THE ATTORNEY-GENERAL v THE LOCAL GOVERNMENT ELECTION COMMISSION (1990 - 1992) Z.R. 182 (H.C.)

HIGH COURT
BWEUPE, J.
14TH OCTOBER, 1992
(1992/HP/2184)

Flynote

Administrative law - Local Government elections - Local Government Election Commission - Extent of powers to legislate.
Statutes - Construction - Statutory instrument in conflict with mother act - whether ultra vires and of no legal effect.

Headnote

The Attorney-General sought an order that reg. 10 of the Local Government Election Regulations contained in SI No. 111 of 1992 and providing that all election candidates should have attained an education level of Grade VII or equivalent, was *ultra vires* the Local Government Elections Act which determined the qualifications for standing. At issue was (1) the interpretation of the extent of the Local Government Election Commission's powers to legislate and (2) the relationship between subsidiary legislation and the enabling Acts of Parliament.

Held:

(i) The Local Government Election Commission is empowered to legislate procedural rules and these powers do not extent to substantive law such as the conditions for candidacy.
(ii) The Local Government Elections Act does not make literacy a condition for candidacy, therefore a regulation creating such a condition is *ultra vires* the Act and of no legal effect.

Cases referred to:

(1) Attorney-General v Silleman [1864] 10 H.L.C. 704.
(2) In re Grosvenor Hotel, London (No.2) [1964] 3 W.L.R. 992.

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Legislation referred to:

1. Constitution of Zambia, Act.1 of 1991, art. 64(4)
2. Interpretation and General Provisions Act, Cap. 2, s.20(4).
3. Local Government Elections, Act 21 of 1991, ss. 3, 8, 16, 17.
4. Local Government Election Regulations, S.I. No. 111 of 1992 reg. 10.

For the applicant: Chifumu Banda, Solicitor-General.
For the respondent: E.J. Shamwana, of Shamwana and Co.

Judgment

BWEUPE, J.:

By an originating summons under order VI rules 2 and 6 of the High Court Chapter 50 and order 5 rule 4 Supreme Court Practice Rules the applicant seeks for an order that the

qualification or disqualification of reg. 10 of the Local Government Election Regulations Statutory Instrument No. 111 of 1992 that purports to state that every candidate in a ward shall state in the nomination paper that the candidate shall have attained educational qualification of not less than Grade 7 or its equivalent is *ultra vires* the provisions of ss. 16 and 17 of the Local Government Elections Act 21 of 1991 and have no legal effect.

The facts upon which the application is based are as follows:

(1) The applicant is a citizen of Zambia and the Attorney-General for the Republic of Zambia.
(2) The respondent is the chairman of the Local Government Election Commission.
(3) On 20th March, 1992 the President, by Government Gazette Notice No. 166, set up a Commission under s.3(2) of the Local Government Elections Act 21 of 1991.
(4) The general purpose of the Commission under the section is to supervise the conduct of the elections.
(5) 22nd October and 30th November, of 1992 have been appointed for nominations and voting respectively.

The applicant, by his affidavit, sets out the following contentions and prayer:

(i) That the sole and principal question at issue herein or is likely to be is one of construction of that portion of s.10(3) of the Local Government Election Regulations Statutory Instrument No.111 of 1992 that purports to state that every candidate in a ward shall state in the nomination paper to be lodged with the returning officer appointed for the ward that the candidate shall have attained educational qualifications of not less than Grade 7 or its equivalent.
(ii) That differences have arisen as to the proper construction of that part of reg.10(3).
(iii) That the Local Government Election Commission has interpreted the said provisions to state that no person may contest the local government elections unless he has attained the prescribed educational qualification and asserts this fact on a statutory declaration in Form L.G.E.S. 3 in the schedule to the said regulations. This declaration constitutes the nomination paper.
(iv) That the applicant has disagreed with this construction because the provisions pertaining to qualifications and disqualification of person

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for election as councillors are provided for in the enabling Act namely at ss.16 and 17 of the Local Government Elections Act 21 of 1991. The Act does not provide for the attainment of the educational standard as a pre-requisite to contest the said elections.
(v) That the said portions of reg.10 complained of are *ultra vires* the Act as it purports to widen and extend the criteria to qualify as a candidate and seeks to depart from and significantly vary from those stipulated in ss.16 and 17 of the said Act.

The applicant then prays that, that portion of reg.10(3) of Statutory Instrument No.111 of the Local Government Regulations of 1992 be declared *ultra vires* the Local Government Elections Act 21 of 1991 and is of no legal effect whatsoever.

The evidence in this case was by affidavit. Mr Hamir, the Attorney-General, swore the affidavit in support of the originating summons. He said he has disagreed with the respondent's construction of s.8 of the Local Government Elections Act 21 of 1991 in that reg.10(3) of Statutory Instrument No.111 of 1992 has widened and extended the qualifications for a person

to stand.

The respondent did not file an affidavit in opposition. He however argued and reiterated the contents of his letter to the Attorney-General that the Commission's understanding of s.8 of the Act did not concur with the interpretation given to the s.8 vis-à-vis ss.16 and 17 of the Act by the Attorney-General. He, however, said that he was non-partisan and would abide by whichever way the decision will go.

The Solicitor-General, Mr *Chifumu Banda*, who represented the Attorney-General, vividly argued that the requirement by reg. 10(3) of Statutory Instrument No.111 of 1992 cannot be supported by the State as it is inconsistent with ss.16 and 17 of the Local Government Elections Act which have stipulated the qualifications and disqualifications of a person who intends to stand as a councillor. The two sections referred to have not stipulated that a person to be nominated as a candidate must have attained an educational qualification of not less than Grade 7 or its equivalent. It is the position of the State that reg.10 of Statutory Instrument No.111 of 1992, which purports to widen and extend the criteria to qualify as a candidate, departs from and significantly varies the qualification stated in ss.16 and 17 of the Local government Election Act 21 of 1991. Section 20(4) of the Interpretation and General Provisions Act Chapter 2 provides that: 'Any provision of a Statutory Instrument which is inconsistent with a provision of an Act, Applied Act or ordinance shall be void to the extent of inconsistency.' He said the enabling Act being the Local Government Act the widened provision in dispute is clearly inconsistent.

True, on the facts of this case; the question at issue is one of the construction of reg.10(3) of the Local Government Election Regulations Statutory Instrument No.111 of 1992 vis-à-vis ss.8, 16 and 17 of the Local Government Elections Act 21 of 1991. For ease of reference I propose to append here below in total the provisions of ss.3(1), 8, 16 and 17 of the Local Government Elections Act and Regulations 10(3) of the Local Government Election Regulations.

Section 3, under which the Commission was set up, reads (leaving out those sub-sections of no application):

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> ''(1) There is hereby established a Local Government Electoral Commission for the purpose of supervising the conduct of elections held under this Act.''

Section 8 under which the Commission derives its powers states:

''(1) Subject to the other provisions of this Act, the Commission may, by Statutory Instrument, make regulations providing for the procedure and manner of conducting every election, and may, at any time, issue instructions to any election officer in connection with his functions under this Act and may require any election officer to furnish to the Commission such information and returns as it may consider necessary.

(2) Without prejudice to the generality of ss (1), the Commission may, by Statutory Instrument, make regulations providing for all or any of the following matters:

> (i) the division of the area of councils into wards;
>
> (ii) the establishment of polling stations in wards;
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> (iii) the nomination of candidates for any election; and the withdrawal of nominations duly made;
>
> (iv) the making and determination of appeals against the rejection of nominations by a returning officer;

(v) the publication of names of candidates whose nominations are accepted;
(vi) the payment of election fees by candidates;
(vii) the use of, and the allocation of, symbols at an election;
(viii) the appointment of, and the duties of, election agents and polling agents;
(ix) the fixing of dates and times for the taking of polls;
(x) the equipment and facilities to be provided at polling stations;
(xi) the persons who may be admitted to polling stations;
(xii) the manner and procedure of voting at an election;
(xiii) the manner of ascertaining the identity of persons wishing to vote at elections and whether such persons are qualified to vote;
(xiv) the manner in which persons who are blind, or otherwise incapacitated, may vote;
(xv) Voting by persons employed on election duties on the day of an election;
(xvi) the maintenance of secrecy at elections;
(xvii) the postponement of, the adjournment of, or an extension of, time for a poll in case of riot or open violence at an election;
(xviii) the administering of oaths or affirmations by election officers in respect of such matters as may be prescribed;
(xix) the procedure to be followed at the conclusion of a poll in an election;
(xx) the procedure for counting votes in an election, and the circumstances in which votes in an election may be rejected by a returning officer as invalid:
(xxi) For the purpose of declaring any candidate duly elected, the procedure to be followed where there is an equality of votes between candidates in an election;
(xxii) the procedure to be followed where only one person or where no person is duly nominated for election in a ward;
(xxiii) the declaration, notification and publication of the result of an election;
(xxiv) the custody and disposal of nomination papers, ballot papers, records, documents and other things relating to the conduct of elections:
(xxv) Election expenses and return relating to such expenses;
(xxvi) the notification and publication of any casual vacancy in the elected membership of a council;
(xxvii) the forms and records to be used for any of the purposes of this Act; and
(xxviii) any matter to be prescribed under this Act.''

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Section 16, which stipulates the qualifications of councillors, reads:

''16. Subject to the provision of s.17, a person shall be qualified for an election as a councillor of any council if, and shall not be qualified to be so elected unless:
(a) he is a citizen of Zambia;
(b) he has attained the age of 21 years; and
(c) he is ordinarily resident in the area of that council.''

Section 17 reads:

''(1) A person shall not be qualified for election as a councillor if ;
(a) he is, under any law in force in Zambia, adjudged or otherwise declared to be of

unsound mind;

(b) he is under sentence of death imposed on him by any Court in Zambia or a sentence of imprisonment, by whatever name called, imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court;

(c) he is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in Zambia, or has made a composition or arrangement with his creditors and has not paid his debts in full;

(d) he has been surcharged under the Local Government Act, of 1991, in any amount exceeding one thousand kwacha and a period of five years has not elapsed since the date on which he was so surcharged;

(e) his freedom of movement is restricted or he is detained under the authority of any law in Zambia;

(f) he is a member of the National Assembly;

(g) he is an officer of employee of a council;

(h) he is on the day for nomination for an election to the council or the day of the election, as the case may be, not paid any rate, charge or tax due and payable to the council or to any other authority; or

(i) he is an election officer.'

Regulations 10(3) of the Local Government Election Regulation of Statutory Instrument No.111 of 1992 which is the bone of contention reads (leaving out those sub-regulations which are of no application):

''(3) Every candidate shall state in the nomination paper to be lodged by him under sub-regulation (2) -

(a) the name of the political party which supports his nomination or

(b) if no political party supports his nomination, that he is an independent candidate; and

(c) the name and address of the person, if any, appointed by him to be his election agent for the purpose of these regulations.

'The candidate shall have attained educational qualification of not less than Grade 7 or its equivalent and shall produce it to the election officer at the time of lodging his nomination paper.'

There is no doubt the Commission for which the respondent is the chairman was validly appointed by the President on 20th March,1992 by *Government Gazette* Notice No.166 under s 3(2) of the Local Government Elections Act 21 of 1991. Under this section the Commission was appointed for the purpose of supervising the conduct of elections. The powers of the Commission are stipulated under s.8 of the Local Government

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Elections Act 21 of 1991, namely to make regulations, subject to the other provisions of the Act, providing for the procedure and manner of conducting every election, and at any time issue instructions to any election officer in connection with his functions.

Sections 16 and 17 of the Local Government Elections Act 21 of 1991 have spelt out the qualifications and disqualifications of a person intending to stand for elections as hereinbefore quoted. These qualifications or disqualifications have been exhaustive.

At this moment I find it necessary to determine in what province does the Commission's

regulation that the candidate 'shall have attained the educational qualification of not less than Grade 7 or its equivalent' fall? There can be no doubt that under s. 3(1) of the Act the Commission was established for the purpose of supervising the conduct of elections and their powers are those spelt out in s. 8(1)-(5) of the Act namely to make regulations providing for the procedure and manner of conducting every election. The answer to the question will now depend on whether what the Commission regulated was a matter of procedure or a matter of substantive law.

In *Attorney-General v Silleman* [1] the Barons of the Exchequer were empowered under s.26 of the Queens's Remembrance Act 1859 to make rules as to the process, practice and pleadings of their Court in revenue cases. The Barons made rules granting an appeal to the Exchequer Chamber and the House of Lords. It was heard that the Barons had no such authority for the matter they regulated on was a matter of substance and not mere procedure. I have no reason to differ with their Lordships' construction of the Act for a different construction would, in effect, have given the Barons authority to confer jurisdiction on two superior courts and to impose on them the duty of hearing appeals.

In *In Re Grosvenor Hotel, London* (No.2) [2] the Supreme Court of Judicature (Consolidation) Act 1925, gave power to make rules. A rule was made to override the power of the executive to intervene in litigation to veto the production of documents. It was held that the power to make rules conferred by the Act applies only to matters of practice and procedure and in so far as a rule purports to override the power of the executive to intervene in litigation to veto the production of documents, it is *ultra vires* for this power of the executive is a matter of substantive law and not one of mere procedure.

As I see it the power to make regulations conferred by s.8 of the Act, in the instant case, applies only to matters of procedure and ss.16 and 17 of the Act deal with matters of substantive law. Is the requirement then that 'a candidate shall have attained the educational qualification of not less than Grade 7 or its equivalent' in the province a matter of procedure or substance?

Quite clearly s.8 in its existing form has set out all that is required for the Commission to regulate and it has been exhaustive. Its jurisdiction is to regulate on mere matters of procedure and conduct of the election. The requirement of educational qualification of Grade 7 or its equivalent is a matter of substantive law which falls within the province of ss.16 and 17 of the enabling Act.

It is my view that where a statute confers a power and particularly one

which may be used to deprive the subject of the individual franchise rights the Court will confine those exercising the power to the strict letter and spirit of the statute. In this view I am reinforced by s.2(4) of the Interpretation and General Provisions Act, cap.2 which states that any provision of a Statutory Instrument which is inconsistent with a provision of an Act, Applied Act or ordinance shall be void to the extent of the inconsistency.

The Commission's requirement of education qualification of Grade 7 does not exist anywhere in the enabling Act. This can certainly not be supported by the Court for the power to regulate implies the continued existence of that which is to be regulated.

Unlike art.64(4) of the Republican Constitution Act 1 of 1991 which requires a candidate intending to stand to be 'literate and conversant with the official language of Zambia' ss.16

and 17 have not set up any educational qualification at all. Clearly by that requirement the Commission purports to regulate what did not exist in the provisions of the enabling Act and in so doing widens and extends the criteria for a person to qualify as a candidate. In my view, and with much respect to the members of the Commission, to make such regulation on a matter of substance and not mere procedure is to fly unduly in the face of the Act.

I consider reg.10(3) of Local Government Election Regulations Statutory Instrument No.111 of 1992 inconsistent with the provisions of ss.16 and 17 of the Local Government Elections Act 21 of 1991 in so far as the regulation purports to widen and extend the criteria to qualify as a candidate.

Consequently I have no hesitation to endorse and confirm that the Attorney-General's understanding of s.8 of the Act truly represents the proper construction of the Act and treat with due respect the Commission's interpretation of the Act as fanciful if not engaging on a frolic of their own.

For the reasons aforesaid I would declare that portion of reg.10(3) of the Local Government Election Regulations Statutory Instrument 111 of 1992 that stipulates educational standard as a pre-requisite for qualification *ultra vires* and is of no legal effect. I would gracefully allow the application.

Application granted.
