

PHIRI (A.I.) v BANDA (J.C.) 1979 Z.R. 90 (H.C.)

HIGH COURT
CULLINAN, J.
5TH FEBRUARY, 1979
1978/HP/EP3

Flynote

Election petition - Commission of illegal practice - Primary election - Whether Electoral Act, Cap. 19, s. 17, refers to it - Whether High Court has jurisdiction to question primary election.

Election petition - Primary election - Commission of illegal practice - Whether action can only be brought if guilty party is actually elected as Member of Parliament - Whether legislation intended delay in presenting petitions until after final election.

Election petition - Election of candidate as member - Meaning of word "member" - Whether it restricts petitions to final elections.

Headnote

Both the petitioner and the respondent were candidates in the National Assembly primary election for the Chipata Constituency held on 19th October, 1978. The respondent and two other candidates received the greatest number of votes and qualified to the final elections where the respondent was subsequently elected to the National Assembly. The petition presented before such election alleging the Commission of an illegal practice by the respondent or his election agent at the primary election was based on s. 17 of the Electoral Act, Cap. 19.

Held:

- (i) An election petition may be presented questioning the result of a primary election in respect of a candidate who is elected as a member of the National Assembly later before the final election because it would be absurd if election petition only applied to final elections since a member of Parliament, guilty of an illegal practice at the primary election, would be allowed to retain his seat. Both the primary and final elections are part of one process, and the candidate must qualify in the primary election in order to proceed to the final elections. Allowing a person guilty of an illegal practice to proceed to the final election bars other possible candidates and only leads to extra expense of having to hold another election later.
- (ii) Article 77 of the 1973 Constitution does confer jurisdiction upon the High Court to entertain petitions questioning primary elections.

p91

- (iii) The legislature's intention was that an election petition questioning the result of a primary election must be presented within thirty days of notification of such result in order to avoid absurdities. The court has jurisdiction to hear such petition irrespective of whether the respondent is elected as a member at the final election.

Case referred to:

- (1) DPP v Ng'andu and Ors (1975) Z.R. 253.

Legislation referred to:

Constitution of Zambia, 1964, Arts 67, 68, 69.
Constitution of Zambia, 1973, Cap. 1, Arts 68, 71, 75 (1), (4), (5), 77, 109.
Electoral Act, 1968, Part VI, s. 16.
Electoral Act, 1973, Cap. 19, ss. 5 (1), 7, 8 (3), 17, 18 (c), 19, 20, 28.
Electoral (National Assembly Elections) Regulations, Cap. 19, reg. 8.

For the petitioner: R.M.A. Chongwe, R.M.A. Chongwe & Co.
For the respondent: S. Patel, Solly Patel, Hamir & Lawrence.

Judgment

CULLINAN, J.: The petitioner was a candidate in the National Assembly primary election for the Chipata Constituency held on 19th October 1978, after which, in due course, the respondent and two other candidates, having received the greatest number of votes pursuant to Art. 75 (5) of the Constitution, qualified for nomination as candidates for the final election. The respondent was subsequently elected to the National Assembly at the final election. The petition, presented before such election, alleging the commission of an illegal practice by the respondent or his election agent at the primary election, is based on the provisions of s. 17 (2) (c) of the Electoral Act, Cap. 19, which find their origin in Art. 77 of the Constitution which in part reads:

"77. (1) The High Court shall have jurisdiction to hear and determine any question whether -
(a) any person has been validly elected or appointed as a member of the National Assembly or the seat of any such member has become vacant;"

Those provisions are a verbatim repetition of the relevant provisions contained Art. 69 of the 1964 Constitution, under which the Electoral Act 1968 was framed. The 1973 Constitution introduced the two-tier system of primary and final National Assembly elections, and following upon that the Electoral Act, 1973 (Cap. 19) subsequently repealed and replaced the 1968 Act. There is no significant difference between the long title of each Act. The provisions of Part VI of the 1968 Act, dealing solely with election petitions, were repeated - with one modification to s. 19 (4) s. 20 (4) in Cap. 19 of the 1970 Ed. of the Laws) concerning the time limit for presentation of a petition, which does not affect the issue in hand. An important addition however was that of a fifth sub-section to s. 16 of the 1968 Act (s. 17, Cap. 19) so that the relevant part of the section now reads:

p92

"17. (1) No election of a candidate as a member shall be questioned except by an election petition presented under this Part.

(2) The election of a candidate as a member shall be void on any of the following grounds which is proved to the satisfaction of the High Court upon the trial of an election petition, that is to say:

- (a) that by reason of any corrupt practice or illegal practice committed in connection with the election or by reason of other misconduct, the majority of voters in a constituency were or may have been prevented from electing the candidate in that constituency whom they preferred, or
- (b) subject to the provisions of subsection (4), that there has been a non-compliance with the provisions of this Act relating to the conduct of elections, and it appears to the High Court that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;
- (c) that any corrupt practice or illegal practice was committed in connection with the election by or with the knowledge and consent or approval of the candidate or of his election agent or of his polling agents;
- (d) that the candidate was at the time of his election a person not qualified or a person

disqualified for election as a member.

(5) For the purposes of this Part "election" includes a primary election."

It can be said that the intention of the legislature in enacting sub-s. (5) was to make the 1968 provisions of Part VI, repeated in 1973, applicable to primary elections also, so that the result of such an election could if necessary be challenged by way of an election petition. Section 17 (1) and (2) refers however to the "election of a candidate as a member". The word "member" is defined in s. 2 of the Act as meaning "an elected member of the National Assembly", a repetition of the 1968 definition. Does s. 17 therefore continue to refer solely to a final election where the successful candidate is elected as a member of the National Assembly? This is the question raised, at the instance of the Court, in order to determine the Court's jurisdiction to entertain the present petition.

The learned counsel for the petitioner, Mr Chongwe, submits that the legislature's intention was expressed in the addition of sub-s. (5) of s. 17 but that the parliamentary draftsman omitted to extend the meaning of the word "member" in sub-s. (1) and (2). He submits that a petition can be filed under the Act against the result of a primary election *per se*.

The learned counsel for the respondent, Mr Patel, submits that the language of sub-ss. (1) and (2) of s. 17 is clear and refers to final elections; this court must follow the plain and ordinary meaning of the words used: the court cannot assume that the draftsman has made any mistake

p93

in the matter; had the legislature intended that the result of a primary election could be challenged by means of an election petition it would have expressed its intention clearly.

There is little doubt that difficulty is encountered in construing the Act to embrace election petitions in respect of the result of primary elections *per se*. The difficulty is apparent not alone in the words quoted in sub-ss. (1) and (2) of s. 17 but elsewhere. Article 75 (1), (4) and (5) of the Constitution reads:

"75. (1) For the purpose of selecting persons from any constituency to be candidates for election to the National Assembly, the Electoral Commission shall hold primary elections in that constituency in such manner as may be prescribed by or under an Act of Parliament.

(4) At the conclusion of the poll the Electoral Commission shall declare the number of votes received by each candidate and shall thereafter submit the names of all the candidates to the Central Committee together with the number of votes received by each candidate.

(5) In any constituency of the National Assembly the three persons who have received the greatest number of votes at the primary election shall be qualified for nomination as candidates for election to the National Assembly from that constituency, unless the Central Committee disapproves the nomination of any such person on the ground that his nomination would be inimical to the interests of the State, in which event the person who has received the next highest number of votes after the said three persons at the primary elections shall become qualified for the nomination."

Again, Art. 67 lays down the qualifications necessary for a person "to be elected . . . as a member of the National Assembly" but goes on to provide that -

"A person shall not be qualified to be a candidate for election to the National Assembly

unless he is one of the successful candidates at the primary elections held in accordance with the provisions of Article 75 and his candidature has not been disapproved by the Central Committee ;".

Those latter provisions are repeated in s. 7 of the Electoral Act. It will be seen that the Constitution and the Electoral Act speak of a success in the primary elections as a qualification for nomination as a candidate in the final elections, subject to the decision of the Central Committee in the matter. The legislation does not speak of any of the three successful candidates in a primary election as being "elected" as such: they merely qualify for subsequent nomination and may decide indeed not to subsequently file nomination papers in the final elections if they so wish. Section 17 however speaks of the "election" of a candidate. Section 18 (c) for example indicates that a petition may be filed by "a person claiming to have had a right . . . to be election as a member at the election to which

p94

the election petition relates": some difficulty is encountered in applying those provisions to a primary election. Section 19 (3), dealing with the invalidity of certain votes upon a scrutiny, refers only to the register of voters: it does not make reference to the "list" of voters in a primary election referred to in s. 5 (1) of the Act. Section 20 (4) refers to one respondent only: a petition might possibly question the result of a primary election in respect of all three successful candidates. Section 28 (1) provides that the court shall determine "whether the respondent or any other and which person was duly elected : " the wording would appear to refer to the result of a final election in which only one candidate is duly elected. The same can be said of s. 28 (3). In particular s. 28 (4) reads:

"(4) Where the High Court determines under subsection (1) that the respondent was not duly elected, and that no other person was duly elected, at the election concerned, the vacancy in the membership of the National Assembly in respect of which that election was held shall be deemed to continue until duly filled."

If a petition was presented immediately after a primary election and was determined before the final election then, no question of "deeming" the particular vacancy in the membership of the National Assembly to continue would ever arise, as a primary election could not have the effect of filling such vacancy. The wording of s. 28 (4) in my view can only refer to the result of a final election.

Those are the difficulties, if I am to accept Mr Chongwe's interpretation of s. 17 (5). As against that, the wording of that subsection is quite specific. Its provisions apply not just to s. 17 but to the complete Part VI of the Act dealing with election petitions. If one applies those provisions to s. 17 (1) and (2) the words "election of a candidate as a member" refer to the whole process of election as a member, that is to say, the primary and the final election: thus, s. 5 (1) of the Act speaks of "a primary election to the National Assembly". The grounds under s. 17 (2) which have the effect of avoiding an "election of a candidate as a member" then refer to primary as well as a final election. As I see it therefore, the primary election of a member of the National Assembly can be rendered void upon proof of any such grounds. If such election is void then it follows that the ensuing process of election, the final election, is also void, because of course the member was not, in retrospect, qualified for nomination as a candidate in the final election. That in my view is the plain and natural meaning of the words in sub-s. (5) as related to the rest of the section and seems to be the only logical explanation for the introduction of that sub-s. in 1973 on the advent of primary elections.

Article 77 (1) of the Constitution provides that "the High Court shall have jurisdiction to hear and

determine any question whether . . . any person has been validly elected . . . as a member of the National Assembly". The aspect of qualification for nomination as a candidate in the final election affects the question of validity of subsequent election so as I see it the High Court under those provisions alone, not to mention those of s. 17 of the Electoral Act, has jurisdiction to entertain a petition questioning the primary election of a member of the National Assembly. If it were

p95

not otherwise an absurdity would arise. Following upon Art. 68 (4) of the Constitution s. 8 (3) of the Electoral Act provides that -

"(3) Any person who is convicted of any corrupt practice or who is reported guilty of any corrupt practice or illegal practice by the High Court upon the trial of an election petition under this Act shall not be qualified to be nominated for election as a member of the National Assembly for a period of five years from the date of such conviction or of such report as the case may be."

If it were not possible to file an election petition in respect of, say, an illegal practice committed by a successful candidate at a primary election, who is subsequently elected to the National Assembly then, on a reading of Arts. 68 and 71 of the Constitution and s. 8 of the Electoral Act such a member would retain his seat in the National Assembly even if he was subsequently convicted of such illegal practice. That to my mind would be an absurd situation. The situation would be even more absurd where the member secured his election as a direct result of such illegal practice, where for example one of two candidates at a primary election procures the prevention of the other from filing his nomination paper and thus is without any poll, in due course, the only person qualified for nomination at the final election where again no poll takes place and he is returned unopposed. In my view therefore the provisions of s. 17 in the least enable a petition to be presented contesting the primary election, and thus the final election of a member of the National Assembly.

Mr Chongwe points to the provisions of s. 20 (3) however which read -

"(3) Every election petition shall be signed by the petitioner, or by all the petitioners if more than one, and shall be presented not later than thirty days after the date on which the result of the election to which it relates is duly declared."

Section 20 (4) is also relevant, it reads -

"(4) Notwithstanding the Provisions of subsection (3), when the election of a member (hereinafter referred to as 'the respondent') is questioned upon an allegation of a corrupt practice or an illegal practice, the election petition may, if the election petition specifically alleges payment of money or some other act to have been made or done since the declaration of the result of the election by the respondent or his election agent, or with the privity of the respondent or of his election agent in pursuance or in furtherance of the corrupt practice or illegal practice alleged in the election petition, be presented at any time within thirty days after the date of such payment or other act."

Where a petition is directed against, say, a corrupt or illegal practice at a primary election then the petition "relates" to the particular primary election at which the act complained of was committed and not the whole process of election from primary through to final election. "The provisions of sub-s. (4) make it clear that time runs from the declaration of the result of

p96

the particular election, be it primary but where a subsequent associated act is done, time is extended to run from the date of such act. Where no such associated act is alleged, a petition contesting the result of a primary election must then be presented not later than thirty days after the declaration of the result thereof, before even the final election may be held, when the petitioner cannot know whether the respondent might prove successful in the final elections. Mr Patel submits that therefore s. 20 (3) is to be construed contrary to the interpretation which I have now placed on s. 17; but that approach, as I see it, does not attempt to interpret sub-s. (5) thereof, or to explain the reason for the introduction of the subsection, or to resolve the apparent absurdity if the interpretation were other than that which I advance. I am faced then with the difficulty of reconciling the provisions of s. 20 (3) and (4) with those of s. 17 (1) and (2). The difficulty is as follows:

- (i) if a petitioner files an election petition shortly after a primary election he is not then questioning the election of a candidate "as member" but as a person qualified for nomination as a candidate for the final election, subject to Central Committee action;
- (ii) if such a petitioner awaits the outcome of the final election he may well be then out of time for presenting the petition, in view of the intervening period between the dates of the primary and final elections which may be set by the Electoral Commission under Rule 8 of the Electoral (National Assembly Elections) Regulations.

It might be said that in order to avoid the latter difficulty the legislature intended that where a ground exists for avoiding a primary election the prospective petitioner must nonetheless await the outcome of the final election, and frame a petition against the result thereof, rather than that of the primary election, joining the successful candidate who ever he may be, whether party to any misconduct or totally innocent thereof; as respondent. The petitioner might then be said to question the latter's election on the basis of, say, the commission by another candidate of a corrupt practice at the primary election. Apart from the fact that this construction of the Act is somewhat strained, two difficulties arise therefrom. Firstly, such construction is contrary to the plain and ordinary meaning of the words contained in s. 20 (3) and (4). Secondly, had the petitioner in such a case made the offending candidate a respondent to a petition against the result of the primary election, then this cause of action would have been complete under s. 17 (2) (c) and he need only have proved the commission of the corrupt practice: if the petition is framed against the result of the final election the offending candidate may no longer be the respondent as such and under s. 17 (2) (a) the petitioner must prove not alone the corrupt practice but also that by reason thereof "the majority of the voters in the constituency were or may have been prevented from electing the candidate in that constituency whom they preferred".

As I have already said, the provisions of Art. 77 of the Constitution in my opinion confer jurisdiction upon the High Court to entertain a petition questioning the primary election of a member of the National

p97

Assembly. Further, I do not see that such provisions are exclusive, that they preclude the High Court, with unlimited original jurisdiction under Art. 109 of the Constitution, from entertaining an application questioning the result of a primary election, where the respondent is not subsequently successful at the final election: if Parliament has vested the High Court with jurisdiction to invalidate the election of one of its members, then I cannot see that the High Court is precluded from questioning the validity of the nomination as a final election candidate of one who fails to secure a seat in Parliament. More importantly, however, I do not see that the provisions of Art. 77 preclude Parliament from specifically so providing by legislation. If Parliament's intention in enacting the Electoral Act is not to be so construed then it seems to me that an absurd situation would arise.

I find it difficult to accept that the legislature intended to make provision for the questioning of

the result of a primary election only where the respondent is subsequently elected at the final election. As far as a petitioner, who is a candidate for example, is concerned, it matters not whether a particular respondent is subsequently placed first, second or third at the final election. If excluded from candidature therein and whether or not the respondent is successful, the petitioner might say that if he had been a candidate he might have received more votes than any other candidate. If not excluded from candidature in the final election and whether or not the respondent or another candidate is successful the petitioner might say that if the respondent had been excluded from the final election a number of voters might otherwise have voted for the petitioner sufficient to give him a majority.

I cannot see that the legislature ever intended to encourage delay in seeking judicial remedy, that a petitioner must await the outcome of a final election when he had a valid cause of complaint which would avoid the primary and therefore such final election. This as I see it applies equally to the various classes of petitioner envisaged under s. 18 of the Act, be he a candidate, a voter or even the Attorney-General himself. In the least the prompt presentation of a petition questioning a primary election would be in the national interest as possibly avoiding the cost of a repeat final election. Again, to suggest that a petition must be presented under the Act within thirty days of the result of a primary election, but must be subsequently struck out for disclosing no reasonable cause of action if the respondent is not elected as a member, depicts an absurd situation.

In the case of the *Director of Public Prosecutions v Ng'andu and Others* (1) at p. 262 Baron, D.C.J., in delivering the judgment of the Supreme Court observed:

"The courts will be very slow to assume that the legislature has made a mistake: unless driven to it the courts will not alter a legislative provision by adding or omitting words, on the principle that if the legislature has made a mistake the simple course is for the legislature to rectify it by amending the provision in the ordinary way. But the courts are driven to supply or omitting

p98

words where it is impossible to make sense of the provision as framed. For instance, Maxwell on Interpretation of Statutes, 10th Edn. at p. 229 has this to say:

" Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, or by rejecting them altogether, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

Again at p. 236 of the same work the learned author says:

" Notwithstanding the general rule that full effect must be given to every word, yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the

enactment, it may, or rather it should, be eliminated. The words of a statute must be construed so as to give a sensible meaning to them if possible.' "

In the present case I am driven to the conclusion that the draftsman considered that the simple addition of sub-s. (5) to s. 17 of the Electoral Act would suffice to give effect to the legislature's intention in the matter, without observing the difficulties involved in applying the subsection to the remainder of Part VI of the Act. I am quite satisfied on the plain and natural meaning of the words of the subsection as applied to all of s. 17 that in the least an election petition may be presented questioning the result of a primary election in respect of a candidate who is elected as a member of the National Assembly at the final election. Further, in view of the explicit words contained in s. 20 (3) and (4) and in view of the absurdities which would arise were the situation otherwise, I am satisfied that it was the legislature's intention that an election petition questioning the result of a primary election must be presented, if at all, within thirty days of the notification of such result, or of the occurrence of an act described in s. 20 (4), and that the court should have jurisdiction to hear such petition irrespective of whether the respondent is elected as a member at the final election.

I rule therefore that the present petition presented on 16th November, 1978, is properly before me.

Application allowed
