REPORTABLE ZLR (24)

Judgment No. SC 25/06
Constitutional Application No. 160/05

(1) CLAUDIOUS MARIMO (2) MOVEMENT FOR DEMOCRATIC CHANGE

v

(1) THE MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS (2) THE ATTORNEY-GENERAL (3) THE CHIEF JUSTICE (4) HERBERT MURERWA

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA, ZIYAMBI JA, MALABA JA & GWAUNZA JA
HARARE, JANUARY 12 & JULY 25, 2006

E Matinenga, with him *E Mushore*, for the applicants

V Mabhiza, with him *C Muchenga*, for the respondents

MALABA JA: This is an application in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") for redress of an alleged contravention of the Declaration of Rights contained in ss 18(1) and 18 (9) of the Constitution.

The right guaranteed to any person under s 18(1) is the right to protection of the law whilst that entrenched in terms of s 18(9) is the right to a fair hearing within a reasonable time by an independent and impartial court established by law.

The first applicant was a candidate for election as a member of Parliament for Goromonzi Constituency in the general election held on 31 March 2005. He was sponsored by the second applicant ("the MDC") which is a registered political party. The seat in Parliament for Goromonzi Constituency was won by the fourth respondent who was a candidate in the general election sponsored by the Zimbabwe African National Union – Patriotic Front ("ZANU-PF").

The Parliamentary elections were conducted in terms of the Electoral Act [*Chapter 2:13*] ("the Act") which came into operation on 1 February 2005. Section 161 of the Act established a new court called the Electoral Court ("the Court") with jurisdiction to hear and determine election petitions and other matters in terms of the Act.

Section 162(1) of the Act provided for the appointment of persons to preside over the court. It reads as follows:

> "162(1) The Chief Justice shall after consultation with the Judge President appoint one or more judges of the High Court to be Judge or Judges, as the case may be, of the Electoral Court."

Section 172 of the Act provided that:

> "172 (1) A decision of the Electoral Court on a question of fact shall be final.
>
> (2) A decision of the Electoral Court on a question of law may be the subject of an appeal to the Supreme Court."

On 15 April 2005 the first applicant filed a petition with the court challenging the validity of the election of the fourth respondent as a member of

Parliament for Goromonzi Constituency. Fifteen other candidates sponsored by the MDC who had lost the election to candidates sponsored by ZANU-PF filed petitions challenging the results in their respective Constituencies.

On 5 May 2005 the Chief Justice, acting in terms of s 162(1) of the Act appointed five judges of the High Court to preside over the court to hear and determine the election petitions. On 23 May the applicants made the application to the Supreme Court attacking the constitutional validity of s 162(1) of the Act. They alleged that the Electoral Court was a "special court" as defined in s 92(4)(b) of the Constitution.

The applicants contended that Parliament ought to have provided that persons to preside over the court had to be appointed in the manner prescribed under s 92(1) of the Constitution. It was their argument that s 162(1) of the Act was inconsistent with s 92(1) of the Constitution. For that reason, they contended that s 162(1) of the Act and the appointments of the judges of the High Court to preside over the court were void. The first applicant alleged that because of the Constitutional invalidity of s 162(1) of the Act and the appointments of the judges to preside over the court the rights guaranteed to him under ss 18(1) and 18(9) of the Constitution were likely to be contravened should the hearing of his election petition commence.

Section 92(1) of the Constitution reads:

"92(1) The power to appoint persons to preside over a special court shall vest in the President, after consultation with the Judicial Service Commission;

provided that Parliament may provide that the Chief Justice may, after consulting the Judicial Service Commission, appoint a person holding the office of judge of the High Court to preside over a special court for such period as he may specify."

A "special court" is defined in s 92(4) of the Constitution to mean:

"(a) the Administrative Court established by s 3 of the Administrative Court Act [*Chapter 7:07*].

(a1) the Fiscal Appeal Court established by s 3 of the Fiscal Appeal Court Act [*Chapter 23:01*].

(a2) the Special Court for Income Tax Appeals established by s 64 of the Income Tax Act [*Chapter 23:06*].

(a3) any court, or other adjudicating authority established by law which exercises any function that was vested in a court referred to in paragraph (a), (a1) or (a2) on the date of commencement of the Constitution of Zimbabwe Amendment (No 15) Act, 1998.

(b) any court or other adjudicating authority established by law other than –

(i) a local court; or
(ii) a court established by or under a disciplinary law or
(iii) a court established by or under an Act of Parliament for the adjudication of small civil claims;

if there is no right of appeal directly or indirectly from a decision of that court or adjudicating authority to the Supreme Court or the High Court;

(c) any court or other adjudicating authority established by law which is declared by that law to be a special court for the purposes of this section."

The application was served on the Chief Justice on 31 May. He appears to have accepted the validity of the contention advanced by the applicants because he thereafter consulted the Judicial Service Commission and the Judge President on the appointment of the judges of the High Court to preside over the court. On 1 June 2005, a letter was sent to each of the judges who had been appointed on 5 May. It reads:

> "It has been brought to my attention that some of the litigants in the electoral petitions are unhappy about your previous appointment as a judge of the Electoral Court because the Judicial Service Commission was not consulted in terms of s 92(1) of the Constitution.
>
> In the event of my appointment of you as a judge of the Electoral Court on 5 May 2005 not being in accordance with the law it is hereby revoked.
>
> Please be advised that I, in my capacity as Chief Justice of Zimbabwe and after consultation with the Judge President and the Judicial Service Commission have appointed you, as a Judge of the Electoral Court with effect from this day the 1st June 2005."

Acting on the authority of the letter of appointment some of the judges refused applications by the petitioners to suspend the hearing and determination of the election petitions pending determination of this application. They also refused requests by the petitioners to refer the question of the contravention of the declaration of rights arising in that court to the Supreme Court for determination in terms of s 24(2) of the Constitution.

It was contended on behalf of the applicants that the re-appointment of the judges on 1 June 2005 was also invalid because there was no Act of Parliament

authorising the Chief Justice to appoint the judges of the High Court after consulting the Judicial Service Commission and the Judge President. It was further argued that the insistence by the judges presiding over the court to hear and determine the election petitions and the refusal to refer the question of the contravention of the Declaration of Rights which had arisen in those proceedings to the Supreme Court for determination violated the petitioners' right to the protection of the law.

The applicants sought by way of relief a declaratory order in these terms:

"It is declared that:

1.1 The Electoral Court established by s 161 of the Electoral Act [*Chapter 2:13*] falls within the meaning of a "special court" as defined by s 92(4) of the Constitution.

1.2 Accordingly the manner of appointment of judges to it as provided in s 162(1) of that Act be and is hereby declared to be inconsistent with s 92(1) and s 18 of the Constitution.

1.3 The initial appointments made by the third respondent to the Electoral Court without consulting the Judicial Service Commission on the specific appointments are accordingly invalid.

1.4 Additionally any appointments made by the third respondent to the Electoral Court without specifying the period of the appointment are invalid.

1.5 All appointments made by the third respondent to the Electoral Court after consulting the Judicial Service Commission without Parliament having provided for the same are also declared to be inconsistent with s 92(1) and hence s 18 of the Constitution and are accordingly invalid.

2. It is ordered that:

2.1 The appointments made by the third respondent to the Electoral Court, whether made in accordance with s 162 of the Electoral Act [*Chapter 2:13*] or made on 1 June 2005 are a nullity, and set aside."

Only the first and second respondents filed opposing affidavits. The first respondent is the Minister responsible for the administration of the Act. The second respondent was cited because s 24(6) of the Constitution gives him a right to be heard by the court on the question whether any law is in contravention of the Declaration of Rights arising for determination in any proceedings before it.

The contention advanced by the respondents in opposing the application was that the Electoral Court was not a "special court" as defined in s 92(4) of the Constitution. The argument was based on the fact that s 172(2) of the Act gave to a party who felt aggrieved by a decision of the court on a question of law a right of appeal to the Supreme Court. There was a right of appeal from a decision of the court to the Supreme Court (so went the argument). The contention was therefore that Parliament was not obliged, in the exercise of legislative power to provide for the appointment of persons to preside over the court after consulting with the Judicial Service Commission. Consequently the respondents denied that there was any inconsistency between s 162(1) of the Act and s 92(1) of the Constitution.

The first question for determination is whether on a true interpretation of s 172(1) of the Act there was no right of appeal from a decision of the Electoral Court within the meaning of s 92(4)(b) of the Constitution. An affirmative answer to

the question will establish as a fact the applicants' contention that the Electoral Court is a "special court" for the purposes of s 92(1) of the Constitution.

A right of appeal is a matter of substantive law. The fact of its non existence can only be established on the construction of the statute by which the court from a decision of which it is alleged that no right of appeal was created. In this case the fact to be established requires proof of a negative statement to the effect that there is no right of appeal from a decision of the Electoral Court. The contention advanced on behalf of the respondents to the effect that the Electoral Court is not a "special court" because s 172(2) of the Act gives a party aggrieved by a decision of that court a right of appeal on a question of law does not assist in the proof of the negative fact in s 92(4)(b) of the Constitution.

It appears to me that one has to look at s 172(1) of the Act in the determination of the question whether there is no right of appeal from a decision of the Electoral Court. Section 172(1) does not expressly provide that there shall be no right of appeal from a decision of the court on a question of fact. It simply provides that a judgment of that court on a question of fact shall be final. Usually the draftsman adds such words as "and not subject to appeal" to put it beyond doubt that the finality of the decision is not in respect of the court in the exercise of its jurisdiction only but binds the parties as well.

Where Parliament intends to vest a decision of a court with finality as was the case in s 172(1) of the Act, there is no right of appeal. Section 172(1) of the

Act embodies the definitive criterion of a "special court" set out in s 92(4)(b) of the Constitution. There is a decision of the court which would form the subject matter of that provision distinguished from the other type of a decision under s 172(2) of the Act from which an appeal would lie to the Supreme Court by the actual nature of the question on which the appeal would otherwise have lain to the Supreme Court but for the provisions of s 172(1). I accept the submission made on behalf of the applicants by Mr *Matinenga* that the Electoral Court established by s 161 of the Act is a "special court" for the purposes of s 92(1) of the Constitution.

Having established a "special court" under *Chapter VIII* of the Constitution and conferred on it the judicial power to hear and determine election petitions, Parliament was bound by s 92(1) of the Constitution to provide for the appointment of persons to exercise the powers of that court in the manner prescribed by the Constitution. The method of appointment of the persons to preside over a "special court" prescribed under s 92(1) of the Constitution ensured that the same conditions of the discharge of the judicial functions of the court were secured for them as were guaranteed to persons appointed under *Chapter VIII* of the Constitution (dealing with the judiciary) as judges of the High Court.

It is common cause that our Constitution is based on the basic concept of the separation of the powers of the State into the legislative, executive and judiciary spheres. In that regard the Constitution is divided into chapters dealing exclusively with the plenitude of each power and how parts of it may be conferred upon appropriate bodies within its sphere.

Judicial authority is dealt with under *Chapter VIII* of the Constitution. Section 79(1) which commences *Chapter VIII* declares that the judicial authority of the State shall vest in (a) the Supreme Court, and (b) the High Court, and (c) such other courts subordinate to the Supreme Court and the High Court as may be established by or under an Act of Parliament. The hierarchical structure of the courts has the Supreme Court at the apex to supervise the exercise of judicial power by subordinate courts through the system of appeals.

The structure of the distribution of judicial power also shows that the independence of the judiciary is more firmly safeguarded for persons presiding over superior courts, that is to say, the High Court and the Supreme Court than it is for subordinate courts. To that end, judges of the High Court and the Supreme Court are appointed by the President after consultation with the Judicial Service Commission. They have security of tenure in that they can remain in office during good behaviour until they voluntarily resign, retire at the age of sixty five or seventy. The office of a judge of the High Court and the Supreme Court cannot be abolished during his or her tenure of office. His or her salary cannot be reduced.

The two pillars of security of tenure and conditions of service firmly secure for the judges of the superior courts the necessary independence from interference by the other organs of the State that is to say the legislature and the executive in the discharge of judicial functions.

It was for the fundamental purpose of securing, for persons who preside over "special courts", the independence in the discharge of judicial functions of those courts safeguarded by the two pillars of security of tenure and conditions of service, that the framers of the Constitution provided that they be appointed in the manner prescribed under s 92(1) which is one of the provisions of the Constitution falling under *Chapter VIII*.

Once it established a "special court," Parliament was bound by s 92(1) of the Constitution to provide that persons who were to exercise the judicial power vested in that court, be appointed by the **President** after consultation with the Judicial Service Commission or provide in the Act that they be appointed by the Chief Justice after consulting the Judicial Service Commission.

It is clear from the provisions of s 92(1) of the Constitution that consultation with the Judicial Service Commission is a mandatory requirement for a valid appointment of a person to exercise judicial power conferred by Parliament on a "special court". Consultation with the Judicial Service Commission by the **President** or **the Chief Justice** is such an integral aspect of the appointment of a person to preside over a "special court" that without it there cannot be a valid discharge of the judicial functions of that court by the appointee.

The consultation by the **President** or **the Chief Justice** of the prescribed body, and not any one else, is so mandatory that Parliament cannot abridge the provisions requiring its enactment in the statute establishing the special court. In

fact any method of appointment of persons to preside over a "special court" which is different from that prescribed under s 92(1) of the Constitution would be invalid.

Under s 162(1) of the Act, Parliament empowered the Chief Justice to appoint sitting judges of the High Court to preside over the Electoral Court which is a "special court", after consulting the Judge President. It transferred the right to be consulted on the appointment of judges of the High Court to exercise judicial power vested in a "special court" from the Judicial Service Commission to the Judge President. Parliament had no power to do that. It was under a duty to provide that the judges of the High Court were to be appointed to preside over the Electoral Court in the manner prescribed under s 92(1) of the Constitution. Failure to so provide means that s 162(1) of the Act is inconsistent with s 92(1) of the Constitution.

Section 3 of the Constitution provides that the Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with it that other law shall, to the extent of the inconsistency, be void. It must follow that to the extent of its inconsistency with s 92(1) of the Constitution s 162(1) of the Act was beyond the legislative competence of Parliament. The appointment of the judges to preside over the special court in the manner prescribed under s 162(1) of the Act was clearly invalid.

The last question for determination is whether the applicants established the contravention of the fundamental rights protected under s 18(1) and 18(9) of the Constitution as they approached this Court on an application under s

24(1) of the Constitution. The law, the right to the protection of which the applicants alleged they had been deprived of under s 18(1) of the Constitution, was s 92(1) of the Constitution. But for Parliament to purport to make a law which was void by virtue of s 3 of the Constitution did not in my view deprive anyone of the "right to protection of the law." That is the case as long as the judicial system of Zimbabwe provides a procedure, as it does, by which any person interested in establishing the invalidity of a statute, in this case s 162(1) of the Act, can obtain from the courts of justice in which the plenitude of the judicial power of the State is vested, a declaration of the invalidity that would be binding upon Parliament itself and upon all persons attempting to Act under, or enforce, the inconsistent law. Access to a court of justice for that remedy is itself "the protection of the law" to which all individuals including the election petitioners involved in this case would be entitled under s 18(1) of the Constitution. See *Attorney General of Trinidad & Tobago v Mcleod* (1985) LRC 81 (PC) at 90 c – e; *Harrikissoon v Attorney General* 1980 AC 265 at 269, 270.

I am however satisfied that the applicants established the contravention of their right to protection of the law by proving the contravention of the fundamental right guaranteed to them under s 18(9) of the Constitution. There is no doubt that the applicants in their capacity as election petitioners were entitled to a fair hearing and determination of their cases by an independent and impartial court established by law. The Electoral Court had to be a "court established by law" before it could be able to afford the applicants the right to due process and to the protection of the law.

The phrase a "court established by law" incorporated into s 18(9) of the Constitution includes two aspects. It refers to a court as an independent

institution and a repository of judicial power. In that sense the Electoral Court was "established by law" in that it was established by s 161 of the Act the validity of which was not attacked.

The second aspect relates to a court as it is constituted that is when a judge sits to exercise judicial power vested in the court and does so on the authority of a valid appointment. It is in the second sense that the phrase was used to allege a contravention of the Declaration of the Rights contained in s 18(9) of the Constitution. As pointed out earlier, the provision by Parliament for the appointment of the judges of the High Court to preside over the Electoral Court in the manner prescribed under s 92(1) of the Constitution was a necessary condition for validity of the appointments and the exercise by the judges of the jurisdiction of that court.

It must follow, that as the judges were not validly appointed, they had no authority to exercise the judicial power of the Electoral Court at the time they purported to hear and determine the election petitions. In other words, the court in which they sat was not properly constituted and was not a court "established by law." There was a violation of the right guaranteed to the applicants under s 18(9) of the Constitution.

A declaration by a validly constituted court as to the law applicable to a determination in a case becomes the law binding the parties to the proceedings until it is reversed on appeal. In that way the court affords to the parties the right to protection of the law. But in this case the rulings refusing the request for the

reference of the question of contravention of the Declaration of Rights contained in s 18(1) and 18(9) were not only clearly wrong in view of the fact that there were indeed invalid appointments of the judges concerned but the court was itself not validly constituted.

The refusal of the application for reference of the question of the contravention of the Declaration of Rights in each case where it had arisen constituted a denial to the election petitioners involved, of the right to protection of the law guaranteed under s 18(1) of the Constitution. See *Martin v Attorney-General & Anor* 1993(1) ZLR 153 (S) at 157 G-158 A; *Tsvangirai v Mugabe & Anor* S-84-05 at 19.

This court has power under s 24(4) of the Constitution to make such orders and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights. What has exercised my mind in this regard is the question whether to order the suspension of the coming into effect of the declaratory order to which the applicants are clearly entitled, for a period in order to give Parliament the opportunity to correct the error in the exercise of its powers.

The problem I have faced is that such an order of suspension of the operation of the declaration of the invalidity of s 162(1) of the Act and the consequent effect thereof would not be "for the purpose of enforcing or securing the enforcement of the Declaration of Rights." It would have the effect of perpetuating a void. A court has no power to fill up such an empty space. It is for Parliament to put in place

a valid law on the appointment of the persons to preside over the Electoral Court to hear and determine the election petitions filed with that Court.

The applicants are accordingly granted the following relief:

"It is declared that:

1.1 The Electoral Court established by s 161 of the Electoral Act [*Chapter 2:13*] falls within the meaning of a 'special court' as defined by s 92(4) of the Constitution.

1.2 Accordingly the manner of appointment of judges to it as provided in s 162(1) of that Act be and is hereby declared to be inconsistent with s 92(1) and s 18 of the Constitution.

1.3 The initial appointments made by the third respondent to the Electoral Court without consulting the Judicial Service Commission on the specific appointments are accordingly invalid.

1.4 Additionally any appointments made by the third respondent to the Electoral Court without specifying the period of the appointment are invalid.

1.5 All appointments made by the third respondent to the Electoral Court after consulting the Judicial Service Commission without Parliament having provided for the same are also declared to be inconsistent with s 92(1) and hence s 18 of the Constitution and are accordingly invalid.

1.6 All appointments made by the third respondent to the Electoral Court, whether made in accordance with s 162 of the Electoral Act [*Chapter 2:13*] or made on 1 June 2005 are a nullity and set aside.

1.7 The first respondent and second respondent are jointly and severally to pay the costs of the application one paying the other to be absolved."

SANDURA JA: I agree.

CHEDA JA: I agree.

GWAUNZA JA: I agree.

ZIYAMBI JA: I have read the judgment of MALABA JA and agree with the conclusions at which he arrived as well as the relief granted. I wish to add the following remarks:

Judges in Zimbabwe are appointed and hold office in terms of the Constitution of Zimbabwe. Their security and tenure of office is guaranteed by the Constitution. Thus the terms and conditions of their appointment cannot, without their consent, be altered during their tenure of office. These provisions make for the independence of the judiciary from the other arms of the State being the Executive and the Legislature.

Section 92(1) of the Constitution provides for judges of the High Court to be appointed to serve in a special court in circumstances limited to the manner of their appointment and the period of appointment. Section 92(2) ensures that during the term of office of such judges appointed to preside over a special court, their conditions of service shall not be amended and their office shall not be abolished without their consent.

No provision is made in the Constitution for judges of the High Court to serve in subordinate courts other than special courts. Thus it would be fair to say that if the Electoral Court is not a special court then the appointment of judges of the High Court to preside in that court is inconsistent with the provisions of the Constitution. The Chief Justice when acting in terms of s 91 of the Constitution can only assign a judge of the High Court to preside in an inferior court if that court is a special court.

In prescribing a manner of appointment by the Chief Justice, other than that enacted in the Constitution, Parliament contravened the Constitution and the offending provisions, being s 162 of the Electoral Act ("the Act"), is invalid by reason of its inconsistency with the Constitution.

It follows from the above that the appointment of the judges of the High Court to preside in the Electoral Court, made by the Chief Justice acting in terms of s 162 of the Act was contrary to the provisions of s 92(1) of the Constitution and therefore invalid.

The contention by the respondent that the Electoral Court is not a special court as defined by s 92(4) of the Constitution since there is a right of appeal on a point of law to the Supreme Court, does not assist its case. Apart from the fact that the right of appeal is, in my view, so limited as to be non existent, if the Electoral Court is not a special court, then the appointments of the judges of the High Court to

preside in it are all invalid. If it is a special court then the procedure set out in s 92(1) must be followed if the appointments are to be valid.

Whichever way one looks at it, the applicants' contentions are valid. If the Electoral Court is to be a special court then Parliament must enact the enabling legislation in conformity with the Constitution. If it is not a special court, then judges of the High Court cannot lawfully be appointed to preside in it.

The most favourable conclusion which can be arrived at in the circumstances, since Parliament is presumed to act in compliance with the Constitution, is that Parliament intended that the Electoral Court should be a special court. In order to give effect to that intention the necessary legislation in accordance with s 92 of the Constitution must be enacted to govern the appointment of judges of the High Court to preside in that court.

Atherstone & Cook, applicants' legal practitioners

Civil Division of the Attorney General's Office, respondents' legal practitioners