1. **SOMEBOODY MACHAYA vs PRESIDNG OFFICER OF THE NOMINATION COURT AND 3 OTHERS**

2. **YOTAM JACOB vs PRESIDING OFFICER OF THE NOMINATION COURT AND 3 OTHERS**

3. **ALEC KASERERA vs PRESIDNG OFFICER OF THE NOMINATION COURT AND 3 OTHERS**

4. **TAWANDA KADOZORA vs PRESIDNG OFFICER OF THE NOMINATION COURT AND 3 OTHERS**

5. **COLLIN CHIRUME vs PRESIDNG OFFICER OF THE NOMINATION COURT AND 3 OTHERS**

6. **SAUL CHINYAMUJIKO vs PRESIDNG OFFICER OF THE NOMINATION COURT AND 3 OTHERS**

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 5 July 2023

Electoral Appeals

J Bhamu, for the applicant
T. M. Kanengoni, for respondents

MUZENDA J: All the six consolidated records are appeals in chambers filed pursuant to the provisions of s 46(19)(b) of The Electoral Act [Chapter 2:13] as read with r11 of the Electoral [Applications, Appeals and Petitions] Rules 1995 S.I 74A of 1995 where appellants seek the following relief as per their draft:

> "(i) *The decision of the first respondent to reject Appellant's Nomination as candidates in Manicaland Province for the purpose of the election of the Two Hundred and Ten members of the National Assembly referred to in s 124(1)(a) of the Constitution set for 23 August 2023 by virtue of Proclamation 4 of 23 published in Statutory 85 of 2023 be and is hereby set aside.*
>
> *(ii) Subject to Appellants being afforded an opportunity to pay the prescribed nomination fee, within four(4) days of this order having been made and served on the parties, Appellants be and are hereby declared as having been validly nominated as candidates for the respective constituencies in Manicaland*

Province for the purposes of the election of the Two Hundred and Ten members of the National Assembly referred to in s 124(1)(a) of the Constitution set for 23 August 2023 by virtue of Proclamation 4 of 2023 published in S.I 85 of 2023.

(iii) Respondents be and are hereby ordered to take all necessary steps to ensure that Appellants are recorded as candidates for elections in their respective intended Constituencies in Manicaland Province for the purposes of the election of Two Hundred and Ten Members of the National Assembly referred to in s 124(1)(a) of the Constitution set for 23 August 2023 by virtue of Proclamation 4 of 2023 published in S.I 85 of 2023 and is reflected as such on election day.

(iv) The costs of the Appels shall be borne by the Respondents."

The Parties

First Applicant **Somebody Muchacha**, is vying for a National Assembly Constituency post for Buhera South representing Citizens Coalition for Change ("CCC"). Second Applicant, **Yotam Jacob** from the same party, was also desirious of contesting in Chipinge Central as a Member of Parliament. Third Applicant **Alec Kaserera** wanted to run for Mutare South National Assembly under CCC. Fourth Applicant **Tawanda Kadozora** from the same political party wanted to run for Nyanga South National Assembly. The fifth Applicant **Collin Chirume** had interest in Buhera North National Assembly under CCC. The sixth Applicant **Saul Chinyamujiko** had interests to run for Buhera Central National Assembly under the political affiliation of CCC. All the 3 Respondents are office bearers of the fourth Respondent Electoral Commission. All the six applicants were legally represented by one Counsel, equally so for all 4 Respondents.

Background

On 21 June 2023 all the six appellants attended Nomination Court which was sitting at Manicaland Mutare Magistrates Court, No. 102, 4 Main Street, Mutare. All six appellants presented their nomination papers to the Presiding Officer and papers indicating that a deposit of the prescribed nomination fee had been paid through a ZWL transfer and that the funds had reflected in fourth respondent's (Zimbabwe Electoral Commission) account. The Presiding Officer, first respondent, rejected appellants' nomination papers principally because in first respondent's view, appellants had not satisfied the requirements of s 47 of the Electoral Act, dealing specifically with payment of the nomination fees. First respondent caused all six

appellants to append their signatures on the rejected Nomination papers. Aggrieved by the rejection, appellants filed their appeals with this court on 25 June 2023.

GROUNDS OF APPEAL

The appellants spelt their grounds as follows:

(i) The first respondent erred in rejecting Appellant's nomination papers when sufficient evidence had been presented that a deposit of the prescribed nomination fee had been paid through a ZWL bank transfer.

(ii) Even assuming that the funds had not yet reflected in fourth Respondent's Bank Account, the first Respondent erred in rejecting the Nomination papers in circumstances of where there had been substantial compliance with the provisions of the nomination requirements in line with s 46(11)(b) of the Electoral Act [*Chapter 2:13*]. This is moreso when the funds have now reflected in fourth respondent's account.

(iii) After the fourth respondent confirmed that the funds paid were cleared in their account, and fourth respondent issued a press statement on 22 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 respective Nomination Courts no later than 1600 hours on 22 June 2023. First respondent erred in rejecting the appellants' nomination papers.

Respondents' Response to Grounds of Appeal

Respondents confirm that appellants attended the Nomination Court and all of them sought to use RTGS system of payment for nomination fees. All presented an application for transfer of funds to fourth respondent but none of the appellants had a corresponding confirmation to show whether the application had been effected by the banks. To the respondents, all appellants did not substantially comply with the provisions of s 46 of the Electoral Act as they were unable to present the proof of payment to the first respondent on the nomination day. Respondents contend further that reliefs sought by appellants in paragraphs (ii) of the notice of appeal contradicts the grounds of appeal in that it requests that the appellants

be allowed four days to effect payment of nomination fees when all allege that they had done so on the 21 June 2023. All in all respondents aver that all the appeals lack merit as well as appellants failed to satisfy the peremptory requirements of nominations on the nomination days required under ss 46 and 47 of the Electoral Act [*Chapter 2:13*] and pray that all the appeals be dismissed with costs.

Submissions by Counsel for Appellants

On the date of hearing parties agreed that since all the heads of arguments for appellants were identical with the exception only of the name of each appellant, the records be consolidated and submissions be made at once and the decision of one appeal would apply to the others. The facts, the law and content of the appeal indeed necessitated this approach. This is an appropriate case of consolidation since all the appellants were represented by one legal practitioner and the respondents were also using one legal practitioner.

Mr *Bhamu* for the appellants indicated that he would abide by the filed heads and added that a court seized with an appeal of this type is empowered to confirm, vary or reverse the decision of the verification officer. All appellants are seeking a reversal of the decision of the nomination officer and seek the variation to the extent of accepting them as valid, that is by accepting all the appellants' nomination papers and availing them as duly nominated for the election in question. Counsel for appellants added that it is trite that there must be compliance with statutory provisions in so far as electoral matters are concerned and cited the case of (1) *Mabika* v *Manyika*, (2) *Muchangi* v *Goto*, (3) *Muchenga* v *Zhanda*, (4) C*hengahomwe* v *Katsande* and (5) *Nhota* v *Jembere* (HH 67/08).

Appellant's Counsel went to add that though the Act makes it mandatory that the nomination fee be deposited with the nomination officer at the same time that nomination forms are lodged, it does not define the phrase "**deposited with**". He emphasized that appellants' appeal is anchored on this critical definition or interpretation of the phrase "deposited with" and the appeals succeed or fall on these two words, that is whether the nomination fees of the appellants were deposited with the nomination officer as contemplated by s 47 of the Act or not.

Mr *Bhamu* extracted a definition from the Corporate Finance Institute of the word "deposit" and quoted the definition: thus

> "*Deposit is a term used to denote the money kept or held in any bank account, especially to accumulate interest. The fund used as a security to get the goods delivered can also be called*

> *a deposit. Any transaction processed to transfer money to an entity for safeguarding can be referred to as a deposit*"[1]

Counsel for appellants proceeded to cite s 2 of the Banking Act [*Chapter 24:20*] which defines "deposit" as follows:

> "*Deposit" means an amount of money, whether made of Zimbabweans or foreign currency or both, cheques or other non-negotiable instruments, which a banking institution accepts for credit to an account in its books or in those of another banking institution inside or outside Zimbabwe*."

Having defined the word "deposit" appellants contend that they instructed their bankers to credit a portion of those funds into respondents' account to hold as nomination fees and issued a stamped copy receipt confirming that an RTGS instruction to credit the fourth respondent's account had been accepted by the bank. Once appellants completed that instruction they cease to control what happens in the banks. Appellants added further that as the appeals were being heard it was then common cause that all the transfers had successfully reflected in fourth respondent's bank account. Respondents, appellants further submitted, do not deny this position and the court must take it as admitted and Counsel referred this court to the matter of *Fawcett Security Organisation* v *Director of Customs and Excise*.[2] Appellants then urged the court to hold that at the time appellants filed the deposit confirmation on 21 June 2023, they all met provisions of s 47 of the Act. Alternatively appellants further contended that appellants substantially complied with the statutory requirements as per s 46(11)(b) of the Electoral Act and urged the court to make a finding that the nomination court ought to have been accepted by first respondent. He went on to cite the case of *Sterling International Ltd* v *Zulu* [3] where the Supreme Court held that:

> "*The categorisation of an enactment as "peremptory" or "directory" with the consequent strict approach that if it be former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour. As was pertinently observed by VAN DEN HEEVER J (as he then was) in Lion Match Company v Wessels 1946 OPD 376 at 380 the criterion is not the quality of the command but the intenion of legislator, which can only be derived from the words of the enactment in general plan and objects. The same sentiment was addressed by MILNE J in JEM Motors Ltd v Boutle and Another 1961(2)SA 320 (N) at 327 in fine 328 B. this approach received imprimatur of the South Africa Appellate Division in Maharaj and Others v Rampersad 1964(4)SA 638(A)*."

[1] https:///corporatefinanceinstitute.com/resources/wealth-management/deposits/.
[2] 1993 (2) ZLR 121 (SC).
[3] 1998 (2) ZLR 293(S) at 301B per GUBBAY JA (as he then was)

Appellants submitted further that they had substantially complied with the electoral legislation. Appellants went on further urging the court to take judicial notice of the fact that an application for transfer of funds will not be accepted by the bank if the account is not sufficiently funded. Further it must be judicially noted that banks have a cut off time for deposits for electronic funds transfers to be processed into the receiving bank, and if requests are made after the cut off time, the funds can only reflect in the receiving account the next morning. Appellants concluded their submission by stating that if the nomination papers are accepted as valid respondents suffer no prejudice and prayed for the upholding of the appeal with costs.

Mr *Kanengon*i submitted on behalf of the respondents that nomination of candidates took place after the Presidential proclamation of 30 May 2023 and set a nomination date for the nomination court to sit and that was 21 June 2023 and no other date and candidates had up to 4pm to comply with the requirements of s 47 of the Electoral Act. He added that all the requirements had to be met on the proclaimed nomination date. Respondents' Counsel emphasized that the signing of the nomination papers and payment of nomination fees by appellants should be done contemporaneously on the nomination day. He cited s 46(15)(c) of the Electoral Act and submitted that a candidate cannot sign on the day and make payments on another date. As such by close of nominations on 21 June 2023 first respondent did not have appellants' nomination fees. He further added that whether the funds later reflected on 22 June 2023 is of no moment. To the respondents a mere application made to a bank by appellants for the bank to process a transfer is not compliance. In terms of s 46 of the Electoral Act, respondents further argued it cannot be interpreted that a process outside the nomination day will meet the requirements of the law. Counsel added that an application for transfer of funds can succeed or fail due to various reasons hence an application for transfer cannot constitute a payment. Respondents averred that for first respondent to validate the nomination papers he or she should have in his or her custody all the papers and payments by close of business on the appointed date of sitting of the nomination day. The cited s 46(11)(b) by the appellants in their heads would not be said to have been substantially complied with if first respondent had not received confirmation of transfer or deposit done on behalf of the appellants in principle, all appellants failed to meet the peremptory requirements of ss 46 and 47 of the Electoral Act. Respondents dissuaded the court from interfering with first respondent's decision on appeal especially on factual issues unless the first respondent's decision was outrageous, devoid of logic and not sensible and quoted the case of *Hama v NRZ* 1996 (1) ZLR 664. In any case,

respondents submitted further, all appellants affirmed and countersigned on the nomination papers their failure to make timeous payments of their fees, otherwise they were to object by way of withholding their signatures before first respondent.

On the aspect of prejudice the respondents submitted that the prejudice on respondents is ingrained on the aspect of legality, all what appellants were reasonably expected was to strictly and jealously abide by the law. By signing the rejected papers by first respondents, appellants confirmed by conduct that they did not meet the requirements pertaining to payment of nomination fees. On the aspects of judicial notice to be taken by the court on the intricacy of electronic transfers, respondents' view is that appellants should have resorted to alternative banking systems available in the country. Where payment of nomination fees is central to nomination, failure to do so militates against compliance, respondents averred. They move for the dismissal of the appeals.

The Law

Rules 11-13 of Electoral (Applications, Appeals and Petitions) Rules, 1995, S I 74A of 1995, provide for appeals regarding nomination of candidates. The requirements of an electoral appeal, the right of the respondent to reply, dates of hearing of the appeal and type of parties who should attend the hearing. Rule 13 provides further that the Registrar shall fix a date for hearing the appeal and shall give not less than five (5) days' written notice of the date to the appellant, the person presiding at the nomination court concerned, the Registrar General and where practicable, to every person who was declared to have been duly nominated or elected at the close of the sitting of nomination court.

Section 46 (7) provides as follows:

"*(7) No nomination paper shall be received by the nomination officer in terms of subsection (6) after four o'clock in the afternoon of nomination day or where there is more than one nomination day for the election concerned, the last such nomination day*."

Section 46(11)(b) provides that:

"*Without derogation from section one hundred and eighty-nine, the nomination officer shall not reject any nomination paper-*

(a) ……

(b) *on account of any other imperfection in the nomination paper if the nomination officer is satisfied that there had been substantial compliance with this section.*"

Section 189 alluded to in s 46(11)(b) provides:

"*S 189 Validation of certain documents despite misnomer or inaccurate description.*

No misnomer or inaccurate description of any person or place in any voters roll or in any list, nomination paper, ballot paper, notice or other documents required for the purpose of this Act shall affect the full operation of the document with respect to that person or place where the description of the person or place is such as to be commonly understood."

Section 46(15)(c) provides:

"(15) A candidate shall not be regarded as duly nominated for election as a constituency member if –
(a) ……..
(b) ……..
(c) *the sum referred to in subsection (1) of Section forty-seven was not lodged with his or her nomination paper; or*"

Section 46(19) provides:

"(19) if a nomination papers had been rejected in terms of subsection (10) or been regarded as void by virtue of subsection (16)-
(a) the nomination officer shall forthwith notify the candidate or his or her chief election agent, giving reasons for his or her decision, and
(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 nomination officer and there shall be no appeal from the decision of that judge; and……."

Section 47 provides:

"*47. Nomination fee*
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 fees as may be prescribed which shall form part of the funds of the commission." (my own emphasis).

Section 3(1)(b) of Electoral (Nomination of Candidates) Regulations, 2014 S I 153 of 2014 provides a clearer position of the subject on fees, thus:

"*Fees on nomination*
3(1) The nomination fee of a candidate for election-
(a) to the office of President in terms of s 105 of the Act is a sum of one thousand United States dollars payable in cash or by bank artified cheque;
(b) *as a constituency member of the National Assembly in terms of Section 47 of the Act is a sum of fifty United States dollars payable in cash.*" (my own emphasis)

Statutory Instrument 144 of 2022, Electoral (Nomination of Candidates) (Amendment) Regulations, 2022 (No.1) amended S.I 153 of 2014, more relevantly relating to nomination of candidates in the National Assembly paragraph 2(b) of the regulations provides:

> *"(b) Subsection (1)(b) by the deletion of "a sum of fifty United States dollars" and the substitution of "a sum of one thousand United States dollars or payable in Zimbabwean local currency at the official market rate."*

In dealing with an approach to be taken by a court of appeal in matters concerning decisions of tribunals or quasi-judicial officers akin to the first respondent, the Supreme Court in the case of *Hama v National Railways of Zimbabwe*[4] held as follows:

> "*Although a decision of the Labour Relations Tribunal can only be brought on appeal on a question of law, its decision on question of fact can be attacked if there is a serious misdirection on the facts, amounting to a misdirection in law. For an appellant to avail himself of a misdirection as to the evidence, the nature and circumstances of the case must be such that it is reasonably probable that the Tribunal would not have determined as it did had there been no misdirection. In other words, the decision must have been irrational in the sense of being so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question could have arrived at such a conclusion*." (my own emphasis).

Issue for determination

Whether the Presiding officer misdirected himself in rejecting appellants' nomination papers on the basis of non-confirmation of application for transfer of funds for nomination fees stipulated in s 47 of the Electoral Act?

Analysis of the Law and facts

It is common cause that all appellants were fully appraised of the requirements of s 47 of the Electoral Act [*Chapter 2:13*] that in terms of S.I 144 of 2022 they were required to pay "*a sum of one thousand United States dollars or payable in Zimbabwean local currency at the official market rate*." All appellants contend that on 21 June 2023, the Nomination date, they produced applications made to their banks to effect transfer into the account of the Zimbabwe Electoral Commission, fourth respondent. Once such an application for an electronic transfer was produced to first respondent, they submitted, first respondent should have accepted appellants nomination papers. It must be noted with great circumspection that s 3(1)(b) of the amended S.I 153 of 2014 clearly and specifically spoke of "*cash*" payment to the first respondent. Section 47 especially provides "*there shall be deposited with the nomination officer…….such nomination fee as may be prescribed*." "*Deposit*" implies "discharge, settlement, clearance, liquidation or amortization." In other words a deposit contemplated in s

[4] Supra at p.65 B-C

47 of the Electoral Act alludes to full settlement of the one thousand United States Dollars by appellants with the nomination officer.

Appellants cites the definition of "*deposit*" as provided for in Corporate Finance Institute to denote the money "*kept or held in any bank account*" or "*any transaction processed to transfer money.*" I am not persuaded by the appellants that "*any transaction processed to transfer money to an entity*," would meet the intention of the legislation to squarely meet the phrase "*there shall be deposited with the nomination officer*." In my view "*shall be deposited with*" implies payment in cash or producing an already processed and confirmed deposit into the account of the nomination officer or Zimbabwe Electoral Commission. As well provided by s 2 of the Banking Act, deposit means an amount of money "*which a baking institution accepts for credit*" and in this case a "deposit" is an amount of money which a nomination officer accepts for credit to his or her account.

An application for a bank transfer made by the appellants remains an application which can be rejected. Only a successful electronic transfer into the account of the nomination officer meets the requirements of s 47 of the Electoral Act. I am unable to accept therefore the arguments by the appellants that first respondent erred in concluding that appellants had not made a proper deposit into first respondent banking account by 4 o'clock in the afternoon on 21 June 2023.

If the funds eventually reflected in fourth respondent's bank on 22 June 2023 by then the contemporaneity of filing the nomination papers as well as the depositing of the fees with the first respondent had passed. By 21 June 2023 all appellants had failed to meet the requirements of s 47 of the Electoral Act.

It is trite that when interpreting statutes words must be given their ordinary grammatical meaning within the text in which they are used unless that would result in an absurdity. In the case of *Thandakile Zulu* v *ZB Financial Holdings (Private) Limited* [5] the Supreme Court held as follows:

> "*The rules of statutory interpretation dictate that the words of a statute shall be given their ordinary grammatical meaning unless doing so leads to an absurdity. In the case of Venter v Rex 1907 TS 910, INNES CJ said the following:*
>
> > *'……it appears to me that the principle we should adopt may be expressed somewhat this way: that when to give plain words of a statute their ordinary grammatical meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it could lead to a result contrary to the intention of the legislature, or as shown by the context or by such other consideration as this court is*

[5] SC 48/18

> *justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect of the words to the extent necessary to remove the absurdity and to give effect to the intention of the legislature.*[6]"

The unambiguous provision of s 47 of the Electoral Act requires a candidate to simultaneously and contemporaneously lodge his or her papers together with the required deposit for nomination fees with the nomination officer before close of nomination period. Once payment is not effected or approved by the transferring bank the papers can be rejected by the nomination court. The decision of first respondent cannot therefore be regarded as outrageous, devoid of logic or against any accepted standards. The first respondent properly in my view read the provisions of s 47 of the Act and made an informed decision.

Appellants urged the court to adjudge that at least appellants substantially complied with s 46. The substantial compliance envisaged in s 46 (11)(b) in my view relates to specifically the nomination paper, on the details captured by a candidate and written on the nomination paper. Section 46 (11)(b) is a summation of all the details in s 46(1) to s 46(10) as read with s 189 of the Act dealing with misnomers or wrong appellations or spelling errors which may not affect the validity of a nomination paper. Section 46 does not provide for nomination fees. Appellant's interpretation of s 46(11)(b) is misplaced in my view and would reject appellants' contention that they substantially complied with the provisions of the Electoral Act. Appellants did not comply with s 46(15)(c) of the Act and did not deposit the fees together with their nomination papers. Assuming that I may be wrong on that conclusion, I am more comforted by the nature of relief sought that all appellants be afforded 4 days to make payments of the nomination fees. Asked by the court to clarify this paragraph (ii) of the relief sought counsel for appellants struggled to explain that indeed payments were made and deposits reflected in fourth respondent's account. I have come to a conclusion therefore that given this type of relief sought an inference can be made confirming the respondents' version that appellants did not deposit any money with the nomination officer on 21 June 2023 or any other date after 21 June 2023. In any case even if such a reflection or payment was done it was no longer in compliance with the provisions of the Electoral Act [*Chapter 2:3*].

[6] See also Chegutu Municipality v Manyera 1996 (1) ZLR 262 (S) and Stonewell Searches (Private) Ltd v Stone Holdings and 2 Others SC22/21

Disposition

On 21 June 2023 all appellants did not meet the requirements of s 47 of the Act, they failed to deposit One Thousand United States dollars or its Zimbabwe local currency equivalent with the nomination officer sitting at Mutare. There is no misdirection committed by the nomination officer in rejecting appellants' nomination papers. The appeals have no merit.

Accordingly it is ordered as follows:

(a) All the appeals are dismissed.

(b) Appellants to pay respondents' costs.

Mbidzo Muchadehama & Makoni, appellants' legal practitioners.
Nyika Kanengoni & Partners, respondents' legal practitioners.