

[21] It is against the backdrop of these legal principles that I consider the preliminary point taken by the respondents.

The application of the law to the facts

[22] The argument by the appellant that the Electoral Court has inherent jurisdiction goes against the jurisprudence established by the Supreme Court in *Kambarami v 1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21. The Supreme Court held that the Electoral Court is a creature of statute and its powers are confined to the four corners of the Act. It can only do that which the Act permits it to do, and no more. It is not a court with inherent jurisdiction. See *Shumba & Anor v Zimbabwe Electoral Commission & Anor* 2008 (2) ZLR 65 (S). Therefore, there is precedent that the Electoral Court is not a court with inherent jurisdiction. The doctrine of precedent, also referred to as *stare decisis* is well-established principle and is a component to the principle of the rule of law, which in turn is a foundational value in our constitutional architecture. The decision in *Kambarami* (*supra*) precedent and is binding on the court. Therefore, the argument that the Electoral Court has inherent jurisdiction has no merit.

[23] In the written heads of argument, the appellant argues that its appeals are in terms of s 46(15) of the Act. Mr *Kanengoni* submitted that the appeals noted by the appellant are clearly indicated as appeals in terms of r 11 of the Electoral Court Rules. I agree. Rule 10 and 11 fall under Part IV under the heading "Appeals regarding nomination of candidates." Rule 10 speaks to s 46(19) of the Electoral Court Act. It is not open to the appellant to change route and argue that the appeals are in terms of s 46(15) of the Act. Further, Mr *Kanengoni* argued further that s 46(15) does not create a right of appeal. That where the Legislature intended to create a right of appeal before the Electoral Court, it has done so in express terms throughout the Act. Electoral processes are not borne out of the common law, they are based in statute. Thus, the various remedies available in the Electoral Court under the Electoral Act are not to be inferred but must arise from specific provisions of the statute. I agree. Section 46(15) merely provides the grounds on which a candidate shall not be regarded as duly nominated. It does not create a right of appeal.

[24] Ms *Ndlovu* urged the court not to elevate form over substance, in other words counsel's submission was that the court should interpret the s 46(19) of the Act and the Rules in conformity with the notion of substantive justice. To achieve substantive justice counsel argued that the the provisions of the legislative scheme must be interpreted purposively. Cut to the bone the argument was that the court must find that there is an appeal proper before the court, because it is the political party i.e., CCC that is aggrieved by the decision of the nomination courts to declare the respondents its duly nominated candidates representing it in various constituencies and wards. It was contended that the decision by the nomination court has created double candidates in constituencies and wards to the prejudice of the pollical party. It was submitted further that the concerned respondents are not CCC candidates, and do not stand for it. It was on the basis of this background that counsel argued that the legislative framework must be interpreted in such a way as to accord the appellant the right of appeal in this scenario. Counsel even asked a rhetorical question and said "in such a case who should appeal?"

[25] I agree that purposive interpretation is aimed at teasing out the values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer an interpretation of a provision that best supports and protect those values. See Currie I & DeWaal J *Interpretation of the Bill of Rights* (5th ed. Juta) 148. However, respect must be paid to the language employed in the legislation. The court does not have a licence to deal with interpretation as it please. If there is an evident and plain meaning of a provision it cannot be ignored in favour of a purposive interpretation. A court can only employ a generous or purposive interpretation as long as the language of the statute permits. See: *S v Zuma and Others* 1995 (2) SA 642 (CC). It is the primary rule of interpretation that if the meaning of the text is clear, it should be applied. See *Principal Immigration Officer v Hawabu* 1936 AD 26. If the plain meaning of the words is ambiguous, vague or misleading, or if a strict literal interpretation would result in absurd results, then the court may deviate from the literal meaning to avoid such an absurdity. See *Venter v R* 1097 TS 910 914; *Chihava and Others* v *The Provincial Magistrate Francis Mapfumo N.O and Another* 2015 (2) ZLR 31 (CC) at pp 35H-36A.

[26] I take the view that the text in r 11 of the Rules as read with s 46(19)(b) of the Electoral Act is clear, unambiguous and neither vague nor misleading. It is clear that in terms of s 46(1) of the Electoral Act a candidate is one, amongst other requirements, who is on the voters roll;

must be nominated by persons who are registered on the voters roll for the constituency or ward for which he or she seeks election; and must submit a passport-sized photograph; and may, if he or she is to stand for or be sponsored by any political party, specify that fact. CCC does not satisfy the characteristics of a candidate. It submitted no nomination papers in terms of s 46 of the Act. CCC is not a candidate. It is a political party sponsoring candidates.

[27] Furthermore CCC does not meet the jurisdictional requirement set out in s 46(19)(b) of the Electoral Act. No nomination papers had been rejected in terms of subsection (10) or been regarded as void by virtue of subsection (16). In *Shumba & Anor v Zimbabwe Electoral Commission & Anor* 2008 (2) ZLR 65 (S) the Supreme Court had occasion to remark that:

> "In my view, if the applicants' nomination papers were rejected other than in terms of s 46(10) or s 46(16) of the Act, then the remedy provided for in subs 46(19) was not available to them."

[28] The remarks in *Shumba* (*supra*) apply with equal force in *casu*. The decision in *Shumba* is precedent and binding on this court. The appellant had no nomination paper rejected in terms of s 46(10) or declared void in terms of s 46(16). The remedy provided in s 46(19)(b) is not available to it. The appellant is aggrieved by the acceptance of respondents' nomination papers. Section 46(19)(b) does not address a situation where a party challenges the acceptance of a nomination paper. It appears to me that a party aggrieved by the acceptance of a nomination paper cannot appeal to the Electoral Court in terms of s 46(19) of the Act.

[29] The appellant is a political party. It is not a candidate whose nomination paper has been rejected in terms of s 46(10) or declared void in terms of s 46(16). The appellant has no right of appeal. This is not placing form over substance. It is an interpretation of the relevant provisions that answers to the language and precedent. See *Kambarami v 1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21; *Shumba & Anor v Zimbabwe Electoral Commission & Anor* 2008 (2) ZLR 65 (S); *Ndlovu & Anor v Ndlovu & Anor* SC 133/02; *Chihava and Others* v *The Provincial Magistrate Francis Mapfumo N.O and Another* 2015 (2) ZLR 31 (CC) at pp 35H-36A.

[30] Judges should interpret the law, not make it. Judges have no authority to create law or amend it. It is the sole right of the legislature to enact laws. Therefore, any interpretation to the

contrary would go against the language of the legislation and precedent. This would amount to a text-book case of judicial overreach. See *Kirstein v Registrar General & Ors* 2019 (3) ZLR 1275 (H).

[31] In the circumstances, the appeal is fatally and incurable defective as it was filed contrary to the provisions of the Electoral (Applications, Appeals and Petitions) Rules, 1995, as read with the s 46(19)(b) of the Electoral Act [Chapter 2:13]. It is for these reasons that this application stands to be struck off the roll.

[32] What remains is the question of costs. No order of costs was sought in this matter, and no order of costs shall be granted.

In the result, it is ordered as follows:

i. The preliminary point that the appeals are fatally defective is upheld.

ii. The appeals are struck off the roll with no order as to costs.

Tanaka Law Chambers, appellant's legal practitioners
Nyika, Kanengoni & Partners, 1st respondent's legal practitioners
Ndove & Associates, 2nd to 4th respondent' legal practitioner (EC 03/23)
Mutuso, Taruvinga & Mhiribidi, for the 2nd to 8th respondents' legal in EC 04/23 & 2nd – 7th respondents in EC 05/23