

DISTRIBUTABLE: (9)

GIFT MACHOKA KONJANA
v
DEXTER NDUNA

CONSTITUTIONAL COURT OF ZIMBABWE
GARWE AJCC, GOWORA AJCC & HLATSHWAYO AJCC
HARARE: 11 MAY 2021, 18 MAY 2021 & 5 OCTOBER 2021

T. Mafukidze, for the applicant

T. Zhuwarara for the respondent

**AN APPLICATION FOR LEAVE TO APPEAL AGAINST A DECISION OF THE
SUPREME COURT**

HLATSHWAYO AJCC

[1] This is an opposed application for leave to appeal against a decision of the Supreme Court (“the court *a quo*”) made in terms of s 167(5)(b) of the Constitution as read with r 32(2) of the Constitutional Court Rules, 2016 (“the Rules”).

FACTUAL BACKGROUND

- [2] This application emanates from an election petition lodged with the Electoral Court to nullify the election of the respondent and to declare the applicant as a duly elected Member of Parliament for Chegutu West. The background to the matter is that in July 2018 the applicant took part in a parliamentary election in Chegutu West in which the respondent was declared the winner by 10,932 votes as opposed to 10,828 votes attributed to the applicant. The applicant lodged a complaint with the Zimbabwe Electoral Commission (ZEC) District Elections Officer challenging the results of that election on the basis that ZEC had made mistakes in collating and verifying the results. The mistake was apparently admitted by ZEC.
- [3] On 10 August 2018 the applicant filed a petition in the Electoral Court seeking the correction of the erroneous declaration. The Electoral Court held that the petition fell foul of the peremptory requirements of r 21 of the Electoral (Applications, Appeals and Petitions) Rules 1995 which sets out certain peremptory requirements pertaining to the form and content of an election petition. The applicant had brought the petition on notice and the court held that the form and content of the petition did not comply with r 21, rendering it fatally defective. The court found that the applicant had failed to present his case in the proper format required by law and there was therefore no valid petition before the court. The petition was accordingly dismissed.
- [4] The applicant noted an appeal to the court *a quo*. Firstly, he averred that the petition was not fatally defective for having been brought on notice as s 169 of the Electoral Act [Chapter 2:13] made such notice mandatory. Secondly, he contended that the Electoral Court could have condoned non-compliance with its rules as s 17(9) of the Electoral Act vests the court with such competence to condone. Lastly, he contended

that the court failed to consider the merits of the petition despite ZEC having acknowledged the error that resulted in the undue return complained against.

[5] Before the matter was heard, the respondent gave written notice of a preliminary objection in the proceedings. He averred, *inter alia*, that the court *a quo* was barred from adjudicating the appeal on account of s 182(2) of the Electoral Act which requires an election appeal to be disposed of within 3 months. He contended that once the prescribed period of 3 months expired, the court has no jurisdiction to entertain the matter. *Per contra* the applicant submitted that s 182 of the Electoral Act did not operate to bar the court from determining the appeal since the applicant had already filed process and the matter was pending. His argument was to the effect that the provision was not intended to non-suit a litigant who was already before the court.

[6] The court *a quo* held that it is a petitioner who is *dominus litis* in an election petition and that it is he or she who ought to seek directions as envisaged by s 182 of the Electoral Act and should be especially vigilant in monitoring and managing the progress of their own cases in order to meet the stipulated time limits. It further found that the 3 months period stated in s 182 was mandatory and could not be exceeded under any circumstances. As a result the respondent's point *in limine*, challenging the continued adjudication of the appeal beyond the time limit prescribed by s 182(2) of the Electoral Act was sustained and the appeal was removed from the roll.

[7] Aggrieved by that finding the applicant filed the present application on 15 April 2021. The respondent opposed the application and argued, in *limine*, that the applicant used the wrong form in that he filed a chamber application when he ought to have lodged

an ordinary application according to r 32(2) of the Rules. He further averred that the applicant could not properly appeal against the decision of the court *a quo* because the decision did not turn on a constitutional issue and lastly that the matter has no prospects of success.

APPLICANT'S SUBMISSIONS BEFORE THIS COURT

[8] Counsel for the applicant argued that two questions arose for determination and these related to whether the applicant was raising a constitutional matter and whether s 182(1) of the Electoral Act is directory rather than mandatory. Counsel submitted that there was no doubt that he sought to raise a constitutional issue and that it was in the interests of justice to approach the court because the Supreme Court interpreted s 182(2) in a manner which made it constitutionally non-compliant. His argument was to the effect that the judgment *a quo* raised the constitutional question of whether interpreting s 182(2) of the Electoral Act as a bar to the hearing of an appeal that was filed on time amounts to an unconstitutional limitation of the right to access the courts under s 69(2) and (3), right to vote under s 67(1)(a), (b), 67(3)(a) and (b) and the right to protection and benefit of the law under s 56(1) of the Constitution. The applicant submitted that since the provision in question was capable of two reasonable constructions, it raised a constitutional issue which required interpretation with the construction which is more constitutionally compliant being adopted. In this light, counsel submitted that there were prospects of success in that the meaning which the court *a quo* had preferred resulted in the unconstitutionality of s 182(2) of the Electoral Act.

[9] Counsel for the applicant further submitted that s 182(2) of the Electoral Act is directory rather than mandatory and cannot constitutionally operate as a time bar to the determination of an appeal already properly pending. It was the applicant's submission that the above provision is capable of two reasonable constructions and the one more constitutionally compliant should have been adopted for the reason that the ouster of a court's jurisdiction is constitutionally incompetent in the absence of clear and unambiguous language used by the legislature. It was Counsel's case that the court *a quo* erred by interpreting s 182(2) of the Electoral Act as mandatory because it has an effect of placing an unconstitutional limitation on the right of access to the courts under s 69(2) and (3) of the Constitution together with the right to protection of the law under s 56(1) of the Constitution. He further argued that ZEC had already admitted to committing the error and as such the decision by the court *a quo* to throw out the petition had an effect of undermining the integrity of democracy which is demanded by s 46 of the Constitution. He thus moved the Court to grant the applicant leave in the interests of upholding the Constitution.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

[10] Counsel for the respondent abandoned his preliminary objection at the hearing and in opposing the application submitted that the application was a disguised appeal against the final judgment of the court *a quo*. He contended that the proceedings *a quo* did not turn on a constitutional question but rather turned on the applicant's failure to have his electoral appeal determined within the three-month period set by s 182 (2) of the Electoral Act. He submitted that the Supreme Court made no constitutional pronouncement capable of being appealed and determined by this Court and as such the applicant's application was devoid of merit. Counsel further argued that no

competent constitutional question could be extracted from the decision of the court *a quo* and as such this Court has no competence to hear and determine the matter since it does not involve the interpretation or enforcement of the Constitution.

- [11] Counsel for the respondent contended that it was incumbent upon the applicant, as *dominus litis*, to effectuate s 182(2) of the Electoral Act and cause the timeous hearing and determination of his appeal before the court *a quo*. He further submitted that electoral petitions are legal processes that are specifically regulated by statute and in this case the provision in question, s 182(2) of the Electoral Act, clearly dictates that an appeal seeking to impugn the decision of the Electoral Court can only be lodged in terms of s 172(2) of the Electoral Act and such appeal must be determined within 3 months from the date of lodgement of such. In turn he argued that the 3 months timeline is peremptory and allows for no extension. Accordingly, the adjudication of the appeal *a quo* outside the time limit would have been irregular and aberrant to our law. In effect, counsel averred that it was not possible for the court *a quo* to depart from the bounds of statute which would have been unconstitutional and a violation of the rule of law. He thus moved for the dismissal of the application.

APPLICATION OF THE LAW TO THE FACTS

- [12] In terms of s 167(5)(b) of the Constitution, the Rules must allow a person, when it is in the interests of justice and with or without leave of the Court, to appeal directly to the Court from any other court. Rule 32 of the Rules gives effect to s 167(5)(b) of the Constitution. It provides as follows:

“32. Leave to appeal

(1) ...

(2) A litigant who is aggrieved by the decision of a subordinate court on a constitutional matter only, and wishes to appeal against it to the Court,

shall within fifteen days of the decision, file with the Registrar an application for leave to appeal and shall serve a copy of the application on the other parties to the case in question, citing them as respondents.”

[13] Section 167(1)(b) of the Constitution makes it clear that the jurisdiction of the court is limited to deciding only constitutional matters and issues connected with decisions on constitutional matters. The case of *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11/18 is instructive with regard to the specialised jurisdiction of the Court. At p 9 of the cyclostyled judgment the Court held thus:

“The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction.”

[14] In *Muza v Saruchera and Ors* CCZ 5/19 the court noted that the purpose of the right of appeal granted to a person under r 32(2) of the Rules, the procedure of an application for leave to appeal provided therein and the contents of the application required under r 32(3)(c) of the Rules, are premised on the existence of a decision by a subordinate court on a constitutional matter only. It is incumbent to note that the purpose of the Rules is to ensure proper exercise of jurisdiction by the court. The matter that gives rise to the need for the court to exercise its jurisdiction must be a constitutional matter decided by the subordinate court.

[15] It is the applicant’s case that the decision of the court *a quo* violated his right to access the courts under s 69(2) and the right to protection and benefit of the law under s 56(1) of the Constitution when it held that s 182(2) of the Electoral Act ousted its jurisdiction

to hear the matter outside the time limits. With regard to the provision in question, the court *a quo* held the following:

“In the result, the respondent’s point *in limine*, challenging the continued adjudication of this appeal beyond the time limit prescribed by s 182(2) of the Electoral Act, is sustained and must be upheld. Consequently, the appeal can no longer be heard or determined by this Court for want of jurisdiction.”

[16] Clearly the applicant’s submission is devoid of merit. The matter before the court *a quo* was a simple electoral appeal against the finding of the Electoral Court which dismissed the applicant’s electoral petition. In disposing of that appeal, the court *a quo* applied the case of *Sibanda & Anor v Ncube & Ors / Khumalo & Anor v Mudimba & Ors* SC 158/2020 and removed the matter from the roll. The basis of that decision was that the court could not entertain the appeal because the time within which that appeal ought to have been determined had lapsed, largely due to the applicant’s attitude who, as the *dominus litis*, sat on his laurels instead of timeously ensuring the prosecution of his appeal as is demanded by s 182(2) of the Electoral Act.

[17] In effect, the court *a quo* interpreted the provisions of the Electoral Act in coming to its conclusion. It never interpreted, protected or enforced the Constitution. The clear result is that the court *a quo* was never seized with a constitutional matter and neither did it decide one. *Du Plessis, Penfold and Brickhill* “Constitutional Litigation” (1 ed, Juta & Co Ltd, Cape Town, 2013) at p 20 states:

“The interpretation of legislation is not always a constitutional matter, it is only the case if the Constitution is brought to bear in the interpretive exercise.”

[18] The applicant in advancing his argument sought to rely on *Chagi and Ors v Special Investigating Unit* 2009 (2) SA 1 (CC) at para 14 wherein it was held as follows:

“The correct interpretation and effect of a statutory provision is not ordinarily a constitutional matter. A debate on the construction of a particular provision does,

however, raise a constitutional issue or a matter connected with a decision of one if the provision is capable of two reasonable constructions, the one being more constitutionally compliant than the other.”

The applicant submitted that the provision in question was capable of two reasonable constructions, and, thus, it raised a constitutional issue and the court *a quo* failed to interpret the section in a manner that makes it constitutionally compliant. The court *a quo* upheld the respondent’s preliminary objection on the basis that the time limits imposed by s 182 of the Electoral Act were mandatory and were to be strictly complied with. Thus, the finding by the court *a quo* involved a straightforward application of law and did not raise constitutional questions about the validity or the proper interpretation or development of that law. In coming to this conclusion, the court *a quo* did not decide a constitutional matter because there was no need to interpret, enforce or protect the Constitution in order to come to the conclusion that the applicant was out of time in executing his appeal. As such, the applicant’s argument in this regard ought to fail.

[19] The applicant also argued that s 182(2) of the Electoral Act is directory rather than mandatory and cannot constitutionally operate as a time bar to the determination of an appeal already properly pending. In this regard he contends that the court *a quo*’s interpretation of the provision had the effect of violating his right to access the court and to protection of the law. Section 182 of the Electoral Act governs the time within which election petitions and appeals are to be determined and it stipulates as follows:

- “(1) Every election petition shall be determined within six months from the date of presentation.
- (2) An appeal under section 172(2) shall be determined within three months from the date of the lodging of the appeal.
- (3) For the purpose of ensuring that an election petition or an appeal is determined within the time-limit prescribed in subsection (1) or (2), as the case may be—

- (a) the Judge President of the High Court or the presiding judge of the Electoral Court, in the case of an election petition; and
- (b) the Chief Justice or the senior presiding judge of the Supreme Court, in the case of an appeal from a decision on an electoral petition; may, notwithstanding any other enactment, give such directions as to the filing of documents and the hearing of evidence and argument as will, in his or her opinion, ensure that the time-limit is met, and the parties shall comply with those directions.”

[20] The Electoral Act is clear in its language that an electoral appeal ought to be determined within three months. The provisions are imperative and therefore mandatory and the time limits stipulated in those provisions cannot be exceeded under any circumstances. It also follows that any adjudicative proceedings that may be conducted beyond those time limits are rendered nugatory and must be regarded as being null and void. In this light, the court *a quo* correctly held that the applicant as the *dominus litis* ought to have been vigilant in monitoring and managing the progress of his case in order to meet the stipulated time limits. The applicant could not sit back and wait for the appeal to be prosecuted in the normal run of things as that would certainly entail the determination of the appeal outside the 3 month prescribed time limit. It is for the above reasons that the court is of the view that the interpretation sought to be ascribed to s 182 of the Electoral Act by the applicant is unreasonable. There is only one reasonable interpretation which was adopted by the court *a quo*, hence it found that it did not have the jurisdiction to hear the matter.

[21] The court holds that the applicant has failed to demonstrate that a constitutional matter was determined by the court *a quo*, hence no appeal can lie against it. The removal from the roll of the appeal by the court *a quo* remains final. It cannot be appealed against because the Supreme Court is the final court of appeal in Zimbabwe, except in matters over which the Constitutional Court has jurisdiction as stipulated in section

169(1) of the Constitution of Zimbabwe. As such, the application has no merit and it ought to be dismissed. However, as far as costs are concerned, nothing has been submitted to persuade the court to depart from the approach that no order of costs should be awarded in constitutional matters. Clearly, whilst right from the outset this matter could have been more competently and expeditiously handled by the applicant and his lawyers, there is nothing in this application that suggests an abuse of the court's processes meriting an order of costs. Equally it would be improper to expect this Court to bend the rules and seek to rectify the situation in this application as that would set a bad precedent¹.

DISPOSITION

[22] In the result, the application be and is hereby dismissed with no order as to costs.

GARWE AJCC: I agree

GOWORA AJCC: I agree

DNM Attorneys, applicant's legal practitioners

Chambati, Mataka & Makonese, respondent's legal practitioners

¹ As the playwright William Shakespeare aptly observed in the play, the Merchant of Venice, Act IV, setting a bad precedent must be avoided at all costs.

Bassanio: Wrest once the law to your authority: To do a great right, do a little wrong and curb this cruel devil of his will.

Portia: It must not be; there is no power in Venice can alter a decree established. It will be recorded for a precedent, and many an error by the same example will rush into the state; it cannot be.