

REPORTABLE (67)

JAMESON ZVIDZAI TIMBA

v

**(1) CHIEF ELECTIONS OFFICER (2) THE CHAIRPERSON
ELECTORAL COMMISSION (3) ZIMBABWE ELECTORAL
COMMISSION (4) JAISON PASADE (5) PETER VICTOR
MUKUCHAMANO**

**SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GUVAVA JA
HARARE, JUNE 12, 2014 & NOVEMBER 17, 2015**

T. Maanda, for the appellants

T.M. Kanengoni, for the 1st, 2nd & 3rd respondents

No Appearance, for the 4th & 5th respondents

GWAUNZA JA: This is an appeal against the entire judgment of the Electoral Court, handed down on 9 January 2014. The appellant prays that the judgment of the court *a quo* be set aside and substituted with one granting the application that he filed in that court. The main relief that he sought before the court *a quo* was an order directing the Zimbabwe Electoral Commission ('the Commission'), to deliver to, and for inspection by, him-

- i) all records relating to the Mt Pleasant Constituency in the 2013 harmonised general elections, and
- ii) all closed and sealed ballot boxes, sealed cardboard boxes and sealed packets referred to in s 70(1) of the Electoral Act (Cap 2:13).

1 FACTUAL BACKGROUND

The background to the dispute is as follows. The appellant was a candidate in the harmonised Presidential, Parliamentary and Local Government elections held on the 31 July 2013. He was a candidate in the Parliamentary election for the Mt Pleasant constituency in Harare. He lost the election to the fourth respondent, who was duly declared the winner in that particular constituency. The appellant was not happy at losing, and filed a petition in the Electoral Court challenging the result of the election. Following the filing of his petition, the appellant further filed an application in the Electoral Court, in terms of ss 21 and 70 of the Electoral Act [*Chapter 2:13*](“the Act”), seeking the relief referred to. This was for the purpose of prosecuting his election petition.

The application was dismissed by the Electoral Court after a full hearing, on a number of grounds. Firstly the court found that the granting of the order sought by the appellant would result in him simultaneously accessing election residue pertaining to the Presidential and Local Government election results in circumstances where no pending petitions existed in relation to those results. Secondly it was the court’s finding that in any event, any challenge or petition regarding the Presidential election would be a matter in which only the Constitutional Court would have jurisdiction. Thus any access to election residue pertaining to the Presidential election could only be by way of an appropriate order granted by that court. Finally the court determined that the absence of any rules governing selective access to election material stored together with that pertaining to the other two components of the harmonised elections, created a *lacuna* in the law whose effect was to disable the court from granting the order sought.

Disgruntled at this decision, the appellant filed this appeal which in my view raises the following issues:-

- i) whether or not the court *a quo* erred in its finding that it had no jurisdiction, under the circumstances, to grant the relief sought by the appellant, and
- ii) whether there was a *lacuna* in the law, as alleged by the respondent, or whether the court *a quo* could have properly granted the relief sought, subject to any conditions that it may have seen fit to impose in terms of s 70(5) of the Act.

It is clear from the evidence before the court that this dispute arose out of a situation that was a direct consequence of the harmonised nature of the 2013 general elections. It is in this respect pertinent to note that there is no dispute between the parties that;

- (i) the elections of 31 July 2013 were held in terms of s 38 of the Act, as read with s 144 of the Constitution of Zimbabwe, which provide for the harmonisation of elections to the offices of the President, Parliament and Local Government Authorities,
- (ii) for what the second respondent (“the Commission”) considered practical purposes, on each polling station there was in use by it, one copy of the voter’s roll for the joint purposes of the Presidential, Parliamentary and Local Government elections,
- (iii) a similar situation pertained to all the protocols kept by the Commission in each polling station relating to all the elections. Reflected in these were, *inter alia*, the number of voters turned away and the reasons thereof, as well as the number of assisted voters,

- (iv) therefore, some of the election residue in those elections were concurrently, all ‘harmonised’(The appellant, however, takes the Commission to task over this situation, as discussed later in this judgment),
- (v) an order granting the relief sought by the appellant would, of necessity have given him access to election material relating to the Presidential and the Local Government elections, in circumstances where, a) he had no use for such other election residue, and b)neither the President nor the other candidates in the Parliamentary and Local Government elections for the same constituency had cause to seek relief similar to the one that the appellant was seeking, and,
- (vi) the appellant as a candidate had the right, in terms of s 70(4) of the Electoral Act, to seek the order that he sought, since it was for the purpose of his (then) pending election petition.

The pertinent provisions of the Electoral Act provide as follows;

“70. Custody and disposal of ballot and other papers

- (1).....
- (2).....
- (3).....
- (4) No person shall open any packet referred to in subsection (1) or permit any such packet to be opened, except in terms of an order of the Electoral Court, which may be granted by the Electoral Act on its being satisfied that the inspection or production of the contents of such packet is required for the purpose of instituting or maintaining a prosecution for an offence in relation to an election or return or for the purpose of a petition questioning an election or return.
- (5) An order of the Electoral Court referred to in subsection (4) may be made subject to such conditions as the Electoral Court may think fit to impose:
Provided.....” (my emphasis)

2. THE ISSUES

I will now turn to the issues raised by this appeal, starting with the one relating to the jurisdiction or lack thereof, of the court *a quo* to determine the matter.

2.1 Jurisdiction

The court *a quo*, as is evident from the above, took the view that it could not grant the relief sought because it lacked the jurisdiction to do so and in any case there was a ‘*lacuna*’ in the law, which created a situation where no safeguards existed against the possibility of exposing election residue of 3rd parties not before it.

The court made reference to s 167(2)(b) of the Constitution which reads as follows:

‘Subject to the Constitution only the Constitutional Court may

- (a) ...
- (b) hear and determine disputes relating to election to the office of the President (my emphasis)

The court then went on to opine as follows:-

“An order by this Court granting him such relief will of necessity also result in access to election residue pertaining to the Presidential and Local Authority elections. This is so by virtue of the ‘harmonised’ nature of the residue as already discussed earlier. Such an order would therefore effectively be one that besides granting access to the House of Assembly residue, would also have the effect of attaining a result that is beyond or outside this Court’s jurisdiction. This Court has no jurisdiction to grant an order that has the effect of simultaneously allowing for the opening of closed and/or sealed ballot boxes and/or packets with Presidential, House of Assembly and Local Authority electoral residue.”

The appellant challenges the stance taken by the court *a quo* and argues that the issues before it did not require the court to hear or determine a dispute relating to the

office of the President. Further, that an order made in terms of s 70(4) of the Electoral Act would not amount to exercising jurisdiction in terms of s 167 (2)(b) of the Constitution.

I am persuaded by these contentions. The wording of s 167 (2)(b) of the Constitution is in my view clear and unambiguous in its meaning. The provision is concerned primarily with disputes relating to election to the office of the President. It provides that any dispute relating to election to that office is to be determined only by the Constitutional Court. The dispute *in casu* does not relate to election to the office of President but to the election of an aspiring member, the appellant, to the House of Assembly.

Accordingly, the matter before the court *a quo* did not constitute a dispute as envisaged in s 167(2)(b) of the Constitution. An interpretation that seeks to import into that provision a meaning to the effect that only the Constitutional Court has jurisdiction to hear any election dispute that mentions the President, even where the relief sought has nothing to do with any matter related to his election to that office, in my view amounts to a misapprehension of both the meaning and ambit of the provision. I entertain no doubt that such a liberal interpretation would open the floodgates for undeserving applications to be brought before the Constitutional Court. This is because, going by such an interpretation, a losing candidate from any constituency, who might wish to have election boxes and packets unsealed in order to access material relevant to his or her election results, would be obliged to file such application before the Constitutional Court. It is to be remembered in this respect that unlike the Parliamentary and Local Government elections which were 'localised' in the relevant constituencies throughout the country, the President's 'constituency' was the totality of all those constituencies. Such an outcome being undesirable, it can hardly be said to have been the intention of the Legislature.

I am satisfied, accordingly, that the dispute *in casu* was not upgraded to one that is envisaged under s 167(2) of the Constitution by the mere fact that the unsealing of boxes and packets in question would have exposed election residue relating to the election of the President.

On that basis, I find that the court *a quo* had and should have properly exercised, jurisdiction to hear the matter on the merits. That is, absent any procedural or other legal barriers.

Having said that, I am nevertheless alert to an important but crucial matter which none of the parties seem to have addressed their minds to. It is also a matter that, given its determination on jurisdiction, the court *a quo* could not have considered. This is the question of joinder, and specifically, a consideration of whether or not all interested parties to this dispute were brought before the court *a quo*. It is in my view safe to assume that, with the election materials sought to be accessed by the appellant being stored together with those relating to the Presidential and Local Government elections, candidates in the latter two elections must have had a vested interest in the subject matter of the litigation, as well as the relief sought therein. To that extent, the candidates concerned may have wished to have their views known to, and considered by, the court, on whether or not in the absence of a challenge to their election, the ‘residue’ relating to their respective election results should be uncovered. This is particularly so given that the unsealing of the boxes in question would have been at the instance of another candidate, not themselves. I therefore entertain no doubt that theirs was the type of interest generally qualified as being ‘direct and substantial’. In other words, interest that necessitated their being joined as parties to the dispute.

I am fortified in this view by the following passage contained in *Herbstein and Van Winsen's* book on the civil practice of higher courts¹;

“A direct and substantial interest has been held to be ‘an interest in the right which is the subject matter of the litigation and not merely a financial interest....’ It is a ‘legal interest in the subject matter of the litigation, excluding an indirect commercial interest only.’ The possibility of such an interest is sufficient, and it is not necessary for the court to determine that it in fact exists”.

In relation to joinder, the learned authors go on to state as follows on the same page;

“For joinder to be essential, the parties to be joined must have a direct and substantial interest, not only in the subject matter of the litigation, but also the outcome”

Applied to the circumstances of this case, I find that candidates in the elections other than the applicant, had a direct and substantial interest in both the subject matter of the litigation, and its possible outcome. These were, respectively, the harmonised election results for the Mt Pleasant constituency, and the unsealing of and access to, the boxes and packets containing such election material. The latter would have simultaneously exposed their own election residue. I find too that the same candidates constituted what the learned authors *Herbstein and Van Winsen* termed ‘necessary’ parties, defined thus at page 215 of the same book,²

“A third party who has, or may have, a substantial interest in any order the court might make in proceedings, or if such order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person waived the right to be joined ...In fact, when such person is a necessary party in this sense, the court will not deal with the issues without a joinder being effected, and no question of discretion or convenience arises.”(my emphasis)

¹ “Civil Practice of the High Courts of South Africa”, 5th ed. at page 217

² 5th ed, *ibid*

It is pertinent to note that the appellant seems to accept that the other candidates in the harmonised elections in his constituency had an interest in the litigation, as is evident from the following submission made in his heads of argument:-

“The conditions (that the court *a quo* could have imposed in terms of s 70(5) of the Act) would have included service of the order *on the other interested parties like the Presidential and Council* election candidates informing them to attend the opening and inspection and resealing of the packets.” (my emphasis)

My view however, is that the type of interest that the other candidates had in the subject matter and outcome of the litigation in question, merited more than mere service on them of a court order granted in proceedings to which they were not party. I see a major difference between serving an order, after the fact, on an interested party, and citing such interested party in the dispute so that they can, if they so wish, file their submissions on the matter before the court. One could envisage a situation where the ‘joined’ parties might have either waived the right to be joined in the litigation, or agreed to a mutually beneficial protocol by which the appellant would access only the material pertaining to his candidature, without having sight of the material relating to the other candidates.

The appellant further does not seem to dispute the respondents’ submission that, due to the harmonised nature of the elections, the various functionaries of the Commission in the presence of all interested parties or their representatives, sealed the packets referred to in s 70(1) of the Electoral Act in one ballot box. That being the case, I do not doubt that the granting of an order requiring the unsealing of such ballot boxes in the absence of those who had participated in such sealing, would be to visit unfairness, if not prejudice, on the affected candidates.

It is therefore beyond doubt that the candidates concerned should have been joined in the proceedings *a quo*. However as already alluded to above, the question of the joinder of the President and the candidates in the Local Government elections in the constituency of the appellant did not arise before the court *a quo*. Indeed the court's declaration as regards its perceived lack of jurisdiction to determine the dispute, precluded such an eventuality. I find nevertheless that even if the court *a quo* had inclined to the view that it had jurisdiction to hear the matter, it would not have been able to proceed to do so, without the 'necessary parties' being joined to the proceedings. This could have come about through the court itself *mero motu* ordering such joinder, or alternatively, at the instance of the applicant, any of the parties cited, or even those wishing to be so joined³.

Apart from the unmet requirement for the court *a quo* to join the other candidates or for the court to first ascertain whether such candidates had waived their right to be joined, I find that there are other factors that obviate the granting of the relief sought by the appellant in this appeal. In terms of normal procedure, this Court could have remitted the dispute to the court *a quo* court for a hearing of the merits thereof. This is in view of its determination that the Electoral Court had the requisite jurisdiction to so hear the matter. However, for the reasons stated below, an order to that effect would, in practical terms, be a *brutum fulmen*:-

- a. In the court *a quo* the appellant sought to have the ballot boxes and packets in question, unsealed so that he could inspect them and elicit facts and figures that he meant to use in order to bolster his (then) pending electoral petition (s 70(4) of the Act).

³ See in this respect Rule 87 of Order 13 of the High Court Rules, 1971

- b. The petition has since been heard, and at the time this appeal was argued, judgment on it stood reserved. The petition was heard without the benefit of the evidence the appellant wished to extract from the boxes and packets in question. To be specially noted in this respect is the fact that the Electoral Court must determine every election petition within 6 months from the date of its presentation. This is by virtue of s182 of the Act, which I find to properly fall within the ambit of s157(1(g)of the Constitution⁴
- c. The application *a quo* was properly founded upon the pendency of the petition that the applicant had filed under a different case in the Electoral Court. In other words the application had to be heard and determined while the petition was concurrently pending a determination.
- d. Given this circumstance, it becomes evident that the foundation upon which the application could stand and be sustained ceased to exist when the hearing of the petition was concluded and judgment on it reserved. In that sense, the petition became a *fait accompli*. To that extent, a remittal of the matter to the court *a quo* would serve no legal purpose.
- e. Lastly one may mention the fact that because the petition was heard, (and possibly determined by now) on a basis other than the material sought to be accessed from the sealed boxes, any link it might have had to the application *in casu* ceased to exist. The petition can properly be determined on appeal,(should there be one), without reference to the application and the relief sought therein.

⁴ It provides that an Act of Parliament must provide for the conduct of elections and referendums (sic) to which the constitution applies, in particular for matters listed therein, which include 'challenges to elections' (my emphasis)

In the result, I find that while the court *a quo*, in the absence of procedural or other legal barriers, would have had the jurisdiction to hear the matter on the merits, its decision to dismiss the application is one that this Court may not properly interfere with.

In all respects therefore, I am satisfied that the appeal has no merit and ought to be dismissed.

2.2 *Lacuna*

While this finding is dispositive of the appeal, I find it pertinent to consider the second issue raised thereby, since it seems to have actively exercised the minds of both the court *a quo* and the parties. This is the question of whether or not *a lacuna* existed in the law, to the extent and with the effect alleged.

I have determined that there were no jurisdictional impediments to the hearing and determination, by the court *a quo*, of the type of dispute that the appellant brought before it. I have also found, however, that the court could not have properly heard the matter in the absence of interested parties whom the appellant failed to cite. I find further that had all interested parties been cited and heard, and assuming the appellant would have proved his case, the court would have in my view been properly placed to grant an order in terms of s 70(5) of the Act. The order would have set out such conditions for the unsealing of the boxes and packets as would safeguard the rights of all other interested parties. While any rules the legislature might wish to enact in this respect may serve to elaborate on the type of conditions that may guide the process of unsealing election boxes without at the same time exposing

material not related to a particular candidate, I am not persuaded that the absence of such rules constitutes a *lacuna* of the nature found by the court *a quo* to exist.

One other matter merits comment. The appellant takes issue with the fact that, having put in place a system that ‘harmonised’ the election residue sought by the appellant, with any that related to the other candidates in the elections, the Commission now sought to rely on its own mistakes to frustrate the appellant’s quest for relief. I do not find merit in this contention. Firstly the Commission’s practical approach in packing together the residue from the three harmonised elections has not been shown to have been so grossly unreasonable under the circumstances, as to merit censure. The only blight on such a system is the one that has been brought out by this dispute, that is, the risk it created for all candidates in harmonised elections in any constituency, to be dragged into the dispute as interested parties in challenges like the one at hand. Secondly, and as I have found, the appellant was partly to blame for the predicament he now finds himself in, due to his failure to cite parties who had a real and substantial interest in the application that he filed before the court *a quo*.

3. Costs

The first, second and third respondents have prayed that the application be dismissed with costs. The appellant, on the other hand, prays that there be no order as to costs, in the event that the appeal is unsuccessful. He contends that the appeal was important in that he sought to have the law clarified on whether a *lacuna* existed in our law relating to the applicability of s 70(4) of the Act.

I am not persuaded that the issue of the alleged *lacuna* in the law was a more important point for determination, than the other issues raised in this appeal. I find, in any case, that even though the appellant was successful on the ground relating to the court *a quo*'s jurisdiction to hear the matter on the merits, he would still have had to confront the hurdle posed by his failure to cite all the necessary parties to the dispute. Accordingly, I see no reason for departing from the general rule that costs follow the cause.

In the result it is ordered as follows;

The appeal be and is hereby dismissed with costs.

ZIYAMBI JA: I agree

GUVAVA JA: I agree

Messrs Maunga, Maanda & Associates, appellant's Legal Practitioners

Nyika, Kanengoni & Partners, 1st, 2nd & 3rd appellants' legal practitioners

Mandizha & Company, 4th respondent's legal practitioners