

1. **LYTON MAGWIZI**

EC 07/23

Versus

PRESIDING OFFICER OF THE NOMINATION COURT

And

**CHIEF ELECTIONS OFFICER
ZIMBABWE ELECTORAL COMMISSION**

And

**THE CHAIRPERSON
ZIMBABWE ELECTORAL COMMISSION**

And

ZIMBABWE ELECTORAL COMMISSION

2. **LOVEMORE MAGAYA**

EC 08/23

Versus

PRESIDING OFFICER OF THE NOMINATION COURT

And

**CHIEF ELECTIONS OFFICER
ZIMBABWE ELECTORAL COMMISSION**

And

**THE CHAIRPERSON
ZIMBABWE ELECTORAL COMMISSION**

And

ZIMBABWE ELECTORAL COMMISSION

3. **TAKWANA MAVHURERE**

EC 09/23

Versus

PRESIDING OFFICER OF THE NOMINATION COURT

And

**CHIEF ELECTIONS OFFICER
ZIMBABWE ELECTORAL COMMISSION**

And

**THE CHAIRPERSON
ZIMBABWE ELECTORAL COMMISSION**

And

ZIMBABWE ELECTORAL COMMISSION

4. MARVELOUS MUYEZI

EC 10/23

Versus

PRESIDING OFFICER OF THE NOMINATION COURT

And

**CHIEF ELECTIONS OFFICER
ZIMBABWE ELECTORAL COMMISSION**

And

**THE CHAIRPERSON
ZIMBABWE ELECTORAL COMMISSION**

And

ZIMBABWE ELECTORAL COMMISSION

IN THE ELECTORAL COURT OF ZIMBABWE
KABASA J
BULAWAYO 25 AND 27 JULY 2023

Electoral Appeal

J. Bamu, for the appellants
T M Kanengoni, for the respondents

KABASA J: This judgment relates to the appeals filed by the four appellants against the decision of the Nomination Court to reject their nomination for the Vungu National Assembly Constituency, the Gokwe Central National Assembly Constituency, the Gokwe Chireya National Assembly Constituency and Gweru Urban National Assembly Constituency, respectively. All the appeals raised the same issues and so were consolidated with the consent of the parties.

The Nomination Court sat on 21 June 2023 at the Magistrates Court Gweru and the appellants' nomination papers were rejected notwithstanding a press statement issued by the fourth respondent acknowledging challenges with payment of nomination fees and inviting those affected to seek redress.

The appellants were aggrieved by the rejection of their nomination papers and attacked the decision on the following grounds:-

1. The first respondent erred in rejecting appellants' nomination papers when appellants were within the nomination court, ready with their payment but fourth respondent's payment system failed to process the payment.
2. The first respondent erred in rejecting appellants' alternative proposition to effect a USD cash payment through fourth respondent at its head office in Harare before the adjournment of the nomination court sitting given the difficulties in the banking system.
3. The first respondent erred in rejecting appellants' nomination papers when sufficient evidence had been presented that a deposit of the prescribed nomination fee had been paid through a USD bank transfer.
4. Even assuming that the funds had not yet reflected in fourth respondent's bank account, the 1st respondent erred in rejecting the nomination papers in circumstances where there had been substantial compliance with the provisions of the nomination requirements in line with section 46 (11) (b) of the Electoral Act [Chapter 2:13]. This is more-so when the funds have now reflected in fourth respondent's account.
5. Even after the fourth respondent confirmed that the funds paid were cleared in their account, and fourth respondent issued a press statement on 22nd of June 2023 noting with concern reports to the effect that prospective candidates were

disqualified from lodging their papers on account of difficulties experienced in effecting payments of nomination fees largely due to the current challenges within the banking system, calling upon the affected candidates to approach the respective nomination courts no later than 1600 hours on 22 June 2023, first respondent erred in rejecting the appellants' nomination papers.

6. In the alternative, 1st respondent erred in rejecting the nomination papers in circumstances where there had been substantial compliance with the provisions of the nomination requirements in line with section 46 (11) (b) of the Electoral Act, [Chapter 2:23]. This is more-so when the fault could not be attributed to the appellants but to fourth respondent's banking payment system that failed.

The appellants' prayer is that:-

1. The decision of the first respondent to reject appellants' nomination as a candidate for election to Vungu, Gokwe Central, Gokwe Chireya and Gweru Urban National Assembly Constituencies for the purposes of the election of the two hundred and ten members of the National Assembly referred to in section 124 (1) (a) of the Constitution set for 23 August 2023 by virtue of Proclamation 4 of 2023 published in Statutory Instrument 85 of 2023 be and is hereby set aside.
2. Appellants be and are hereby declared as having been validly nominated as candidates for election to Vungu, Gokwe Central, Gokwe Chireya and Gweru Urban National Assembly.
3. Respondents be and are hereby ordered to take all the necessary steps to ensure that appellants are recorded as candidates for election to Vungu, Gokwe Central, Gokwe Chireya and Gweru Urban National Assembly Constituency for the purposes of the election of the two hundred and ten members of the National Assembly referred to in section 124 (1) (a) of the Constitution set for 23 August 2023 by virtue of Proclamation 4 of 2023 published in Statutory Instrument 85 of 2023 as is reflected as such on election day.
4. The costs of the appeal shall be borne by the respondents.

The background facts, except for the reason which led to the rejection of the appellants' nomination papers are largely common cause. These are they:-

The appellants presented themselves for nomination as candidates for the respective four National Assembly Constituencies as shown earlier on in this judgment. On presenting the nomination papers the first respondent rejected them due to non-payment of the nomination fee. It is also common cause that a press statement was issued by the fourth respondent on 22 June 2023 to the effect that prospective candidates who had been disqualified on account of difficulties experienced in the banking system should approach the respective nomination courts no later than 1600hrs on 22 June 2023. The appellants sought to rely on this press statement with no joy.

The issue is whether the appellants fell within the category of those prospective candidates covered by the press statement.

Mr Bamu, for the appellants contended that the appellants fully complied with the statutory requirement in terms of s46 and s47 of the Electoral Act. They attempted to pay the nomination fees using the POS platform but failed. They then acted upon the press statement issued by the fourth respondent and made an application for funds transfer on 22 June which funds then reflected in the fourth respondent's account on 23 June 2023. Counsel further argued that the respondent's response to the appeal acknowledged the reason for the failure to pay the fees as advanced by the appellants, that is the failure of the POS platform.

Counsel further argued that s46(10) states when a nomination paper can be rejected and the first respondent failed to abide by the provisions of the statute when he rejected the appellants' papers. This is so, so counsel argued, because there is a distinction between a nomination paper and a nomination fee. The nomination paper was rejected for a reason not provided in s46(10) and this was a misdirection. This is a process which starts with acceptance of the nomination paper then payment of the fee. The nomination paper ought therefore to have been accepted and the candidate deemed not nominated upon failure to pass the second stage of payment of the requisite fee.

Mr Kanengoni for the respondents was of a different view and contended that by contending that the first respondent fell outside the provisions of s46(10) the appellants were taking themselves out of court as that would mean they have no right of appeal where the rejection is in terms of s46(10) or s46(19) of the Act.

Counsel further submitted that the respondents' contention was that no attempt was made to use the POS platform and that is why there was no error receipt as such machine was

never used for purposes of payment. The appellants were 4 out of 8 candidates representing the UZA party but US\$ payments were only available for 4 which was paid leaving out the four appellants resulting in an endorsement of the nomination paper to the effect that: “Candidate not sponsored by given party in terms of financing.” The failure to pay nomination fees was therefore the reason for the rejection of the nomination papers.

As regards the two tier process explained by Mr *Bamu*, counsel submitted that the two are not separate actions but one process which starts with the validity of the nomination paper followed by the payment of the nomination fee. If the fee is not paid even if all other requirements are met the nomination paper is rejected. The appellants did not fall under the people covered by the press statement and sought to profit from a set of affairs that did not relate to them.

These submissions are clearly not in sync as regards what happened at the nomination court. It therefore has to be determined as to what exactly the appellants did on the nomination day. In the heads of argument, Mr *Bamu* submitted that at the time the appellants presented the nomination papers, they tendered copies of the bank transactions in which the bank was instructed to credit the respondents with the full amounts required as nomination fees for the purposes of section 47 of the Electoral Act [Chapter 2:13].

It is for this reason that I decided not to consider each ground of appeal in turn for the very reason that the only issue relates to what happened on nomination day and the answer to that decides whether the appellants have made a case for the relief they seek.

Had this been the position all this court would have to decide is whether the submission of the copies of the bank transactions sufficed as proof that nomination fees had been paid.

Section 47 of the Electoral Act provides that:-

“At the same time as the nomination paper is lodged in terms of section 46 there shall be deposited with the nomination officer, by or on behalf of the person nominated, such nomination fee as may be prescribed, which shall form part of the funds of the Commission.”

In *Valerio v Presiding Officer of the Nomination Court & 8 Ors* HH 432-23 the appellant presented her nomination papers together with the statement from her bank showing transfer details of the transaction she had done. That documentation was availed to the court in light of the press statement already alluded to and the court found that the bank transaction presented by the appellant constituted proof of payment.

Mr Kanengoni, counsel for the respondents, contended that the *Valerio* case is distinguishable in that the appellants *in casu* did not fall within the category of the people covered by the press statement of 22 June 2023 whilst *Mr Bamu* contends that the appellants' circumstances dovetail with the *Valerio* situation and so their nomination papers ought to have been accepted.

I find *Mr Kanengoni's* argument persuasive for the following reasons:-

The appellants aver that on the nomination day they presented their papers ready with the payment and would have paid but for the fourth respondent's payment system which failed to process the payment.

If this was so an error receipt would have been generated and would have been ample proof of such failure. However in response to a question posed by the court, *Mr Bamu* appeared to suggest that no attempt was ever made to use the P.O.S system and so no error receipt would have been generated. This appears to be at variance with the appellants' assertion that such payment system failed.

Equally puzzling is the assertion that on presenting their nomination papers the appellants tendered copies of the bank transactions in which they were instructing their bankers to credit the respondents with the full amounts prescribed as nomination fees.

Had such bank transactions been availed, the appellants would have been in the same category as *Valerio* and such documents would have been availed to the court.

It is a contradiction in my view and an irreconcilable one to say in one breath the appellants were ready with payment but for the fourth respondent's payment system which failed to process the payment and in the same breath assert that on presentation of the nomination papers copies of the bank transactions instructing such bank to credit the respondents' account were also presented. It is either the appellants sought to pay using the POS machine or they had already paid through the bank. It cannot be both.

Granted the respondents in their reply to the appeal appeared to suggest that the application for transfer of funds to the fourth respondent without the corresponding confirmation of whether such had been effected by the bank was not proof of payment of the nomination fees. Whilst this assertion appears to acknowledge that an application for transfer of funds was presented, the appellants' lack of coherence on what exactly it is they did in fulfilment of the requirement to pay nomination fees defeated their cause. The basis of the

appeal cannot possibly change depending on the response. Put differently if the rejection of the nomination papers was due to a failure of the POS machine to process the payment that reason stands no matter how the respondents respond. Equally, if the rejection of the nomination papers was because the first respondent insisted on a confirmation of the transfer and not the instruction to the bank to transfer money from the appellants' account to the fourth respondent's account such would not change and all the appellants needed to do, like Valerio, was produce the bank instruction document. Such a document would have shown that the rejection was ill-advised as the bank would not have accepted the instruction when the account had no money to effect the payment.

In any event why produce a receipt showing a successful transfer of US\$4000 on 23 June 2023 and relating to some other UZA candidates? That receipt which was filed of record shows a successful transfer on 23 June and cannot possibly be a confirmation of the receipt of money into the fourth respondent's CBZ account as that would be for the CBZ to know not the transferring bank.

The issue of whether there was compliance with s47 or substantial compliance only comes in where it has been shown that the appellants were failed by the system or that they had a bank transfer instruction which in light of the press statement and the decision in *Valerio (supra)* would have brought them within the category of the persons covered by the fourth respondent's press statement.

In *Muzenda v Kombayi & Anor* 2008 ZWHHC 47 KUDYA J (as he then was) articulated what it is the court considers in a matter which involves compliance with a peremptory provision. The issues to consider are:-

1. The relevant legislation
2. What actually happened
3. Whether the provisions of the relevant legislation were substantially complied with and
4. Whether there was any prejudice as a result of the non-compliance.

The foregoing is only relevant where there has been some compliance with the legislation. Section 46 of the Act lists what a candidate for election as a constituency member of the National Assembly must comply with. Tied to section 46 is section 47 which then

requires a candidate who has successfully met the section 46 requirements to deposit the nomination fee at the same time that he/she lodges the nomination papers.

Mr Bamu's submission that the two provisions amount to a process wherein the successful completion of one entitles the candidate to acceptance of nomination papers followed by the payment of nomination fees which is the second phase finds no favour with me. I am persuaded by *Mr Kanengoni's* argument that the two are one process, the success of one must also include the success of the other for a candidate to be successfully nominated.

The wording of s 47 could not be clearer. The golden rule of interpretation dictates that the words of a statute must be given their ordinary grammatical meaning unless to do so would lead to an absurdity. (*Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings* HH 302-2011).

A receipt generated by Stanbic Bank with transaction ID 31720526 for US\$4 000 which was transferred into the fourth respondent's CBZ account shows June 23, 2023 as the date of such transaction. Whilst the candidates reflected thereon are not the appellants *in casu*, *Mr Bamu* submitted that the receipt's relevance was in that it showed the transfer of money into the respondents' account as nomination fees. Why would the date be reflected as 23 June 2023 if as at 21 June 2023 the appellants are said to have presented a bank instruction to their bank. The receipt therefore does not go to show that payment was made on date of nomination or that it was a receipt generated following the 21 June 2023 instruction. In any event that 21 June 2023 instruction would have been the document relevant to show the correctness of the appellants' narrative.

Where there has been a failure to comply with a peremptory provision the court cannot possibly look at whether there was prejudice. This may be relevant when it involves service of process and adherence to time limits (*Muzenda v Kombayi & Anor (supra)*) but not a complete failure to pay nomination fees on submission of the nomination papers. To read into the legislative provision that a payment done days later is a valid payment because it was still made is to seek to adopt an interpretation not intended by the law maker. I say so because such an interpretation is tantamount to saying a candidate can lodge their papers with an assurance that the nomination fee, which the candidate does not have at the time, would be paid in due course.

The contention by *Mr Kanengoni* that the 4 appellants were among 8 who required payment of nomination fees but payment for 4 was available and was duly paid appears to find support on the papers. More so as the appellants' story as to what happened on nomination day lacks consistency as already demonstrated elsewhere in this judgment.

To answer the question I posed earlier, the appellants have not shown that the press statement of 22 June 2023 covered their circumstances. That press statement was not meant to give a second chance to those who were not in funds on 21 June 2023 to pay when such funds were subsequently availed.

The appellants have therefore not made a case for the relief they seek.

In the result I make the following order:-

The appeal by each of the four appellants be and is hereby dismissed with costs.

Mbidzo, Muchadehama & Makoni c/o Ncube-Tshabalala Attorneys, appellants' legal practitioners
Nyika and Kanengoni, respondents' legal practitioners