AMUEL MIYANDA v RAYMOND HANDAHU (1994) S.J. 39 (S.C.)

SUPREME COURT
NGULUBE, CJ., BWEUPE, D.C.J., SAKALA, CHAILA AND CHIRWA, JJ.S.
19TH MAY AND 21ST JUNE, 1991.
S.C. JUDGMENT NO. 5 OF 1994
APPEAL NO. 25 OF 1994

Flynote
Article 65 of the Constitution of Zambia - Whether sufficiently comprehensive - Disqualification from election to parliamentary office.

Headnote

The appellant was the successful candidate against the respondent in the 1991 Parliamentary general elections for the Matero Constituency in Lusaka. By his petition, the respondent alleged that at the time of the election the appellant was a person disqualified for election by virtue of the provisions of Article 65(5)(c) and/or (e). the whole of clause (5) of Article 65 of the Constitution of Zambia.

Held:
(i) The whole of Article 65 of the Constitution is sufficiently comprehensive on the question of disqualification from election to parliamentary office.

Cases referred to:
1. Evo v Supe and Another (1986) L.R.C. (Cons.)13
2. Capper v Baldwin (1965) 20B 53

For the appellant: M E Sikatana of Messrs Veritas Chambers
For the respondent: S S Zulu of Zulu and Company

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Judgment
NGULUBE,C.J.: delivered the judgement of the court.

This is an appeal from the decision of the High Court by a majority of two to one upholding an election petition brought about by the respondent against the appellant. The appellant was the successful candidate against the respondent in the 1991 Parliamentary general elections for the Matero Constituency in Lusaka. By his petition, the respondent alleged that at the time of the election the respondent was a person disqualified for election by virtue of the provisions of Article 65(5)(c) and/or (e). the whole of clause (5) of Article 65 reads---

"(5) No person holding or acting in any post office of the appointment---

(a) in the Defence force as defined in the Defence Act, the Combined Cadet Force, the Zambia National Service, or any other force or service established for the preservation of security in Zambia;

(b) in the Zambia Police Force, the Zambia Police Reserve, the Zambia Security Intelligence Service the Anti-Corruption Commission, the Zambia Prison Service or in any other force or service established for the persevation of security in Zambia;

(c) in the Public Service including an office to which Article 61 applies;

(d) in the Teaching Service; or

(e) prescribed in that behalf or under an Act of Parliament;

shall be qualified for election as a member of the National Assembly"

The facts, very briefly stated, were that the respondent was employed by the Zambia National Provident Fund Board substantively as Legal Counsel but at the relevant time as Acting Board Secretary. The Board is established under the Zambia National Provident Fund Act, Cap 513, at Section 6(1). Section 5(3) provides:

"5 (3). The Board may appoint, on such terms and conditions as it sees fit, such persons as are in its opinion necessary for the administration of the Fund."

It was not in dispute that the appellant was an employee of the Board by virtue of the power the Board has to create such jobs as it considers necessary for the administration of the Fund. It was not in dispute that the appellant's post was not specifically established by the Act, such as is the case with the Director and the Deputy Director under sections 6 and 7 respectively. The appellant went on unpaid leave of absence in order to participate in the elections, apparently on the basis that if service in a parastatal of this kind was public service or service in an office prescribed by or under an Act of Parliament, the old constitution which was then still in force required such persons to go on leave. The provisions of Article 68(5) and (6) of the old constitution read:

"68(5). A person holding or acting in any post, office or appointment-----

(a) in the Defence Force as defined in the Defence Act, the Combined Cadet Force, the Zambia National Service or in any other force or service established for the defence of Zambia;

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(b) in the Zambia Police Force, the Zambia Police Reserve, the Zambia Security Intelligence Service, the Anti-Corruption Commission, the Zambia Prison service or in any other force or service established for the preservation of security in Zambia.

(c) in the public service, including an office to which Article 116 applies;

(d) in the teaching service;

(e) in a parastatal body;

(f) prohibited in that behalf by or under an Act of Parliament; or

(g) in the Party on the basis of full-time employment;

shall vacate that post, office or appointment immediately upon being declared elected;

(6) Any person referred to in Clause (5) shall, unless he vacates his post, office or appointment before the election to which that clause relates, proceed on leave from his employment within fourteen days after the dissolution of Parliament by reason of which the election becomes necessary, or, in the case of the a by-election, within fourteen days after the date of publication in the Gazette of the instrument by which the Electoral Commission prescribes, in pursuance of Article 75, the date for delivery of applications for adoption of candidates for the by-election."

However, between the appellant going on unpaid leave and the elections, the current constitution was enacted Article 65(5) of which we have already quoted. It was quite clear that, had the old provisions been continued, the petition would not have had any leg to stand on and there would have been no occasion for seeking the assistance of cases like *Evo v Supa and Another* (1) from Solomon Islands) where, on their constitutional and legal arrangements, the election of a public officer who had proceeded on leave was upheld on the basis, inter alia, that the word "election" related to the choosing of candidates by vote and did not suggest that it included both the nomination and the poll. In fairness, we should mention that Mr Sikatana drew our attention to this case only in passing and it is wholly irrelevant to the problem at hand.

The questions before the High Court were whether the appellant was employed in the public service . Article 113(1)of the constitution provides that "the public service" shall have the meaning assigned to it by an act of Parliament and Section 2 of the Service Commissions Act, 1991 (no. 24 of 1991) has defined it to mean the Civil Service of Zambia. Employment under the Zambia National Provident Fund Board was so clearly not in employment in the civil service as it is widely known and understood.

However, by a somewhat circuitous argument, the majority learned trial judges answered the second question in the affirmative. They argued that paragraph (e) of clause 5 of Article 65 had two limbs to it, namely posts prescribed in that behalf being posts specifically stated or mentioned under the Act of Parliament and posts "under an Act of Parliament" being "posts or appointments which are not specifically provided for under an Act of Parliament but which are created or made in accordance with the provisions of an enabling Act of Parliament." They argued that, as the Board is a creature of an Act of Parliament and it has power to

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create various administrative posts, the appellant's post was equally a creature of the same Act of Parliament creating the Board; ergo, the appellant was appointed under the authority of an Act of Parliament and he was disqualified for election. The learned dissenting judge argued to the effect that the word "prescribed" governed the whole par. (e) and a post had to be specifically caught by the disqualification.

The question before us is whether the majority had correctly interpreted this part of the constitution so as, in effect, to disqualify all employees of a statutory board be they so humbly placed or, as Mr Zulu proposed, only the senior management posts. The decision of the majority would undoubtedly disqualify all employees of the Zambia National Provident Fund Board and there would be no basis for drawing any lines between one category and another.

The gravamen of Mr Sikatana's submissions was that the majority had erred in failing to construe this provision in its natural and grammatical meaning so that the word "prescribed" could not be dropped in relation to posts "under an Act of Parliament". Quite naturally, Mr Zulu was quite happy to agree with the construction adopted by the majority. Mr Sikatana began by pointing out a factual misdirection when the majority stated that they could not find the word " prescribed" defined anywhere, including in the Interpretation and General Provisions Act, Cap. 2. Section 3 of Cap 2 in fact defines "prescribed" as meaning "prescribed by or under the written law in which the word occurs". It is quite conceivable as Mr Sikatana suggested, that the learned majority might have adjusted their reasoning had they not failed to spot the word in Cap 2. In the arguments before us, both counsel agreed that par. (e) fell to be considered as comprising two limbs. However, they were not agreed whether, as Mr Sikatana argued, both were governed by the transitive verb "prescribed" or whether, as Mr Zulu proposed, the verb did not apply to the second limb so that persons simply holding posts "under an Act of Parliament" were disqualified even if such posts were not specifically mentioned. On Mr Zulu's argument, posts "under an Act of Parliament" includes posts authorised to be created by a board established under an Act of Parliament.

We have given anxious consideration to the arguments and submissions, which we have condensed, perhaps too drastically, for the sake of brevity. We have reminded ourselves that the object of interpretation is the ascertainment of the intention expressed. As Basu's commentary on the constitution of India puts it in the 5th edition, vol. 1, at p. 34:-

> "The fundamental rule of interpretation of all enactment to which all other rules are subordinate is that they should be construed according to the intent of the Parliament which passed the law."

It is not what the legislature meant to say or what their supposed intentions were with which the court would be concerned; the court's duty is to find out the expressed intention of the legislature. When the language is plain and there is nothing to suggest that any words are used in technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers, and the like: See, for instance *Capper*

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v Baldwin (2), per Lord Parker. Cj., at p. 61 especially from letters E to G.

We are alive to the fat that the issue before us concerns a citizen's right to offer himself for election unless not qualified or he is disqualified. Mr Sikatana has argued in favour of reading par. (e) of Article 65(5) in its ordinary and grammatical meaning. In this he was on firm ground since the rules of grammar apply to the construction of phrases and sentences, unless such an approach produces absurdity, repugnance or inconsistency with the rest of the instrument. The word "prescribed" can not be dropped for the purpose of catching those that have not bee expressly disqualified or for the purpose of enabling the court to exercise a nebulous discretion of disqualifying only those it considers to be in senior management in a statutory board, which would be the effect of acceding to Mr Zulu's proposal in this regard.

The starting point surely must be that everyone who is qualified must be eligible to stand for election unless specifically disqualified. Disqualification is so serious a matter that it can not legitimately be left to the destructive analysis or beneficial interpretation of the courts, depending on which side particular judges with to fall. For our part, we would not overlook maxims like "expressio unius est exclusio alterius" which would mean the express mention of a thing excludes things which are not mentioned, that is, in our case, the express stipulation of those that are disqualified or to be disqualified under a law excludes a law excludes those not expressly so stipulated.

We have considered the wording of the former constitution which we have already quoted on the same subject matter. We have also visited literature from other commonwealth countries having similar provisions. For instance, Basu in vol. 3 at p. 301 discusses Article 191 clause (1) (e) in India which talks of "disqualified by or under any law made by Parliament". One such law was the representation of the People Act, 1951, which, in sections 7 and 8, disqualified directors, managing agents, etc. of parastatals. Another good example of legislative clarity is the House of Commons Disqualification Act, 1957 of the United Kingdom whose section 1 reads:

"1. Disqualification of holders of certain offices and places;

(1) Subject to the provisions of this Act, a person is disqualified for membership of the House of Commons who for the time being:

(a) Holds any of the judicial offices specified in Part I of the First Schedule to this Act;

(b) is employed in the civil service of the Crown, whether in an established capacity or not, and whether for the whole or part of his time

(c) is a member of any of the regular armed forces of the Crown;

(d) is a member of any police force maintained by a police authority;

(e) is a member of the legislature of an country or territory outside Commonwealth; or

(f) holds any office described in Part II or Part III of the said First Schedule.

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2. A person who for the time being holds any office described in Part Iv of the said First Schedule is disqualified for membership of the House of Commons for any constituency specified in relation to that office in the second column of the said Part IV.

3. In this section the following expressions have the meanings hereby respectively assigned to them, that is to say:

"civil service of the Crown" includes the civil service of Northern Ireland, Her Majesty's Foreign Service and Her Majesty's Overseas Civil Service;

"police authority" means a police authority as defined for the purpose of the Police Pensions Act, 1948, or the Ministry of Home Affairs for Northern Ireland; and "member" in relation to a police force means a person employed as a full time constable;

"regular armed forces of the Crown" means the Royal Navy, the regular forces as defined by section two hundred and twenty five of the Army Act 1955, the regular air force as defined by section two hundred and twenty three of the air Force Act , 1955, the Women's Royal Navy Service, Queen Alexandra's Royal Naval Nursing Service and Voluntary Aid Detachments serving with the Royal Navy.

> 4. Except as provided by this Act, a person shall not be disqualified for membership of the House of Commons by reason of his holding an office or place of profit under the Crown or any other office or place; and a person shall not be disqualified for appointment to or for holding any office or place by reason of his being a member of that House."

The schedules contain long lists of specified offices which disqualify, including certain stipulated offices in parastatals, statutory boards and other public companies. What is clear in terms of subsection (4), is that there is no general disqualification of persons holding officers or places of profit under the crown and elsewhere except those listed. We consider that the two examples we have referred to indicate "prescribing" in a typical fashion.

We are satisfied that the dissenting judge came to correct conclusion on the need for posts to be specifically prescribed, although we do not agree with him when he suggested that the phrase "prescribed in that behalf" in paragraph (e) was ambiguous or meaningless. In applying a literal construction when no good reason exists for proceeding otherwise, as in this case, the court cannot be entitled to infer omissions on the part of the legislature and the court is bound to give every word and every phrase a meaning. We consider that the whole of Article 65 is sufficient comprehensive on the question of disqualification and has prescribed certain services and offices and, at par. (e), covered posts specifically prescribed now and in future.

It follows from what we have been saying that we do not consider it legitimate for the majority learned trial judges to have dropped the word "prescribed" in

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relation to the phrase "or under an Act of Parliament" in paragraph (e) or Article 65(5) of the constitution since that was the expressed intention of parliament when the ordinary and literal meaning is attached to the revision, using ordinary rules of grammar.

It follows also that the appeal is allowed and the determination that the appellant's election was null and void is set aside. We enter judgement for the appellant. On the question of costs, we agree with Mr Zulu who was successful below that it was important for this court to adjudicate on the issue raised by this appeal, which issue was undoubtedly one of general importance. The appeal was one of those rare ones permitted by the proviso to Article 72(2) of the constitution which allows only those appeals which raise questions of law, including the interpretation of the constitution. In keeping with our usual practice in such cases, we consider that there should be no order for costs both here and in the High Court.

Appeal allowed.
