REPORTABLE (78)

SAVIOUR KASUKUWERE
v
(1) LOVEDALE MANGWANA (2) ZIMBABWE ELECTORAL COMMISSION (3) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

SUPREME COURT OF ZIMBABWE
GUVAVA JA, BHUNU JA & CHATUKUTA JA
HARARE, 27 & 28 July 2023

W. Ncube with *M. Ndlovu* and *R. T. Mutero,* for the appellant,

L. Uriri with *E. Mubaiwa,* for the first respondent

T. M. Kanengoni, for the second respondent

T. Tembo, for the third respondent

GUVAVA JA:

[1] On 28 July 2023 this Court dismissed with no order as to costs an appeal against the judgment of the High Court under judgment number HH 418/23 dated 12 July 2023. At the end of the proceedings this Court indicated that the reasons for this decision would be availed in due course. Set out hereunder are the Court's reasons thereof.

THE PARTIES

[2] The appellant is a prospective presidential candidate in the forthcoming Presidential Election slated for 23 August 2023. The first respondent is a registered voter in Ward 1 Mhondoro Ngezi Constituency. The second respondent is the Zimbabwe Electoral Commission (ZEC), established in terms of s 238 of the Constitution of the Republic

of Zimbabwe Amendment (No. 20), 2013 (the Constitution). It is responsible for the administration of elections in Zimbabwe. The third respondent is the Minister of Justice, Legal and Parliamentary Affairs. He is cited in his official capacity.

FACTUAL BACKGROUND

[3] The facts founding the instant appeal are as follows: On 21 June 2023, the appellant amongst other prospective candidates, successfully lodged his nomination papers as a presidential candidate before the Nomination Court. The first respondent became aware of the appellant's nomination and acceptance of candidature through the social media. He took exception to the acceptance of the appellant's candidature.

[4] In a letter dated 22 June 2023 addressed to the Chief Elections Officer, the first respondent stated that the appellant had not been resident in his constituency and in the country for a continuous period of eighteen (18) months. He further stated that the appellant did not therefore meet the requirements set out under s 91 (c) – (d) of the Constitution. He also stated that s 23 (1) and (3) of the Electoral Act [*Chapter 2:13*] (the Act) mandated that a registered voter ceased to be retained on the voters roll if he had not resided in that constituency for a continuous period of eighteen (18) months. In reply to the letter, the second respondent advised the first respondent to approach the Electoral Court for relief.

[5] The first respondent thereafter, filed in the High Court, an urgent court application under s 85 (1) (a) of the Constitute alleging that his fundamental rights under s 56 (1), s 67 (1) (a) and 67 (3) had been violated. He contended that the decision of the Nomination Court to accept the nomination for candidature of the appellant violated s

91 (1) (c)–(d) as read together with para 1 (2) of the 4th Schedule to the Constitution as read with s 23 (3) of the Act.

[6] The first respondent averred that he approached the High Court as he was of the view that the Electoral Court does not have the jurisdiction to issue declaratory relief. He further averred that the Act and Electoral (Applications Appeals and Petitions) Rules,1995 (S.I. 74A of 1995) (the Electoral Rules) did not provide him with any relief.

[7] In opposing the application, the appellant raised several preliminary objections. He stated that the court *a quo* did not have the jurisdiction to hear and determine electoral matters in which the Electoral Court has exclusive jurisdiction. He argued that the first respondent could have proceeded in terms of s 28 (1) and 33 (1) of the Act. He further stated that the first respondent had no *locus standi* to bring the application. The appellant further alleged that the first respondent approached the court *a quo* on wrong choice of law and in violation of the principle of subsidiarity.

[8] On the merits, the appellant stated that the first respondent failed to show how the decision of the Nomination Court violated his constitutional rights. The appellant admitted that he temporarily left the country on medical grounds but denied that he was out of the country for a continuous period of eighteen (18) months.

[9] The second respondent filed a notice indicating that it would abide by the decision of the court *a quo*.

FINDINGS BY THE COURT *A QUO*

[10] On the preliminary points raised, the court *a quo* made the following findings:

a) on jurisdiction, that it had jurisdiction in terms of s 171 (1) (a) and (c) as read with s 85 (1) of the Constitution;

b) in respect to *locus standi* of the first respondent, it found that he had the *locus* by virtue of s 85 (1) (a) which accords an individual the right to approach a court alleging a violation of his fundamental rights;

c) on wrong choice of law, it found that the Electoral Court does not have the necessary jurisdiction to issue declaratory orders. It further found that the application was not a review disguised as a declarator as the first respondent had no remedy of review under any other law; and

d) on the question of breach of the principle of subsidiarity, it held that the first respondent had no other remedy under any other law but to approach a court under s 85 (1) (a) of the Constitution.

[11] On the merits, the court *a quo* made the following findings:

a) that once the first respondent had made a negative averment, which was admitted by the appellant, that the appellant had left the country, the onus shifted to the appellant to prove that he was not out of the country and his constituency for a continuous period of eighteen (18) months;

b) that the appellant had failed to discharge the reverse onus placed upon him;

c) in interpreting s 23 (3) of the Act, it held that once a person is absent from the country and therefore his/her constituency for the prescribed period, he/she is deemed by operation of law to have ceased to be a registered voter. It further found

that cessation of registration as a voter in turn disqualifies one from nomination as a presidential candidate;

d) that the appellant was not resident in the country and as such not resident in his constituency for a continuous period of eighteen (18) months. Accordingly, the court found that the appellant had ceased to be a registered voter and consequently did not qualify for nomination as a presidential candidate.

[12] Following the above findings, the court *a quo* issued the following order:

"IT IS DECLARED:

1. That the decision of the nomination court sitting at Harare on 21 June 2023 to accept first respondent's nomination paper and candidature for election to the office of the President of the Republic of Zimbabwe in the elections scheduled to be conducted on 23 August 2023 was a violation of the provisions of section 91 (1) (c) and (d) read together with paragraph 1 (2) of the Fourth Schedule of the Constitution of Zimbabwe, 2013 as further read together with section 23 (2) of the Electoral Act.
2. That the decision of the Nomination Court sitting at Harare on 21 June 2023 to accept first respondent's nomination paper and candidature for election to the office of the President of the Republic of Zimbabwe in the elections scheduled to be conducted on 23 August 2023 is in violation of applicant's constitutional rights as set out in sections 56 (1), 67 (2) (a) and 67 (3) (a) of the Constitution of Zimbabwe, 2013.
3. That the decision of the Nomination Court sitting at Harare on 21 June 2023 to accept first respondent's nomination paper and candidature for election to the office of the President of the Republic of Zimbabwe in the elections scheduled to be conducted on 23 August 2023 is declared null and void and of no force and effect and hereby set aside.

4. That first respondent is not a candidate for election to the office of President of Zimbabwe in the elections scheduled to be conducted on 23 August 2023.

ACCORDINGLY, IT IS ORDERED:

5. Second and third respondents shall not include the name of first respondent in the preparation of ballot papers to be used in the elections scheduled to be conducted on 23 August 2023.
6. First respondent is interdicted from representing of holding himself out to the general public and electorate in Zimbabwe of abroad whether physically or through any form of media as a candidate for election to the office of the President of Zimbabwe in elections scheduled to be held on 23 August 2023.
7. Each party shall bear its own costs."

[13] Dissatisfied with the court *a quo*'s decision, the appellant filed the instant appeal on the following grounds:

GROUNDS OF APPEAL

"1. The court *a quo* erred at law in finding that it had the requisite jurisdiction to deal with the matter when the dispute before it clearly emanated from the **Electoral Act [*Chapter 2:13*]** and in particular sections **23, 28 and 33** thereof.

2. By finding that the 1st respondent had *locus standi in judicio* and adopting a liberal approach to it in a clearly non-constitutional matter, the court *a quo* committed an error at law which must be impeached by this Court.

3. By finding that the **General Notice 1128-2023** made in terms of section **106** of the **Electoral Act [*Chapter 2:13*]** did not constitute law, the court *a quo* grossly erred and misdirected itself as it ignored the provisions of section **15A** and **20** of the **Interpretation Act [*Chapter 1:01*]**.

4. By entertaining the application on constitutional basis as it did, the court *a quo* erred and violated the constitutional principle of subsidiarity as it ignored specific provisions in the **Electoral Act [*Chapter 2:13*]**, **Administrative Justice Act [*Chapter 10:28*]** and/or common law, which provide specific, adequate and satisfactory remedies to the 1st respondent.

5. *A fortiori*, the court *a quo* erred in making an uncanny finding that the decision of the nomination court did not constitute a reviewable decision at law thereby dismissing the preliminary point that the application was a disguised review process.

6. The court *a quo* further erred in placing reverse onus to the appellant to prove his residence status in violation of the law and in complete disregard of the averments that were made by the 1st respondent in evidence.

7. Further, the court *a quo* erred in making a finding that the averments pertaining to the residence status of the appellant as made by the 1st respondent were in the negative thereby improperly applying the law.

8. Related to ground number 7 above, the court *a quo* grossly misdirected itself in making a factual finding that the appellant was not or has not been in the country for a period stipulated in **section 23 (3)** of the **Electoral Act** in the absence of evidence establishing the same.

9. In taking purported judicial notice of the alleged absence of the appellant from Zimbabwe, the High Court erred, in using the principle of judicial notice to assist the 1st respondent in discharging an onus that he had miserably failed to establish on the founding papers.

10. The court *a quo* erred and misconstrued section **23 of the Electoral Act** in deeming the appellant removed from the voters roll without having regard to

section 28 of the same which posits a process which must be followed in removing a registered voter from the voters roll thereby disqualifying him as a presidential candidate for the forthcoming plebiscite.

11. All in all, the court *a quo* erred at law by granting as it did, an unspeaking order with the result that no one knows what relief exactly was granted in the absence of an unissued draft order which does not form part of the disposition of the judgment.

12. The court *a quo erred* at law in granting an application without making a positive finding on the infringement of section 67 of the Constitution.

RELIEF SOUGHT

1. The appellant prays that the appeal be allowed with costs and that the judgment of the court *a quo* handed down under **EC 10/23** on 12 July 2023 be set aside and in its place and stead thereof be substituted with the following:

IN THE MAIN

"The court declines its jurisdiction."

IN THE ALTERNATIVE

"The application is struck off the roll with costs."

IN THE ALTERNATIVE

"*The application is dismissed with costs on an attorney-client scale.*""

[14] By consent the above grounds were amended by adding the following:

"13. In dealing with the question of the perceived absence of the appellant from a constituency and not cessation of residence in a constituency, the court *a quo* erred and by so doing, conducted a wrong enquiry leading to a judgment that is contrary to the dictates of s 23 (3) of the Electoral Act.

OR

13. The court *a quo* erred at law in disposing of the matter before it on the basis of perceived absence from a constituency when the law upon which the application was predicated, s 23 (3) of the Electoral Act relates to cessation to reside in a constituency, a totally different concept that has its own different requirements."

PROCEEDINGS BEFORE THIS COURT

[15] Prior to the hearing of this appeal, the appellant had, by letter dated 21 July 2023 and addressed to the Registrar, requested the appointment of a five-member bench to determine whether or not the case of *Kambarami* v *1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21 was properly decided. At the commencement of the proceedings the appellant abandoned the request and submitted that the matter should proceed before the bench as constituted.

[16] Mr *Kanengoni,* for the second and Ms *Tembo,* for the third respondent submitted that they would abide by the decision of the court.

JURISDICTION OF THE SUPREME COURT

[17] The first respondent filed a notice of objection in terms of r 51 of the Supreme Court Rules, 2018 raising two objections. The first objection being that this Court does not have jurisdiction to hear the appeal. The first respondent, relying on *Mlilo v The President of the Republic of Zimbabwe* SC 179/20, argued that the court *a quo* had determined an application brought in terms of s 85 (1) (a) of the Constitution alleging violation of fundamental rights under Chapter IV of the Constitution. He further argued

that in terms of s 169 (1) of the Constitution, the Supreme Court does not have jurisdiction to hear and determine such an appeal. He further argued that the Supreme Court is a creature of statute and that had the legislature intended to give it jurisdiction to determine appeals of a constitutional nature, it would have said so in express terms as it did in respect of the High Court in terms of s 171(1) (c) of the Constitution.

[18] *Per contra*, the appellant, submitted that this Court is the proper forum to hear the appeal. He argued that s 169 (1) of the Constitution presupposes the existence of jurisdiction of this Court to hear and determine all appeals as a court of final resort except in constitutional matters where the Constitutional Court has final jurisdiction. The right to approach the Constitutional Court directly from a decision of a lower court only arises in terms of s 167 (3) of the Constitution. He further submitted that the *Mlilo* judgment (*supra*) relied on by the first respondent was inapplicable in that it related to circumstances in which a lower court will have made a decision on constitutional validity or invalidity. It is only in those instances that a party has direct access to the Constitutional Court.

[19] After hearing submissions on this point, the Court dismissed the point *in limine* raised by the first respondent as it was of the firm view that it has jurisdiction to hear and determine the appeal. This Court was in agreement with the appellant that s 169 (1) of the Constitution confers appellate jurisdiction in all matters on this Court. The Supreme Court has final jurisdiction in all matters except in constitutional matters. The Constitutional Court's decision is final in all constitutional matters.

Section 169 (1) of the Constitution provides as follows:

"**Jurisdiction of the Supreme Court**

169 (1) The Supreme Court is the final court of appeal for Zimbabwe, except in matters over which the Constitutional Court has jurisdiction."

[20] The wording of this provision is clear. By its very nature, the Supreme Court is a court of appellate jurisdiction and is mandated to deal with all appeals from all subordinate courts. This is evidenced by s 21 of the Supreme Court Act [*Chapter 7:13*] (Supreme Court Act) which reads:

"21(1) The Supreme Court shall have jurisdiction to hear and determine an appeal in any civil case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court.
(2) Unless provision to the contrary is made in any other enactment, the Supreme Court shall hear and determine and shall exercise powers in respect of an appeal referred to in subsection (1) in accordance with this Act."

(See also the Preamble to the Supreme Court Act.)

[21] On a proper reading of s 169 (1) of the Constitution as read with s 21 of the Supreme Court Act, it is manifestly clear that the lawmaker did not intend to oust the appellate jurisdiction of the Supreme Court in constitutional matters. All that the lawmaker did was to strip the Supreme Court of its final jurisdiction in constitutional matters without divesting it of its jurisdiction over constitutional matters. The submissions by the first respondent that the appellant would have a second bite of the cherry in having two appeals in one matter is without merit. This is because in the normal course of proceedings a matter may commence in the Magistrates Court and proceed all the way up to the Constitutional Court.

[22] As regards the applicability of *Mlilo* (*supra*), this Court is of the view that it does not apply to the circumstances of this matter. In that case, this Court was dealing with the question whether an order of constitutional validity issued by the High Court is

appealable to this Court rather than directly to the Constitutional Court in terms of s 167 (3). In the present matter, the application before the court *a quo* was in respect of an alleged violation of fundamental rights in Chapter IV of the Constitution. This clearly distinguishes it from the *Mlilo* case.

[23] It is for these reasons that the preliminary objection on jurisdiction was dismissed.

VALIDITY OF THE NOTICE OF APPEAL

[24] The second preliminary objection related to the validity of the notice of appeal. The first respondent argued that the notice of appeal was defective in a number of respects, *inter alia*, in that:

1. the grounds of appeal lacked clarity and precision, were prolix and attack every finding of the court *a quo* in violation of r 37 (1) (d) as read with r 44 (1) of the Supreme Court Rules, 2018;
2. the failure by the appellant to properly cite, in the notice of appeal, the second respondent's correct address is contrary to r 11 of the Supreme Court Rules; and
3. the appellant seeks in its prayer several forms of relief in the alternative and therefore the relief sought is not exact.

[25] The first respondent abandoned the objections in the second and third paragraphs, and in our view properly so. This leaves the first paragraph for the Court's consideration. The first respondent's main complaint was that the grounds were prolix. The appellant, on the other hand, submitted that the grounds of appeal complied with the rules.

[26] Having carefully considered the objections, we are of the firm view that although the grounds are rather inelegantly worded, prolix and attack almost every finding made by the court *a quo*, they are nevertheless substantially in compliance with the rules. The Court comes to that conclusion having due regard to the importance of the case.

JURISDICTION OF THE COURT *A QUO*

[27] In dealing with the merits of the appeal, the appellant raised a new point of law without notice to the other side. The new point related to jurisdiction of the court *a quo* and by extension to this Court. It was submitted that in terms of s 167 (2) (b) of the Constitution, it is only the Constitutional Court that can hear and determine disputes relating to election to the office of President. It was further submitted that the section relates, not only to election petitions but also to every facet of the process of electing the President, starting with the nomination process under consideration.

[28] It was submitted that s 161 of the Act creates the Electoral Court as a specialised division of the High Court with exclusive jurisdiction to hear and determine all electoral matters except for petitions relating to disputes on the election of the President and criminal cases. It was further submitted that the Electoral Court, being a division of the High Court, has powers to give judgments, orders and directions which powers include issuing declaratory orders.

[29] The above submissions were made contrary to the concession made in the appellant's heads of argument that the electoral court does not have the power to issue a declaratory order. Upon being engaged by the court on this apparent contradiction, the appellant submitted that he was withdrawing the concession as it was bad at law. For this

submission he relied on the case of *Moven Kufa & Anor* v *The President of Zimbabwe & Anor* CCZ 22/17.

[30] It was submitted that the first respondent could not approach the court *a quo* in terms of s 85 (1) of the Constitution as his remedy lies in the Electoral Court. It was further submitted that whilst s 171(1) of the Constitution granted the court *a quo* the right to hear and determine constitutional matters it did not take away the jurisdiction of the Electoral Court in electoral matters.

[31] It was further argued that in the *Kambarami* case (*supra*) the court did not consider the import of s 161 and in particular that the court is a division of the High Court and has the same powers as the High Court. In concluding his submissions on this point, the appellant submitted that the judgment was *per incuriam* and it did not have to be followed as a precedent of the court.

[32] *Per contra*, the first respondent, objected to the new point of law, arguing that such a point cannot be taken without notice. It was also submitted that this point was not raised in the court *a quo* neither was it addressed in the appellant's heads of argument before this Court. Notwithstanding the objection, the respondent submitted as follows: There is a distinction between nomination and election. Nomination is a process that precedes an election. In the event that a person is unhappy with the nomination process he appeals to the Electoral Court in terms of Part IV of the Election Rules. However, in the event that there is a dispute relating to the election of the President into office, one can only approach the Constitutional Court directly. The process of nomination takes place long before an election.

[33] It was further submitted that r 10 of the Electoral Rules provides that an appeal to the Electoral Court may only be made by a candidate. The first respondent, not being a candidate, would not have been able to bring an appeal in terms of the Act and its rules. The first respondent therefore, did not have a remedy in the Electoral Court.

[34] In relation to the issue raised in the first ground of appeal, the first respondent asserted that s 161 of the Act is only applicable when the court is seized with an application or an appeal in terms of the Act. It was argued that the application before the court *a quo* was brought in terms of s 85 (1) of the Constitution wherein the first respondent was seeking a declaratory order. The first respondent desirous to bring a constitutional application, had the right to approach the court *a quo* as the court was given the power under s 171 of the Constitution to hear and determine constitutional applications. The court *a quo*'s finding that the Electoral court does not have jurisdiction to issue declaratory orders is grounded in a judgment of the Supreme Court itself in the *Kambarami* case (*supra*). It was further submitted that the Electoral Court has the same powers as the High Court only in the limited circumstances set out in the Act and discussed in the *Kambarami* case. The decision in that case was binding on the court *a quo*.

[35] Having considered the submissions by the parties, this Court finds that the court *a quo* had jurisdiction to hear and determine the application in terms of s 85 (1) of the Constitution which reads as follows:

"85 Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely-
  (a) any person acting in their own interests;
  (b) …….
  (c) …
  (d) …

(e) …

Is entitled to approach a court, *alleging* that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation."

The Court's finding in this regard finds expression in the words of MALABA DCJ (as he then was) in the case of *Meda* v *Sibanda* 2016 (2) ZLR 232 (CCZ) at p 236 B – D where he remarked that:

> "It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. The facts on which the allegation is based must of course, appear in the founding affidavit.
>
> Whether or not the allegation is subsequently established as true is a question which does not arise in an enquiry as to whether the matter is properly before the Court in terms of s 85(1). In this case, the applicant alleged in the founding affidavit that her right to property had been infringed.
>
> Whether her allegation is true or not is not the issue. What matters is that she alleged a violation of a fundamental human right and as such the Court was properly seized with the matter. The question of the veracity of the allegation would have been tested on the basis of evidence placed before the Court."

[36] Considering that the *Meda* case (*supra*) is a decision of the Constitutional Court, it is final and binding on all subordinate courts. That being the case, the court *a quo* undoubtedly had the requisite jurisdiction in terms of s 171 (1) of the Constitution as it was dealing with a constitutional application brought in terms of s 85 (1) of the Constitution.

[37] The appellant went to great lengths arguing that what was before the court *a quo* was an electoral matter which should have been filed before the Electoral Court on the basis that it has exclusive jurisdiction to hear all electoral matters. The submissions by the

appellant raise the issue whether the conferment of exclusive jurisdiction on the Electoral Court in terms of s 161 of the Act ousts the court *a* quo's jurisdiction in electoral matters. That issue was resolved by the *Kambarami* case (*supra*) where it was stated that:

> "25. The Electoral Act does not provide nor purport to give the court the jurisdiction to grant declaratory orders. A *declaratur* by nature is a special remedy open to any individual who has an interest in any matter who seeks a declaration on existing or future rights. The power of the High Court to grant declaratory orders is entrenched in s 14 of the High Court Act. Section 14 provides as follows:
>
> > "14.**High Court may determine future or contingent rights**
> > The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."
>
> 26. It seems to me that s 14 of the High Court Act is a special provision which flows from the fact that the High Court has inherent jurisdiction which the Electoral Court does not have. The remedy of a declaration of rights is a remedy which the High Court grants within its discretion. That is not a remedy which may be shared by a court which has limited jurisdiction.
>
> 27. It could not have been the intention of the legislature to give the Electoral Court the power to grant declaratory orders through the amendment of s 161 of the Act. In my view, s 161 of the Act was amended so as to provide the Electoral Court with wider powers so that it is not restricted to dealing only with election petitions as was the position prior to 2012." (*ZIMASCO (Pvt) Ltd* v *Maynard Marikano* 2014 (1) ZLR 1).

[38] The decision in the *Kambarami* case that the Electoral Court does not have jurisdiction to issue declaratory orders is final and binding. The correctness and finality of decisions of the Supreme Court cannot be impugned as was enunciated in *Lytton Investments (Pvt) Ltd* v *Standard Chartered Bank Zimbabwe Limited & Anor* 2018 (2) ZLR 743 (CCZ) at 756 where it was held that:

> "The principles that emerge from s 169 (1) of the Constitution, as read with s 26 of the Act (Supreme Court Act) are clear. A decision of the Supreme Court, on any non-constitutional matter in an appeal is final and binding on the parties and all courts except the Supreme Court itself……
>
> What is clear is that the purpose of the principle of finality of decisions of the Supreme Court on all non-constitutional matters is to bring to an end the

> litigation on the non-constitutional matters. A decision of the Supreme Court on a non-constitutional matter is part of the litigation process. The decision is therefore correct because it is final. It is not final because it is correct.
>
> The correctness of the decision at law is determined by the legal status of finality. The question of the wrongness of the decision would not arise. There cannot be a wrong decision of the Supreme Court on a non-constitutional matter."

[39] The submission by the appellant that the decision in the *Kambarami* case is i*n per incuriam* in without merit. This Court engaged the import of s 161 of the Act in coming up with its decision. The fact that the Electoral Court is a division of the High Court does not detract from the fact that it is a creature of statute with limited jurisdiction. The court *a quo* was therefore correct as it was bound to follow the decision in the *Kambarami* case.

[40] This Court finds that the Electoral Court did not have jurisdiction to issue a declaratory order which was sought by the first respondent in the court *a quo*. Accordingly, this Court finds no merit to the challenge to the court *a* quo's jurisdiction.

[41] Having found that the court *a quo* had jurisdiction in terms of s 85 (1) of the Constitution, to the exclusion of the Electoral Court, the question of subsidiarity falls away.

LOCUS STANDI

[42] On *locus standi*, the appellant submitted that the first respondent had no standing to bring the application before the court *a quo*. It was submitted that the only persons who had the right to challenge the nomination of the appellant are those registered on the same voters roll or candidates in the same constituency. The appellant's counsel

referred the court to s 28 of the Act and submitted that the first respondent was a voter in the same constituency as the appellant. It was further submitted that the first respondent therefore had no direct and substantial interest in the appellant's status as a voter. It was argued that the court *a quo* erred in adopting a liberal approach in making a finding that the appellant had a direct and substantial interest in the nomination of the appellant.

[43] *Per contra*, it was submitted, for the first respondent, that he would not have been able to object in terms of s 28 of the Act as he is not a voter registered in the same constituency with the appellant. It was further submitted that the first respondent could also not proceed in terms of s 33 as he is not a voter registration officer.

[44] The question of *locus standi* is determined by the nature of the application brought before a court. The first respondent brought an application in the court *a quo* in terms of s 85 (1) alleging a breach of fundamental rights. Section 85 (1) entitles the first respondent to approach a court alleging violation of his fundamental rights. In the *Meda* case (*supra*) at 236 B - D it was held that:

> "It is clear from a reading of s 85(1) of the Constitution that a person approaching the Court in terms of the section only has to allege an infringement of a fundamental human right for the Court to be seized with the matter. The purpose of the section is to allow litigants as much freedom of access to courts on questions of violation of fundamental human rights and freedoms with minimal technicalities. ……
>
> Whether her allegation is true or not is not the issue. What matters is that she alleged a violation of a fundamental human right and as such the Court was properly seized with the matter. " (See also *Lytton* case (*supra*) at 749 G).

[45] The submission by the appellant that the first respondent did not have *locus standi* on the basis that he was not a registered voter or candidate in the same constituency as the

appellant was irrelevant for the purposes of the application before the court *a quo*. What was material was whether he was alleging a violation of his fundamental rights under Chapter IV of the Constitution. The court *a quo* therefore correctly found that the first respondent had the *locus standi* as he was alleging a violation of his fundamental rights.

APPELLANT'S RESIDENCY STATUS

[46] The appellant submitted as follows: The first respondent made a bare averment in his founding affidavit before the court *a quo* that the appellant was outside the country without providing any evidence. This is a positive averment and therefore, the first respondent had the onus to prove that the appellant was out of the country. Whilst conceding that the appellant was out of the country temporarily on medical grounds, the concession was not a basis for reversing the onus. The court *a quo* was therefore wrong in finding that the appellant had reverse onus.

[47] It was further submitted as follows: The court *a quo* misconstrued s 23 (3) of the Act. The said provision relates to cessation of registration as a voter as opposed to absence from the country and constituency. The first respondent's founding affidavit was premised on absence. The court *a quo* embarked on a wrong inquiry whether the appellant was absent from the country and his constituency instead of inquiring into whether he had ceased to be a voter.

[48] Further, that s 23 of the Act is not a deeming provision. It does not render the appellant automatically removed from the voters roll. Section 28 of the Act is the relevant provision that ought to be engaged in order to remove a registered voter from the voters roll after complying with the procedure set out thereunder. The failure by the first

respondent to engage the procedure set out in s 28 of the Act was detrimental to his case.

[49] In response, the first respondent submitted as follows: The averment by the first respondent that the appellant was not in the country was a negative averment. Such an averment could not be proved by the first respondent. Once the appellant conceded, as he did in his opposing affidavit, that he had indeed left the country it was incumbent upon him to state when he returned. It was submitted that the interpretation of s 23 (3) has been interpreted by the Constitutional Court in a number of cases and the Supreme Court is therefore bound by the decisions in those cases.

[50] The crux of the appellant's complaint on this issue is that the court *a quo* arrived at an incorrect factual conclusion regarding whether or not he was in the country and his constituency for a continuous period of eighteen (18) months. This Court finds that the court *a quo* was correct in finding as a fact proved that the appellant was outside the country and therefore his constituency for a continuous period of eighteen (18) months.

[51] Section 91 (1) of the Constitution sets out the factual premise that must be satisfied regarding the residency status of a presidential candidate. It is worded as follows:

> "**91 Qualifications for election as President and Vice-President**
> (1) A person qualifies for election as President or appointment as Vice-President; if he or she—
> (a) is a Zimbabwean citizen by birth or descent;
> (b) has attained the age of forty years;
> (c) **is ordinarily resident in Zimbabwe;** and
> (d) is registered as a voter." (own emphasis)

[52] It is apparent from the above that a person aspiring to be a president must be ordinarily resident in Zimbabwe and must be a registered voter. The question to be answered is whether the appellant was ordinarily resident in Zimbabwe and a registered voter at the time the Nomination Court accepted his nomination as a presidential candidate for the forthcoming elections.

[53] The first respondent's contention is that the appellant had not been resident in Zimbabwe for a continuous period of eighteen (18) months and had therefore been deemed to have ceased to be a registered voter. The appellant conceded leaving the country temporarily for purposes of receiving medical care.

[54] The Court agrees with the first respondent's submissions. It is trite that what is admitted need not be proved. Therefore, this Court holds that once the appellant conceded that he left the country and therefore his constituency, the onus shifted to him to prove that he was not absent from the country and his constituency for a continuous period of eighteen (18) months. This is so because this is information which is specifically within his knowledge. As was stated in *Musanhi* v *Mt Darwin Rushinga Co-operative Union* 1997 (1) ZLR 120 the question whether an averment is positive or negative is not material. GUBBAY CJ remarked at p 123 that:

> "The learned Judge President took the view that as the respondent could not be required to prove a negative, A that is, non-delivery, the onus was on the appellant to prove the deliveries on a preponderance of probabilities. This he had failed to do.
>
> Counsel for the appellant argued before this court that it is not a rule of our law that the onus of proof cannot lie upon the party who makes a negative allegation. It still has to be determined who can be said to assert and who to deny. I agree with that submission. It is not very helpful, in my opinion, to ask whether a party is making a positive or negative allegation. This is because by adroit linguistic manipulation a positive averment can always be couched into a negative statement. See Hoffmann and Zeffertt South African Law of Evidence

4 ed at 511. I prefer, and commend, the approach of Grosskopf JA in Eskom v First National Bank of Southern Africa Ltd 1995 (2) SA 386 (A) where, at 392D-E, the learned Judge of Appeal remarked:

> "It has often been said that determining the incidence of the onus of proof 'is merely a question of policy and fairness based on experience in the different situations'. (Wigmore as quoted in Mabaso v Felix 1981 (3) SA 865 (A) at 873C and During NO v Boesak & Anor 1990 (3) SA 661 (A) at 673A). **As a matter of fairness and sound judicial policy, it seems reasonable that, where one party has the means of establishing a particular fact and his opponent not, the onus should rather be on the former than on the latter.** Although this factor would not be conclusive it should, in my view, be accorded some weight. It was taken into consideration in Mabaso's case supra at 873E-F in determining the onus in civil cases where a defendant relies on self-defence as a justification for what would otherwise be an assault."

And continued at 393D-F:

> "... it is not a principle of our law that the onus of proof of a fact lies on the party who has peculiar or intimate knowledge or means of knowledge of that fact. The incidence of the onus is determined by law. In many cases the person burdened by the onus as laid down in the sources of our law may be required to prove a fact which is peculiarly within the knowledge of his adversary. This does not, however, mean that a court, where the incidence of the onus of proof in a particular situation is uncertain and has to be determined, may not have regard, inter alia, to matters of practical convenience and fairness such as the sources of knowledge available to the rival parties."(own emphasis)

[55] The court *a quo* cannot be faulted for holding that the appellant had the onus of proving when he returned to the country as the evidence of his return was in his exclusive knowledge. It is common cause that the appellant is not within the country. The court *a quo* was correct in taking judicial notice, as this Court also does, of the fact that all the appellant's affidavits in relation to this matter are being notarised from South Africa. The appellant failed to discharge the onus cast upon him. The court *a quo* was therefore correct in making a factual finding that the appellant was not in the country and his constituency for a continuous period of eighteen (18) months. It is trite that this Court does not lightly interfere with factual findings of a lower court. (See *Barros* v *Chimphonda* 1999 (1) ZLR 58). The court *a quo* thus properly exercises its discretion in making the factual finding and there is no basis upon which it can be impugned.

[56] Section 23 (3) of the Act provides:

> "(3) A voter who is registered on the voters roll for a constituency, other than a voter who has been registered in that constituency in terms of the proviso to subsection (1), **shall not be entitled to have his or her name retained on such roll if, for a continuous period of eighteen months, he or she has ceased to reside in that constituency:**
>
> Provided that nothing in this subsection shall prevent his or her name from being struck off such voters' roll—
> (*a*) on his or her being registered in another constituency; or
> (*b*) if he or she becomes disqualified for registration as a voter." (my emphasis)

The import of the provision was considered in the case of *Bukaibenyu v The Chairman of the Zimbabwe Electoral Commission* & Ors 2017 (1) ZLR 7 (CC), wherein MALABA DCJ (as he then was) held at 10 H- A that:

> "Section 23 (3) required that a voter be ordinarily resident in the constituency in which he or she was to vote for purposes of being qualified for registration on the voters roll for that constituency. If the voter became absent from the constituency in which he or she was registered as a voter for a continuous period of twelve months, his or her name had to be removed from the voters roll of that constituency **as he or she would be deemed to have ceased being a resident of that constituency**." (own emphasis) (See also *Shumba & Ors* v *Minister of Justice, Legal and Parliamentary Affairs* 2018 (1) ZLR 509 (CCZ).

[57] Thus, it is apparent that s 23 (3) is a deeming provision. The import of the provision is that cessation of registration on the voters roll is an inescapable consequence of one's absence from his constituency for a continuous period of eighteen (18) months. In other words, once a registered voter is absent from his constituency for the prescribed period, he automatically ceases to be a registered voter. The appellant's contention that he was absent from his constituency on medical grounds appears to be premised on s 33 (3) of the Act which provides

> "(3) In determining the period of absence of any person for the purposes of subsection 2, no account shall be taken of any period during which the person-

(d) resides outside Zimbabwe on account of ill health and disability."

That section relates to instances where the voter registration officer considers whether a voter has become disqualified for registration as a voter. In those circumstances, the onus lies on the appellant to prove the reason for absenteeism. Apart from his mere say so the appellant did not produce any evidence to show that he was temporarily absent from his constituency on medical grounds for the duration of the prescribed period.

As correctly found by the court *a quo*, the appellant failed to prove that he was out of his constituency on medical grounds. Proof of his absence on medical grounds was within his personal knowledge. The appellant's absence therefore resulted in him being deemed to have ceased to be a registered voter by operation of law.

[58] Accordingly, there is no merit in the appellant's appeal on this issue.

[59] Grounds 11 and 12 were not motivated by the appellant either in the heads of argument or in oral submissions. Ground 11 related to the issuance of an unspeaking order. Ground 12 attacked the court a quo's finding for failing to make a finding on the violation of fundamental rights. It is trite that a ground not motivated is deemed abandoned. Both grounds 11 and 12 are accordingly deemed abandoned.

DISPOSITION

[60] In summing up, this Court has made the following findings, that:

1. it has jurisdiction to hear and determine the appeal;

2. the court *a quo* had the jurisdiction to hear and determine the constitutional application before it in terms of s 85 (1) of the Constitution and the question of subsidiarity does not arise;
3. the Electoral Court had no jurisdiction to issue a declarator;
4. the first respondent had *locus standi*;
5. the court *a quo* made the correct factual finding that the appellant was absent from the country and therefore absent from his constituency for a continuous period of eighteen (18) months;
6. the court *a quo* corrected interpreted s 23 (3) of the Act to the effect that the appellant's absence from his constituency for the prescribed period entailed cessation of his registration as a voter and consequently disqualified him from nomination as a presidential candidate.

[61] The above findings of fact and law are dispositive of the appeal and it is therefore not necessary to relate to other issues raised by the appellant.

[62] That being the case and on the basis of such findings, the appeal cannot succeed.

[63] This being a constitutional matter it is customary not to award costs.

[64] It was for the foregoing reasons that this Court dismissed the appeal with no order as to costs.

BHUNU JA I agree

CHATUKUTA JA I agrees

Mhishi Nkomo Legal Practice, the appellant's legal practitioners

Nyahuma Laws, first respondent's legal practitioners

Nyika Kanengoni & Partners, the second respondent's legal practitioners

The Attorney General's Office, the third respondent's legal practitioners