

LINDA TSUNGIRIRAI MASARIRA
versus
PRESIDING OFFICER OF THE NOMINATION COURT
and
CHIEF ELECTIONS OFFICER
ZIMBABWE ELECTORAL COMMISSION
and
THE CHAIRPERSON
ZIMBABWE ELECTORAL COMMISSION
and
ZIMBABWE ELECTORAL COMMISSION
and
EMMERSON DAMBUDZO MNANGAGWA
and
NELSON CHAMISA
and
DOUGLAS TOGARASEI MWONZORA
and
LOVEMORE MADHUKU
and
SAVIOUR KASUKUWERE

ELECTORAL COURT OF ZIMBABWE
MHURI J
HARARE, 24 and 27 July 2023

Electoral Appeal

Mr *A Makoni* for Appellant
Mr *T M Kanengoni* for 1st, 2nd, 3rd and 4th respondents
No appearance for 5th, 6th, 7th, 8th and 9th respondents

MHURI J:

On the date of hearing this appeal (24 July 2023) Counsel representing Appellant and 1st to 4th Respondents agreed and advised the Court that 1st to 4th Respondents' heads of argument be filed before end of day on Tuesday 25 July 2023 and if need be, Appellant files supplementary heads of argument before end of day on Wednesday 26 July 2023 and thereafter I would then consider the papers filed of record and determine the appeal on the papers so filed unless there were issues that needed clarification. I sought clarification from appellant's counsel as to why appellant did not attach the bank transfer application forms to her appeal as

was done in the matter of *Elizabeth Isabel Valerio v Presiding Officer of the Nomination Court & Others* HH 432/2023 under case EC 02/2023. The response was that the appellant's matter was different from Valerio's in that appellant presented forms which had not yet been submitted to the bank but it was her intention to pay through an RTGS bank transfer.

On the basis of the above, I then reserved judgment and this now is the judgment.

On 21st June 2023, Appellant approached the Nomination Court seeking to be registered as a presidential candidate for the harmonised general elections to be conducted on the 23rd August 2023.

Inter alia, when lodging her or his nomination papers with the Chief Elections Officer, a candidate is required to deposit the prescribed nomination fee. This is provided for in Section 105 of the Electoral Act [*Chapter 2:13*], (The Act) which reads as follows:

“At the same time as the nomination paper is lodged by or on behalf of a candidate for election as President, there shall be deposited with the Chief Elections Officer, by or on behalf of the person nominated, such nomination fee as may be prescribed, which shall form part of the funds of the Commission.”

Although appellant in her Heads of Argument referred to s 47 in this regard, which section relates to other candidates, that section is however similarly worded as s 105.

1st Respondent declined to accept appellant's nomination papers and it is this decision that aggrieved Appellant, prompting her to approach this Court on appeal in terms of section 46 (19) (b) of the Act which provides:

“If a nomination paper has been rejected in terms of subsection (10) or been regarded as void by virtue of subsection (16)-
(a).....
(b) The candidate shall have the right of appeal from such decision to a judge of the Electoral Court in chambers and such judge may confirm, vary or reverse the decision of the nomination officer and there shall be no appeal from the decision of that judge;
(c).....
(d).....”

The grounds upon which this appeal is premised are two and these are that:

1. The 1st Respondent erred in rejecting Appellant's Real Time Gross Transfer System method of payment, insisting that the Appellant pays in United States Dollars or using the ZIPIT platform. The Appellant's bank's ZIPIT platform permits a limit of Z\$2,500,000.00 per month and her limit was Z\$1,500,000.00 per day.
2. After the 3rd Respondent issued a press statement on the 22nd of June 2023 noting with concern reports to the effect that prospective candidates were disqualified from lodging their papers on account of difficulties experienced in effecting payments of nomination

fees largely due to the current challenges within the banking system, calling upon the affected candidates to approach the respective Nomination Courts no later than 1600 hours on 22 June 2023, 1st Respondent erred in not entertaining the Appellant, indicating that she was *functus officio*.

Appellant's prayer was for the following relief:

- (i) That the decision of the 1st Respondent to reject Appellant's Nomination as a candidate for election to office of president for the purposes of the presidential election to be held on 23 August 2023 be and is hereby set aside.
- (ii) Appellant be and is hereby declared as having been validly nominated as a candidate for election to office of president for purposes of the presidential election to be held on 23 August 2023, upon submission to 1st Respondent of proof of payment of the nomination fees within twenty fours from the date of this Court's order.
- (iii) 1st, 2nd, 3rd and 4th Respondents' be and are hereby ordered to take all necessary steps to ensure that Appellant is recorded as a candidate for election to office of president for the purposes of the presidential election to be held on 23 August 2023 and is reflected as such on election day.
- (iv) The costs of the appeal to be borne by 1st, 2nd, 3rd and 4th Respondents.

Appellant submitted that on the nomination date (21 June 2023) she presented at the nomination Court to file her nomination papers and payment of nomination fees as required. She presented bank transfer forms but the 1st Respondent refused to accept them stating that that mode of payment will not reflect in 4th Respondent's bank account on that day. She was advised to use the ZIPIT platform but her daily transaction allowance was not sufficient to cover the prescribed fee or to pay cash, that is in US\$ which she could not afford. Faced with this predicament she was unable to file her nomination papers and be registered as a presidential candidate. The following day, 22nd June 2023, 4th Respondent issued a press statement to the effect that those who had experienced challenges occasioned by the banking system should approach their respective nomination courts. She presented herself at the nomination court again but could not file her papers as the 1st Respondent told her she was *functus officio*.

Aggrieved by 1st Respondent's decision she sought recourse by filing this appeal in this Court on the two grounds stated earlier.

To substantiate her appeal, appellant through her heads of argument submitted, in summary, that 1st Respondent erred in rejecting her Real Time Gross Transfer System (RTGS) mode of payment insisting that she pays in US\$ or ZIPIT platform where ZIPIT platform of her bank permitted limits of ZW\$ 1.5 million only per day which was not enough to meet the nomination fee. Having failed to lodge her papers on the first day, she tried again on the 22 June on the strength of 2nd Respondent's press statement. She submitted that she was a victim of the challenges occasioned the previous day with the banking system and therefore ought to have been allowed to re-lodge her papers.

Her other submission was that she had substantially complied with section 47 or 105 of Act as provided for in section 46 (11) (b) as such she ought to have been and should be registered as a presidential candidate.

The 1st - 4th Respondent are strongly opposing the appeal and their prayer is that it be dismissed for lack of merit with costs. Their submissions in summary are that:-

1. Section 47 or 105 of the Act is peremptory and enjoined appellant to pay the prescribed nomination fee at the time she lodged her nomination papers on nomination day, that is, 21 June 2023.
2. The press statement by 4th Respondent could not lawfully extend and was not meant to extend the sitting of nomination court beyond 21 June 2023.
3. The rejection of appellant's nomination papers for failure to pay the fees was due and correct
4. There was no substantial compliance. The provisions of section 46 (11) of the Act do not apply.
5. Appellant does not fall under the ambit of the press statement issued by 4th Respondent. Her case is distinguishable from the case of *Valerio v Presiding Officer of the nomination Court (supra)*.

A question arises to the effect that did the 1st Respondent err in holding that he/she was *functus officio* when appellant presented herself on the 22nd of June 2023. Although this is not one of her grounds of appeal in terms of section 46 (8), in particular the *proviso* thereto, the answer is in the negative. Section 46 (8) reads as follows:

“The nomination officer shall examine every nomination paper lodged with him or her which has not been previously examined by him or her in order to ascertain whether it is in order and

shall give any candidate or his or chief election agent an opportunity to rectify any defect not previously rectified and may adjourn the sitting of that court for that purpose from time to time: provided that the sitting shall not be adjourned to any other day that is not a nomination day.”

It is noted however that the press statement issued by the 4th Respondent gave some reprieve to certain candidates who faced certain challenges when trying to comply with the provision of section 47 or 105. The press statement reads as follows:

“The Zimbabwe Electoral Commission has noted with concern reports to the effect that prospective candidates were disqualified from lodging their nomination papers on account of difficulties experienced in effecting payment of nomination fees largely due to the current challenges within the banking system.

In view of this, the Commission is calling upon all candidates and parties whose nomination papers had been submitted but had challenges with the Commission’s point of sale machines and those who had submitted of payments but funds not reflecting in ZEC’s account to approach the respective nominations courts wherein their papers were lodged and make the necessary payments or get confirmation of said payment no later than 1600hrs on 22 June 2023.

The overriding mission of ZEC is to be as accommodative and inclusive as possible to enable Zimbabwean voters to exercise their cherished democratic rights.” (Underlining is mine for emphasis)

The statement is worded in clear and unambiguous terms. Those candidates who were affected by the challenges in the banking system were to approach their respective nomination courts on the 22nd of June 2023 before 1600hrs. This statement granted the grace period within which affected candidates were to be entertained. This is common cause.

On the strength of the press statement, appellant approached 1st Respondent so as to re-lodge her papers but to no avail.

The next question that arises then is whether appellant fell under the ambit of the press statement for the court to grant her the relief she is seeking. One needs to carefully read the press statement. As earlier stated, the statement was written in clear and unambiguous terms. As stated by DEME J in the *Valerio case (supra)* the statement relates to two categories of candidates, the first one being the likes of Valerio who on the nomination day presented proof of bank stamped application forms for transfer of funds into 4th Respondent’s bank account but the transfer had not yet reflected in the account. The second being those who encountered challenges on Respondent’s point of sale machines. *In casu*, as clarified by her counsel, appellant presented bank transfer forms to 1st Respondent which she had not presented to the bank meaning she had not made the application for the transfer of funds at the bank, hence her

failure to attach the forms unlike Valerio who presented transfer forms which were duly stamped by the bank and duly signed by a bank official and her only predicament being that the transfer of the funds had not yet reflected in the 4th Respondent's account. Appellant knew well before, that her ZIPIT daily transaction limit would not meet the prescribed fees. This cannot be said to be a bank challenge which happened on the day in question. Further, appellant does not state that she tried to use the Respondent's point of sale machines to effect the transaction and encountered a challenge. Even if it were to be accepted that she was told to pay cash in US\$ it was not her submission that she tried to withdraw the cash but encountered some challenges at the bank.

All these having been considered it is my finding that appellant does not fall under the ambit of the press statement. She does not fall in either of the two categories.

The next point to be considered is, was there substantial compliance by appellant for her to succeed in this appeal? She relied on section 46 (11) of the Act to bolster her argument.

The peremptory provision of section 47 or 105 which requires that payment of nomination fees as well as lodging of nomination papers be done contemporaneously goes without argument. This, appellant must have known well before the nomination day. Do the actions by appellant of the 21st of June 2023 before 1st Respondent constitute substantial compliance with section 47 or 105. I do not think so. Section 46 (11) provides different scenarios which the nomination officer can condone and accept nomination papers. It reads:-

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

- a) Solely on account of any minor variation between the name of any person as it appears on the nomination paper and as it appears on the voters roll, if the nomination officer is reasonably satisfied that the variation is due to an error; or
- b) On account of any other imperfection in the nomination paper if the nomination officer is satisfied that there has been substantial compliance with this section” (emphasis added)

Particular reliance was made on subsection (b) above. This section is also worded in clear and unambiguous terms. It relates to minor variations in the names on the nomination paper and voters roll and the variation having been as a result of an error. Under subsection (b) it relates to any other imperfection in the nomination paper. *In casu*, the rejection was not on the basis of an imperfection in the nomination paper. The rejection was on the basis of non-compliance with the peremptory provision of section 47 or 105 to wit, non-payment of the prescribed nomination fees at the time of lodging papers. What substantial compliance is there where one has presented forms not yet submitted to the bank, where there is no evidence that the RTGS transfer application duly stamped and signed by the bank was done and all that was

left was for the money to reflect in the 4th Respondent's bank account. What substantial compliance is there, where one does not try to transact using the 4th Respondent's point of sale machines? There is none in my view.

Further, it is pertinent to mention also that section 46 (11) relied on, does not cover non-compliance with section 47 or 105. The words "... that there has been substantial compliance with this section" in section 46 refer not to section 47 or 105 but section 46.

Section 104 of the Act that provides for nomination of candidates for election to office of President provides in subsection (3) that:-

"Subject to this section, section 46 shall apply, with any changes that may be to the nomination of candidates for election to the office of President."

To that end therefore section 46 (15) (c) applies *mutatis mutandis* with equal force to appellant. It reads:

"A candidate shall not be regarded as duly nominated for election if-

- a)
- b)
- c) The sum referred to in section forty-seven was not lodged with his or her nomination paper
- d)
- e)"

This section is also couched in peremptory terms, it does not by any stretch of imagination permit substantial but full compliance in so far as the payment of nomination fees is concerned. This argument in my view cannot assist appellant either.

The Court is alive to and appreciate the sentiments echoed by appellant in paragraph 22 of her supplementary heads of argument to the effect that one of the national objectives captured in section 17 of the Constitution is the promotion of the full gender balance in Zimbabwean society and in particular, to promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men.

The law however has to be complied with irrespective of gender. If appellant had complied with the law, her nomination papers would have been accepted.

All having been considered I find that this appeal lacks merit and cannot be upheld.

In the result, it is ordered that the appeal be and is hereby dismissed with costs.

Mbidzo, Muchadehama & Makoni, appellant's legal practitioners
Nyika Kanengoni & Partners, 1st - 4th respondents' legal practitioners


26-7-2023

