REPORTABLE ZLR (51)

Judgment No. SC 48/05
Civil Application No. 77/05

(1) THE CHAIRMAN ZIMBABWE ELECTORAL COMMISSION (IN HIS OFFICIAL CAPACITY) (2) THE CONSTITUENCY ELECTIONS OFFICER CHIMANIMANI CONSTITUENCY (IN HER OFFICIAL CAPACITY)

vs

(1) ROY LESLIE BENNET (2) THE PRESIDING JUDGE ELECTORAL COURT

IN THE SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, JUNE 16 & NOVEMBER 1, 2005

G C Chikumbirike, for the appellants

A P de Bourbon SC, for the first respondent

No appearance for the second respondent

ZIYAMBI JA: On 18 February 2005 nominations were held in terms of the Electoral Act [*Chapter 2:13*] ("the Act"). A Nomination Court sat at Mutare Magistrates' Court for the purpose of accepting nomination papers in respect of aspiring candidates for the elections scheduled to take place on 31 March 2005. The second applicant was the constituency elections officer who received and processed the nomination papers for all the constituencies in the Manicaland Province.

The first respondent, who at the time was the Member of Parliament for Chimanimani, submitted his nomination papers through his Chief Elections Agent. The nomination papers were rejected by the second applicant on the ground that the first respondent was, at that time, serving a term of twelve months imprisonment imposed on him by Parliament for contravening item 16 of the Schedule of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*].

The second applicant, relying on the provisions of subparagraph (2) (c) of paragraph 3 of Schedule 3 ("the Schedule") of the Constitution of Zimbabwe, took the view that the first respondent was disqualified notwithstanding the fact that his name was on the voters roll and rejected his nomination papers. Subparagraph (2) of paragraph 3 of the Schedule states:

> "(2) The following shall be disqualified for registration as a voter for the periods stated hereunder-
>
> (a)……
>
> (b)……
>
> (c) any person who has been convicted –
>
> (i) within Zimbabwe of a criminal offence; or
>
> (ii) ……
>
> and sentenced by a court to imprisonment, by whatever name called, for a term of six months or more, for the period of his imprisonment".

The first respondent was aggrieved by that decision and appealed to a judge of the Electoral Court in terms of s 46(19)(b) of the Act.

The learned judge of the Electoral Court found that the rejection by the second applicant of the first respondent's nomination papers was not "legally correct" in that the finding by Parliament that the first respondent was guilty of "a contempt offence" did not constitute a criminal offence in the conventional sense and that accordingly the sentence imposed upon the first respondent did not disqualify him from registration as a voter or standing as a candidate for election to the office of Member of Parliament. He accordingly reversed the decision of the second applicant. In terms of s 46(19)(b) no appeal lies against the decision of a judge sitting in terms of that subsection.

The applicants have brought this application by way of review. They claim that they may lawfully do so because the Electoral Court being an inferior court, its decisions are reviewable by this Court which possesses the same powers on review as the High Court. For this proposition they rely on s 25 of the Supreme Court Act [Chapter 7:13] ('the Supreme Court Act'), which provides as follows:-

> "25 **Review Powers**
>
> (1) Subject to this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court, respectively, to review the proceedings and decisions of inferior courts of justice, tribunals and administrative authorities.
>
> (2) The power, jurisdiction and authority conferred by subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court.

> (3) Nothing in this section shall be construed as conferring upon any person any right to institute any review in the first instance before the Supreme Court or a judge of the Supreme Court, and provision may be made in rules of court, and a judge of the Supreme Court may give directions, specifying that any class of review or any particular review shall be instituted before or shall be referred or remitted to the High Court for determination". (The underlining is mine)

Alternatively, they contend, rather curiously in my view, that the prohibition against appeals contained in s 46(19)(b) of the Act, applies only in respect of the candidate whose nomination papers would have been rejected or regarded as void by the Constituency Elections Officer. Thus, they argue, the second applicant was not denied a right of appeal by s 46(19)(b) of the Act. Accordingly, if this Court is not persuaded that the application for review is properly before it, the Court was being asked, to grant, to the applicants, leave to appeal out of time and to regard the papers filed before it as an application seeking such relief.

The application was opposed by the first respondent (whom I shall refer to as "the respondent") on the following grounds, namely:-

> "(1) that the applicants are not properly before this Court on review by virtue of s 25(2).
>
> (2) that the applicants have not established a legal right to approach this Court on review as a Court of first instance.
>
> (3) that reviews by the Supreme Court are limited to those done at the instance of the Supreme Court or a judge thereof and in terms of subsection (3) individual litigants cannot directly approach the Supreme Court on review".

In any event, so the respondent submitted, the applicants had not complied with Order 33 on which they rely and the application should on that ground also, fail.

It is proposed firstly to deal with the issue of whether the application is properly before this Court for review for if it is not, that is the end of the matter.

It appears to me that the effect of subsections (2) and (3) of s 25 of the Supreme Court Act is that although the Supreme Court may correct an irregularity in proceedings or in the making of a decision which comes to its attention, not necessarily by way of appeal or application, no person has the right to institute any review in the first instance before this Court. Thus it is not open to a party aggrieved by proceedings in a lower court to apply directly to the Supreme Court on review for redress. This much is clear from the wording of s 25 (3) of the Supreme Court Act.

The Supreme Court is an appellate Court. It has no original jurisdiction except when it sits as a Constitutional Court by virtue of s 24 of the Constitution of Zimbabwe ("the Constitution"). The powers conferred on the Supreme Court by s 25(1) of the Supreme Court Act are, therefore, to be exercised as part of its appellate jurisdiction. This view is, in my judgment, emphasized by the fact that the legislature has made the provisions of subsection (1) "subject to" the rest of the section, that is, subsection (2) and (3).

Section 25(2) confers additional jurisdiction which may be exercised when it comes to the notice of the Supreme Court or a judge of that court that an irregularity has occurred in proceedings not before it on appeal or application. Thus s 25(2) deals with irregularities in respect of which no appeal or application is before the Supreme Court and the review is undertaken at the instance of the Supreme Court and not of any litigant. Reviews of such irregularities would, but for the provisions

of s 25(2), fall outside the jurisdiction of the Supreme Court acting in terms of its appellate jurisdiction or sitting in terms of s 24 of the Constitution. This view is emphasized by s 25(3) which states that s 25(1) and (2) must not be construed as giving a right of review at first instance.

It was submitted on behalf of the applicants that whilst it is generally accepted that the Supreme Court, being a court of appeal, its powers of review and the power of review of individual judges are normally used only in circumstances in which the matter, the subject of review, is properly before the Court by way of appeal, this, however, does not mean that a matter cannot be brought for review before this Court at first instance. Support for this stance, it was submitted, was to be found in subsection (3) of s 25 which, while conferring no right to institute proceedings in the first instance before this Court, places the institution of proceedings at first instance in the Supreme Court at the discretion of the Court.

This submission is in my view untenable for, if the intention of the legislature was that applications for review in the first instance should be instituted in the Supreme Court, and at its discretion, that intention would be expressly stated. On the contrary, there is a clear prohibition against the institution of review proceedings in the Supreme Court as a Court of first instance.

What is also clear from a reading of s 25 is that, but for s 25(2), the Supreme Court would be unable to correct such irregularities as are envisaged in that subsection unless such proceedings were the subject of an appeal or application properly before it. Thus s 25(2) relaxes, to the extent stated therein, the limitation on

the jurisdiction of the Supreme Court to appeals and applications in terms of s 24 of the Constitution.

However, lest it should be thought that litigants have, because of the provisions of s 25(2), the right to approach the Supreme Court directly in order to obtain redress for perceived irregularities, s 25(3) was enacted to correct any misconception that a litigant may approach this Court directly for review. Thus the Act expressly prohibits any attempt to approach the Supreme Court as a Court of first instance in an application for review.

It is clear from the above, that the intention of the legislature was to ensure that the Supreme Court remains the final Court of Appeal. The application before us is one for review at first instance - the very thing which is prohibited by s 25(3). In the premises, I agree with the submission advanced on behalf of the first respondent, namely, that this application was contrary to statute.

I turn to consider the alternative relief sought by the applicants.

The applicants seek leave to appeal out of time. The success of such an application depends in the first place, on the applicant having a right of appeal and, *inter alia,* on there being prospects of success on appeal.

Subsection (19) of s 46 of the Act provides:-

"(19) If a nomination paper has been rejected in terms of subsection (10) or been regarded as void by virtue of subsection (16) -

> (a) …….
>
> (b) the candidate shall have the right of appeal from such decision to a judge of the Electoral Court in chambers and such judge may confirm, vary or reverse the decision of the constituency elections officer and there shall be no appeal from the decision of that judge;" (my underlining).

The submission advanced by the applicants that the prohibition against appeals in terms of this subsection applies only to the candidate, in this case, the respondent, is far fetched. The prohibition against any appeal whatsoever is clear and does not in my view admit of the interpretation sought to be placed on it by the applicants. The language used by the legislature is indicative of its intention that the decision of the Judge sitting in terms of s 46(19)(b) should be final. Since the applicants have no right of appeal, not only are there no prospects of success on appeal but in the absence of a right of appeal, the application for leave to appeal cannot be entertained by this Court.

Accordingly the application was ill advised and not properly before us. In the circumstances no consideration of the merits of the application is possible and it is therefore struck off the roll. The costs of the application shall be borne by the first applicant.

SANDURA JA: I agree.

CHEDA JA: I agree.

Chikumbirike & Associates, applicants' legal practitioners

Kantor & Immerman, first respondent's legal practitioners