Zimbabwe

Application by opposition to obtain copy of voters roll

Judge G Friedman, formerly Judge President of the Cape Provincial Division Africa and Judge of Appeal of the Appellate Division of the Supreme Court of South Africa, was requested by the General Council of the Bar of South Africa, the General Council of the Bar of England and Wales, the Society of Advocates of Namibia and the Australian Bar Association, all of which are members of the International Bar Association's Forum for Barristers and Advocates, to serve as an independent observer at the appeal in the Supreme Court of Zimbabwe in the matter between *Morgan Tsvangirai and two others v The Registrar-General of Elections* .

Judge Friedman was present throughout the hearing of the appeal in Harare on 1 October 2002, and afterwards submitted a report, dealing with the background to the application, the high court judgment, the notice of appeal, and the applications to lead new evidence (paragraphs 1-22 of the report). The following are extracts from his observations regarding the approach of the Supreme Court (pars 23-27), the true issue (pars 28-38), *res judicata* (pars 39-43), the constitutional right to information (pars 44-49), and the conclusion (pars 50-52) reads as follows:

"The approach of the Supreme Court

The argument on appeal centred largely round the effect of section 18 of the Electoral Act. Both appellants' and respondent's counsel received a courteous hearing from the three Supreme Court judges who comprised the Appeal Bench. From the questions addressed to counsel by the Bench it became apparent that the Court was *prima facie* of the view that, although the voters' roll for every constituency was, in terms of section 18(1) open to inspection by the public, it was only a person inspecting the voters' roll for any constituency, who was entitled to make copies thereof. There was no evidence on the record that Tsvangirai or Sibanda had inspected the voters' rolls. Despite the absence of any reference in the record to the question as to whether Tsvangirai or Sibanda had inspected the voters' roll, during the course of respondent's counsel's argument, one of the judges somewhat surprisingly asked respondent's counsel whether, as a fact, anyone had inspected the voters' rolls. Be that as it may, however, the Supreme Court, in its unanimous judgment found that as there was no allegation in the papers that Tsvangirai or Sibanda had inspected the voters' roll, there was no basis for a claim to entitlement to copies in terms of section 18(2) of the Electoral Act.

A second basis for the Supreme Court's conclusion that the appeal should be dismissed was that the Electoral Act did not provide for

> 'the acquisition of a copy of the common voters' roll by a candidate in the same Presidential elections to which the voters' roll in question relates'.

The Court meant by the 'common voters' roll' the voters' roll in respect of each one of Zimbabwe's 120 constituencies. It was only an individual voter, the Court held, who has a 'special interest' entitling him or her to inspect the particular constituency roll on which he or she should be registered to vote. Accordingly, so the Court held, Tsvangirai should properly have sought an amendment to the Electoral Act, not relief from the courts.

The third (and consequential) conclusion the Supreme Court reached was that the Registrar-General had previously acted without statutory authority and hence illegally in delivering (by agreement made an order of Court) a copy of the national voters' roll – thus encompassing the rolls for all 120 constituencies – to appellant. Accordingly the principle of *res judicata* could not be invoked (as 'estoppel cannot be used to make legal what otherwise would be illegal').

Finally, the Court dismissed the claim to entitlement to the national voters' roll on the basis of the provisions of section 20 of the Constitution of Zimbabwe, because the reference in that section to the freedom to receive and impart ideas and information without interference relates only to freedom of expression. Section 20(1), the Court held, was 'not intended to cover such a situation' as here, where a litigant seeks access to a public record to be able to vindicate other constitutional rights.

The Supreme Court did not support, it is to be noted, the *ratio* of the judgment of the court *a quo*: that the Electoral Act 'has remained in the pre-computer age,' so that 'copy' excludes electronic copy (see paragraph 19 of the report). The Supreme Court noted that'[c]ogent arguments, well supported by relevant authorities, were advanced by the Appellant against [that] finding.'

In the light however of the Supreme Court's conclusions as to why the appeal had to fail on other grounds, it was 'not necessary to consider the merit of these submissions. Suffice it to say that I would have found the arguments to be very persuasive had they been advanced within the appropriate context.'"

The true issue

What the Supreme Court overlooked was the effect of the Registrar-General's letter of 10 April (quoted in paragraph 16 above). As at the date of the hearing in the court *a quo* the Registrar-General was prepared and had offered to furnish copies of the voters' rolls in printed form. His attitude was that he was not, as a matter of law, obliged to furnish copies of the voters' rolls in electronic format. The only issue, was whether appellants were entitled to receive copies of the voters' rolls in electronic format or whether they were entitled to such copies only in printed format.

Because this was the limited nature of the dispute, appellants had not, in the application, attempted to introduce evidence on the question of whether they had in fact inspected the voters' rolls and had thus met the requirements of section 18(2) of the Act. This question, because only a single legal issue was in dispute (ie whether appellants were entitled to a copy of the voters' roll in electronic format or merely in printed form), had not been dealt with in the papers. (Nor had it been raised in respondent's counsel's heads of argument. It arose for the first time in questions from the Bench during oral argument on appeal.)

Appellants' counsel (on notice to the respondent's legal representatives) sought leave to submit additional heads of argument the day after the hearing of the appeal, in order to deal further with this and other questions that had been raised during the hearing. Gwaunza AJA, writing for the Supreme Court, expressed her 'extreme displeasure' at this course and stated that she regarded this as 'an attempt by the appellant to improperly influence the outcome of this matter.' She said that

both the document and its contents would accordingly be disregarded.

This criticism of counsel is to my mind entirely unwarranted. In the Further Submissions counsel requested an opportunity of dealing with the question that had been raised by the Court, namely whether only a person inspecting the voters' roll was entitled to a copy of it, and at the same time served a copy of the Further Submissions on respondent's legal representatives inviting them to respond. This is by no means an unusual procedure and is generally regarded as helpful to the Court in arriving at its conclusions. It certainly did not merit the reprimand it received. No impropriety at all was involved, as the Court suggested. To reflect in this way upon counsel seeking leave to answer not the arguments of his opponents but new points raised without notice by the court itself was in my view totally unjustified.

It is unfortunate that the Supreme Court chose to disregard the further submissions. Had the Court seen fit to read these submissions it would have become clear to it that compliance with all the requirements of section 18 of the Electoral Act did not constitute the issue in the case and that the duty of the court on appeal was to determine the actual dispute between the parties as it appeared from the record. The respondent, as I have noted, quite explicitly elected to confine his defence to the application to one point and one point only, namely that he was not obliged in law to furnish copies of the voters' roll in electronic form. The authorities quoted in the Supplementary Submissions support the proposition that a court of appeal is obliged to determine the issues raised by the parties and to confine its enquiry to the facts placed before the court, and to the issues as raised by the parties on the papers.

That this is so is very clearly established, at common law as well as in case-law. Thus in *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635F-H it was noted:

'Counsel cited authority, ancient and modern, for the principle that a judicial officer in civil proceedings must resolve the dispute on the issues raised by the parties and confine the enquiry to the facts placed before the Court; he must not have regard to extraneous issues and unproved facts. Thus Voet says in discussing the duties of a Judge:

'But things can no how be done by him without being called upon which spring in their own origin from the litigants. Thus account should not be taken in giving judgments of exceptions not raised, nor of witnesses not produced ....

It follows from this that a Judge cannot make good matters of fact if they are not stated by the parties, unless they are quite notorious from the documents which have been put in by way of proof in the proceeding. That is to prevent his appearing by making good doubtful matters of fact to fill the role not so much of Judge as of advocate, and to defend as counsel rather than to judge. (Voet 5.1.49 Gane's trans vol 2 at 60)'. (Emphasis supplied.)

Or as Dumbutshena AJA (previously Chief Justice of Zimbabwe) put it in *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (NmSC) on behalf of the Supreme Court of Namibia:

'It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions ... It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied upon by counsel.'

The position therefore as at the date of the hearing of the appeal was that the Registrar-General had previously consented to an order that he should furnish the voters' rolls in electronic format. In the present application he stated that he was prepared to furnish the voters' rolls in printed, but not in electronic format. However, when he was asked, on a without prejudice basis, pending the appeal for copies of the voters' rolls in printed form he was unable, allegedly through lack of the necessary resources, to do so.

It was common cause on the papers that in terms of section 15(3) of the Electoral Act, all voters' rolls in Zimbabwe are kept in electronic form by the Registrar-General in his Central Registry in Harare. The Supreme Court however held that 'the previous issuance by the respondent of copies of the original common voters' rolls, in computer or any other format to the appellant could not properly have been done pursuant to those two provisions' – i.e. sections 18(2) and 18(3) of the Electoral Act. The Supreme Court went on to hold that no weight could accordingly be attached to the letter of 7 January 2002 in which, pursuant to the orders granted by consent, the Registrar-General stated that he was providing voters' rolls in electronic format in compliance with section 18(2) of the Act.

The reasoning of the Court in this regard appears to be that section 18(1) only refers to the voters' roll for each constituency, not what the Court termed 'the complete roll for all 120 constituencies.' The Court concluded:

'The simple reality is that neither subsections 18(1) and (2) nor other provisions of the Electoral Act provide a basis for what the appellant seeks in this application, which is the acquisition of a copy of the common voters' roll by a candidate in the same Presidential elections to which the voters' roll in question relates.'

This reasoning is in my view insupportable. This is firstly so as a matter of construction. The greater clearly includes the lesser: a national election (such as that here) manifestly involves all constituencies. Sections 18(2) and (3) patently do not restrict the rights in question to the rolls in respect of single constituencies.

It is also untenable for a second reason. This is that the Court, again, was not entitled to create an issue for the parties. As already noted (see paragraph 35 supra), both sides accepted that a national voters' roll was kept, pursuant to section 15(3) of the Electoral Act. There was no suggestion of *ultra vires* or illegality in the Registrar-General providing a copy of it. A court will only *mero motu* take the point of illegality if satisfied that all the necessary and relevant facts are before it *(F & I Advisors (Edms) Beperk v Eerste Nasionale Bank van SA Beperk* 1999 (1) SA 515 (HHA) at 525H-526C, and earlier authorities reviewed).

Res judicata

This brings me to the *res judicata* argument that was raised by appellants' counsel. The Registrar-General had previously consented to an order obliging him to furnish the voters' roll in electronic form. The question therefore is: have the requirements for a defence of *res judicata* been established? These requisites are as follows: the proceedings must be between the same parties and founded on the same cause of action. The first requirement was clearly met. The Supreme Court found that the second requirement had not been met as the two applications did not concern the same subject matter. The reasoning for this finding is that in the first application the consent order required the Registrar-General to provide copies of the voters' rolls up to January 2002, whereas in the application which formed the subject matter of the appeal, appellants sought 'the total voters' roll, including the supplementary voters' roll compiled after the earlier copies had been provided.' The Supreme Court accordingly found that 'what the appellant now seeks is substan-

tially different from what he was before provided with'.

It is so that in the earlier application the order granted by consent related to the voters' roll up to 2 January 2002 and that in the second application what was sought was the complete voters' roll as at 3 March 2002 including the two supplementary rolls. The issue, however, was the same: what Tsvangirai sought and obtained in the first application was an order that the Registrar-General furnish him with a complete voters' roll. The fact that as at the date of the first application the complete voters' roll was that which had been closed as at 2 January 2002 and that as at the date of the second application the complete voters' roll included names which had, pursuant to the Presidential Decrees, been included up to later dates, does not detract from the fact that appellants were seeking substantially the same relief in both applications, namely the right to be supplied with copies of the complete voters' roll in electronic form. The fact that substantially the same relief is claimed is sufficient to meet the requirements of a defence of *res judicata*.

This is clearly established under the common law of Zimbabwe. Thus *Huber Hedendaegse Rechtsgeleertheyt* 5.38.12 states in relation to this requirement: 'A thing is one and the same when we claim first a part and then the whole of it; or *vice versa*, first the whole and afterwards a part' (Gane's translation, vol. 2 p 340). Or as Voet *Commentarius ad Pandectas* 44.2.3 puts it: 'A thing is understood to be the same so often as what was sought before the earlier is sought before the later judge. This therefore applies also to a thing which has been increased or lessened, or when a part is claimed of something which had been claimed in whole' (Gane's translation vol 6 p 554; emphasis supplied). Both in Roman and Roman-Dutch law, moreover, the thing in dispute remains the same whether it is sought *ad corpum*, in value or (as was the case in both instances here) as a right (*D* 44.2.7; Watson's translation vol 4 p 623, and Voet *loc cit*).

Most latterly, it may be noted, South Africa's Supreme Court of Appeal – there being no material difference in South Africa and Zimbabwe common law regarding *res judicata* – has even held that it is not an immutable requirement of the *exceptio rei judicatae* that the same thing must have been demanded in the earlier proceedings (*Kommissaris van Binnelandse Inkomste v ABSA* 1995 (1) SA 653 (A) at 668B-D; see too Joubert (ed) *Law of South Africa* vol 9 (first reissue 1996) paras 439 and 446). It is however not necessary to consider this aspect further: it is clear that, if the Court had applied the relevant legal test correctly, it could not have reached the conclusion it did in relation to *res judicata*.

It follows that the appellants' reliance on *res judicata* should have succeeded. Substantially the same thing was in issue. The suggestion that the Registrar-General had previously acted *ultra vires* or illegally in delivering computer copies in respect of the national voters' roll is baseless, for the reasons set out in paragraphs 37 and 38 supra. On this basis alone the appeal should have been upheld.

The constitutional right to information

In the founding affidavit in the application reliance was also placed on sections 18, 20 and 21 of the Constitution of Zimbabwe. It was stated that Tsvangirai's rights in terms of those sections were being infringed as he was being deprived of essential and fundamental information which he required in order to exercise his right to challenge the outcome of the Presidential Election. Section 20(1) of the Constitution reads as follows:

'20. Protection of freedom of expression

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to

hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.'

The right to receive information in terms of this section of the Constitution has been reinforced by the Access to Information and Protection of Privacy Act [Chapter 10:27] which came into effect on 15 March 2002 i.e. before the application was launched.

In the affidavit filed in support of the application express reference was made to the Constitution but not to the provisions of the Access to Information and Protection of Privacy Act. However, in the notice of appeal reliance was placed on section 5 read with section 8 of that Act. Section 5 reads as follows:

'Subject to section 10, every person shall have a right of access to any record, including a record containing personal information, that is in the custody or under the control of a public body.'

In its judgment, the Supreme Court held that section 20 of the Constitution was 'concerned, basically, with the right to freedom of expression' and that 'to regard, as the appellant does, the entitlement to receive information as the dominant concern of subs 20(1) of the Constitution is to clearly misinterpret and distort its otherwise clear meaning.'

The Supreme Court accordingly held that as Tsvangirai required the voters' roll, not for the purpose of exercising his right to freedom of expression, but for the purpose of exercising his right to challenge the outcome of the election 'sec 20(1) of the Constitution is quite evidently... not intended to cover such a situation.'

With regard to the Access to Information and Protection of Privacy Act the Supreme Court found that as reliance had not been placed on this Act in the application and as appellant had failed to show that he had made a request to the respondent under that Act in the prescribed manner, and that such request had been refused, he was not entitled to rely on that Act.

With respect to the learned judge of appeal who wrote the judgment, it seems to me that to say that section 20(1) of the Constitution does not confer a right to receive information for the purpose required by appellant, is to place too narrow a construction on that section. Although the section does refer to freedom of expression, it also states quite explicitly that no person shall be hindered in his freedom to receive information. It is trite that constitutional provisions according rights are to be interpreted generously, as the Supreme Court of Zimbabwe itself has previously held on numerous occasions (*Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) at 495B-496F; *Minister of Home Affairs and Others v Dabengwa and Another* 1982 (4) SA 301 (ZS) at 306E-H; *Minister of Home Affairs v Bickle and Others* 1984 (2) SA 439 (ZS) at 447C-G; *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1984 (2) SA 778 (ZS) at 778G-779A; and *Bull v Minister of Home Affairs* 1986 (3) SA 870 (ZH & ZS) at 872J-873C and at 880J-881C). The approach here adopted is quite the converse.

Moreover, although express reference was not made in the application to the provisions of the Access to Information and Protection of Privacy Act itself, the requisites for the right to the information sought by appellant were clearly present. Appellant was accordingly entitled to rely on the provisions of that Act as a basis for obtaining a copy of the voters' roll. It has been repeatedly held 'that a legal issue which has not been pertinently raised in an appellant's application but which appears from the proven facts may be considered by the court [of appeal] and may form the basis of its judgment' (*Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A) at 285C-F (own translation). But in the present case, the claim to the roll in computer form was expressly made with reference to the constitutional entitlement to access to information too. The fact that no reference was made in addition to the Act which is executory of that constitutional provision, cannot be a disqualification for reliance on the constitutional right. The question is whether the issue was raised sufficiently clearly to alert the respondent: it is not a requirement that a particular statute or provision in it must be explicitly cited (*Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623F-H).

Conclusion

All in all I consider the judgment of the Supreme Court to be fundamentally flawed. The voters' roll is a matter which is in the public domain. Every member of the public has access to it. That entitlement is fundamental to a constitutional democracy and to the exercise by the public of a number of interrelated fundamental rights. A person challenging an election result is *a fortiori* a person who requires the voters' roll. The allegation (in paragraph 46 of the application) that Tsvangirai urgently required the national voters' roll in order to prepare to mount a challenge to the presidential election which he contends was irregularly conducted in several material respects, was not refuted by the Registrar-General. The technical approach adopted by the Supreme Court – in my view, wrongly dismissing the appellants' reliance on *res judicata*, wrongly dismissing the application on a basis not raised on the papers or even in argument by the Registrar-General himself, and wrongly failing to sustain the constitutional claim to access to a public record – has effectively precluded Tsvangirai from obtaining a copy of the voters' roll in any form at all: the form in which it is as a fact kept in Zimbabwe, i.e. electronic form, has by the judgment of the Supreme Court been denied him, and the Registrar-General has indicated that in the form in which he concedes appellant is entitled to the roll, i.e. in printed form, it cannot be supplied because of an alleged lack of resources.

The right to challenge the result of an election, provided the challenge is not an abuse of the process of the court (of which there is no suggestion in this case), is part and parcel of the democratic process in a constitutional democracy like Zimbabwe. In the light of the undisputed evidence that the voters' roll is required for the legitimate purpose of an electoral challenge one would have hoped that the Court, as the guardian of the rights of the individual, would have been astute to ensure that the appellant was placed in possession of the voters' roll, particularly in view of the very limited ground on which the respondent's refusal to supply it was based. Unfortunately in this regard the judgment falls short.

To sum up, by reason of the flawed judgment of the Supreme Court, the leader of the official opposition and candidate in the challenged presidential election is unable to obtain a copy of the voters' roll in electronic form for the purposes of his pending challenge to the result of the election; moreover the Registrar-General has indicated that for logistical and financial reasons the voters' roll cannot be supplied even in printed form. The election petition will, in the result, have to be contested without reference to an indispensable evidential component. This serves not only to place an undesirable impediment on the appellant's electoral challenge, but also to render more difficult the trial court's function in deciding on the merits of the challenge. The outcome of the appeal can therefore, in all the circumstances, only be described as highly unsatisfactory."

See also the report by Judge Smalberger on page 48.