

FRANCIS XAVIER NKHOMA Vs GODFREY MIYANDA - NATIONAL SECRETARY OF THE MOVEMENT FOR MULTIPARTY DEMOCRACY (Sued on his own behalf and on behalf of the Movement for Multi-Party Democracy) (1995) S.J. (S.C.)

SUPREME COURT
GARDNER, CHAILA AND MUZYAMBA, JJ.S.
14TH MARCH, 1995 AND 8TH JUNE, 1995.
S.C.Z./8/61/94

Flynote

Appeal - Declaration - Party Constitution - Regulation 4(m) vis a vis Article 9(d) of Party Constitution

Statutory Construction - The golden rule - Ordinary meaning of the words of a statute

Headnote

The appellant appealed against a High Court decision declining to grant a declaration that the appellant is the only lawful Provincial Chairman of the Movement for Multi-Party Democracy for the Eastern Province, a declaration that by virtue of the position as Provincial Chairman he is entitled to attend meetings of the National Executive Committee as an injunction to restrain the respondent from interfering in any way with the appellant's rights and performance of his duties as Provincial Chairman. In addition the appellant was contending that Regulation 4(m) which was promulgated by the National Executive Committee of the Party was ultra vires Article 9(d) of the party constitution.

Held:

- (i) Regulation 4(m) is ultra vires Article 9(d) of the Party Constitution
- (ii) The appellant is entitled to a declaration that, (at the time of this judgment) he is the only lawful provincial chairman of the MMD for the Eastern Province.
- (iii) The appellant is entitled to a declaration that, whilst as Provincial Chairman, he is entitled to attend National Executive Committee Meetings.
- (iv) Whilst the appellant is serving as Provincial Chairman in accordance with the terms of this judgment, he is entitled to an injunction to prevent the respondent from interfering with performance of his duties

Cases referred to:

- 1. Caledonian Ry. v North British Ry. (1881) 6 App. Cas. 114 at p 122.
- 2. Abley v Dale (1850) 20 L.J.C.P. 33.

For the appellant: R.M. Simeza of Simeza Sangwa and Associates
For the Respondent: Ernest C Mwansa, Legal Secretary

Judgment

GARDNER, J.S.: delivered the judgment of the court.

On the 14th of March, 1995 we allowed this appeal and made declarations in accordance with the application of the appellant. We further said that the appellant was to continue in his office as Chairman of the Eastern Province of the Movement of the Multi-Party Democracy until further elections. We said we would give our reasons later and we now give those reasons.

This is an appeal from a judgment of the High Court declining to grant a declaration that the appellant is the only lawful Provincial Chairman of the Movement for Multi-Party Democracy for the Eastern Province, a declaration that by virtue of the position as Provincial Chairman he is entitled to attend meetings of the National Executive Committee as an injunction to

restrain the respondent from interfering in any way with the appellant's rights and performance of his duties as Provincial Chairman.

We will refer to the Movement for Multi-Party Democracy as MMD throughout the course of this judgment.

The facts of the case were that, in 1993, the appellant stood as a candidate for election as Provincial Chairman for MMD in the Eastern Province, and, on the 17th May 1993 he was duly elected the winner. At the time it was provided by Article 9(d) of the MMD Constitution as follows: "Any member of the party has a right (d) to elect or be elected to or appointed into the leadership of any of the party organs and positions of authority. "On the 6th of February, 1993 Regulation 4(m) was promulgated by the National Executive Committee of the Party and read as follows:

"4 (m) Except for Parliamentary and National Executive positions as candidate must satisfy the Returning Officer that he is ordinarily resident in the area in which he seeks to file a nomination for election. Thereafter some members of the party National Executive Committee decided that Regulation 4(m) was *ultra vires* Article 9(d) of the Party Constitution and notified members of the party the Regulation 4(m) was rescinded so that 'any member of the party is free to contest election to any post in any area he so wishes even if he is not resident there'. During the course of the appeal it was agreed by both parties that the members who set out to declare Regulation 4(m) *ultra vires* had no right to make such an announcement, and we agree that this declaration by some of the members does not affect the issue one way or another."

When the matter came before the High Court the learned High Court Commissioner found that Regulation 4(m) was not *ultra vires* the Party Constitution, and that, the appellant was not entitled to the declaration he sought. the appellant now appeals against that decision.

It is clear that the Party Constitution under Article 55 may be amended only by the Party Convention but that under article 54 the National Executive Committee has power to make regulations for effective carrying out of the provisions of the Constitution and for proper running of the Party. It has been argued by Mr Mwansa for the respondent that Regulation 4(m) is merely an elaboration of the rights provided by Article 9(d). He also argued that in construing the effect of Article 9(d) and Regulation 4(m) the court should consider the intention of those who framed the Constitution and the Regulation, and pointed out that the learned trial commissioner had found that it would be quite unreasonable to assume that the makers of the Constitution intended to confer on members the right to stand in any party elections in any part of the country. Finally, Mr Mwansa pointed out that the term of office for the appellant to act as Provincial Chairman had now come to an end so that he could not continue to act in any event. Having regard to the provisions of Article 25 this information does not appear to be correct.

The question for consideration as Provincial Party Chairman regardless of where they are ordinarily resident, and, if so, whether Regulation 4(m), which provides that a candidate for such a position must be ordinarily resident in the area, is *ultra vires* the provisions of Article 9(d).

There was evidence from Defence Witness 1, the National Secretary of the Movement for Multi-Party Democracy, that prior to February, 1993 a number of Provincial Chairmen and had been elected without being resident within their respective provinces and it was felt that there was a need for Provincial Chairmen to reside in their province for the more effective management of the province. For this reason, the National Executive Committee decided that regulation 4(m) should be promulgated. When considering the construction of article 9(d) of the Constitution we must take this evidence into account.

The golden rule of construction in cases of this nature was referred to by Lord Blackburn in *Caledonian Ry. v North British Ry.* (1) in which His Lordship said: "There is not much doubt about the general principle of construction. Lord Wmsleydale used to enunciate (I have heard him many and many a time) that which he called the golden rule for construing all written engagements. I find that he stated it very clearly and accurately in *Grey v Pearson* in the following terms: " I have been long and deeply impressed with the wisdom of the rule, now I believe, universally adopted - at least in the courts of law in Westminster Hall - that in construing wills, and indeed statutes and all written instruments, the grammatical and

ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further."

This principle should be read in conjunction with the comments of Jervis C.J. who said, in *Abley v Dale* (1850) 20 L.J.C.P. 33. "If the precise words used are plain and unambiguous, we are bound to construe them in their ordinary sense, even though it does lead to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure, but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning." We have referred to the possibility of absurdity because the learned trial commissioner did so. However, we must first approach the wording of article 9(d) to see if it is straightforward. The article reads: "A member of the Party has a right (d) to elect or be elected or appointed into the leadership of any of the party organs and positions of authority." As it is, the article does not impose any residential qualification on a member wishing to be elected and the ordinary meaning of the words is quite clear. The evidence of DW1 in this respect was solely that there was need for Provincial Chairmen to reside in their provinces for more effective management of the provinces. The same witness gave evidence that there were existing provincial chairmen, who did not reside in their provinces, who were not to be affected by the proposed regulation. There was no suggestion that having non resident provincial chairmen was absurd or unworkable - only that they would be more effective in managing their provinces if they resided there. The reasons put forward may be good grounds for amending Article 9(d), but cannot support a construction of that article as meaning something which it does not say. In the light of DW1's evidence it cannot possibly be suggested, even if it were relevant, that the article as it stands is obscure or creates an absurdity. In any event the question of absurdity does not arise unless there are two ways in which it is possible to construe the wording, in which event, of course an absurd construction is to be avoided. In this case there is no question of such an alternative construction.

As to whether Regulation 4(m) so affects Article 9(d) that it is ultra vires the article, we are quite satisfied that it is not merely an elaboration of the manner in which members may be considered eligible to stand as party chairmen. The regulation imposes a condition as to residence which is not in the original article, and we agree with the appellant that his rights under article 9(d) would be infringed if regulation 4(m) were to stand. In the event we find that Regulation 4(m) is ultra vires the Constitution and the appellant is entitled to a declaration that at the time of our judgment he was the only lawful provincial chairman of the MMd for the Eastern Province.

As to whether or not the appellant is, by virtue of his being provincial Chairman, entitled to attend meeting of the National Executive Committee, we find that Article 48 specifically provides that provincial chairmen shall be ex officio members of the National Executive Committee, and the appellant is entitled to a declaration that, whilst as Provincial Chairman, he is entitled to attend National Executive Committee Meetings. We also find that, whilst the appellant is serving as Provincial Chairman in accordance with the terms of this judgment, he is entitled to an injunction to prevent the respondent from interfering with performance of his duties.

We indicated when we delivered our judgment that the appellant was to continue in office until further election removed him from such office. For the avoidance of doubt we make it clear that the appellant was elected as Provincial Chairman for the period covered by his election in May, 1993, thereafter, in accordance with Article 25, he ceases to be a member when that term of office comes to an end by the election of a new Provincial Chairman three years after his election in May, 1993.

Costs will follow the event.
Appeal Allowed.
