ABEDNICO BHEBHE

And

NJABULISO MGUNI

And

NORMAN MPOFU

Versus

THE CHAIRMAN OF ZIMBABWE ELECTORAL COMMISSION N.O.

And

THE ZIMBABWE ELECTORAL COMMISSION

And

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 28 JANUARY & 13 OCTOBER 2011

M. Ncube, for the applicants
Ms F. Chimbaru, for the 3rd respondent

Opposed Application

NDOU J: The applicants seek an order in the following terms:

"It is hereby ordered that:

The third respondent be and is hereby ordered and directed to gazette a date for elections within 14 days of granting of this order in the following House of Assembly Constituencies:-

(i) Nkayi South
(ii) Lupane East
(iii) Bulilima East"

The background facts of this application are the following. All three applicants were elected members of the National Assembly in the 2008 general elections under MDC ticket. They represented Nkayi South, Lupane East and Bulilima East constituencies respectively. They fell out of favour with their MDC party resulting in their expulsion from the party in 2009. The MDC party ensured that the applicants had their membership of parliament terminated. By notices pursuant to the provisions of section 41(1) (E) of the Constitution of Zimbabwe the Clerk of Parliament notified them that their membership of the august house had been terminated with effect from 22 July 2009. The Speaker of the House of Assembly notified the 3rd respondent in terms of section 39(11) of the Electoral Act [Chapter 2:13] of the vacancies in the above-mentioned constituencies. The said notice was dated 17 August 2009. Up to date of the issuance of the application the 3rd respondent had not acted in terms of section 39 in order to fill these vacancies. This is the pith and marrow of this application. Section 39 *supra* provides:

> "(1) A vacancy in the membership of Parliament which exists otherwise than by reason of a dissolution of parliament shall, subject to this section, be notified to the President and the Commission in writing by the Speaker as soon as possible after the Speaker becomes aware of the vacancy.
>
> (2) The President shall, within a period of fourteen days after-
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> (a) he or she has been notified of this section of a vacancy in the membership of Parliament; or
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> (b) a declaration is made by the Chief Elections Officer in terms of section fifty; of
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> (c) a nomination day or the last nomination day as the case may be, where no person has been duly nominated for election publish a notice in the Gazette ordering a new election to fill the vacancy in the same manner, with any changes that may be necessary, as is provided in section thirty-eight in regard to a general election and the provisions of this Act shall apply accordingly."

The third respondent in answer to this application does not deny that a notice was given to him in terms of section 39(1) of the Act. The 3rd respondent contends that section 39(2) *supra*, should be interpreted as directory and not peremptory, arguing that such an approach to interpretation would be reasonable given the lack of funds for holding elections. It is trite that language of a predominantly imperative nature is generally taken to be indicative of peremptoriness. The verb "shall" is one such word – *Messenger of Magistrates Court, Durban* v

Pillay 1952(3) SA 678 (A); *R* v *Busa* 1959 (3) SA 385 (A), *Maharaj and Ors* v *Ramperstad* 1964 (4) SA 638 (A) at 644. But, a court called upon to determine whether a particular provision is peremptory or directory must construe the language of the concerned provision in the context, scope and object of the Act of which it forms part – *Charlestown Town Board* v *Vilakazi* 1951 (3) SA 361 (A). In *Maharaj and Ors* v *Ramperstad, supra* at pages 643 G to 644 B the court had this to say:

> "Appellants' counsel pointed out that the regulation used the word "shall" … in relation to the requirement of attaching to the application a plan or map tracing, and on the authority of such decisions *as Messenger of the Court, Durban* v *Pillay* 1952 (3) SA 678 A … he contended that this was a "strong indication" that the requirement was peremptory. In the former of the two cases referred to immediately above, VAN DEN HEEVER JA described the word "*moet*" ("shall") in Katian terms as embodying the "categorical imperative". It would be a work of supererogation to refer to the long list of examples in our reported case law where that word, in the light of considerations pointing to another conclusion has had to surrender this resounding accolade and been reduced to the status of a mere directory verb."

Further, in *Nkisimane and Ors* v *Santam Insurance Co Ltd* 1978 (2) SA 430 (A), TROLLIP JA had this to say:

> "Preliminarily I should say that statutory requirements are often categorized as "peremptory" or "directory". They are well known concise and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non – or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or in other words, upon the intention of the law giver as ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular (see the remarks of VAN DEN HEEVER J *in Lion Match Co Ltd* v *Wessels* 1946 OPD 376 at 380). Thus, on the one hand, a statutory requirement construed as peremptory usually still needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity. (See authorities quoted in *Shalala* v *Klerksdorp Town Council & Anor* 1969 (1) SA 582 (T) at 587A-C). On the other hand, compliance with a directory statutory requirement, although desirable, may sometimes not be necessary at all, and non – or defective compliance therewith may not have any legal consequence (see for example,

Sutter v *Scheepers* 1932 AD 165). In between those two kinds of statutory requirements it seems that there may now be another kind which, while it is regarded as peremptory, nevertheless only requires substantial compliance in order to be legally effective (see *JEM Motors Ltd* v *Boutle and Anor* 1961 (2) SA 320 (N) at 327 in fin – 328B and *Shalala's c*ase *supra* at 587F – 588H, and of *Maharaj and Others* v *Rampersad* 1964 (4) SA 638 (A) at 646C-E). It is unnecessary to say anything about the correctness or otherwise of this trend in such decisions. Then, of course, there is also the common kind of directory requirement which need only be substantially complied with to have full legal effect (see for example *Rondalia Versekerings – Korporasie Bpk* v *Lemmer* 1966 (2) SA 245 (A) at 257H-258H)."

It is thus clear that the mere use of labels such as the word "shall" does not necessarily mean that the provision is peremptory. Such language, in many cases, represented little more than the first stage of the enquiry. "It is the duty of the courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute concerned to be construed: - *Crawford and Ors* v *Borough of Eshowe & Anor* 1956 (1) SA 147 (NPD) and *Vita Food Products, Incorporated* v *Unus Shipping Co Ltd* 1939 AC at 293. The court must carefully examine the object at the Act and the public importance of compliance with it. Such case has to be considered on its merits – *Liverpool Borough Bank* v *Turner* 2d G.F. and J. 502, 507. It is not the first time that I have to decide whether section 39(2) is peremptory or directory. In *Sibanda* v *The President of the Republic of Zimbabwe* HB-46-08 the same issue arose. In that case considered on its merits, I held that the language of section 39(2) is peremptory.

However, there are exceptions to this general rule – *JEM Motors Ltd* v *Boutle & Anor* – *supra* and New Zealand case of *Simpson* v *Attorney General* [1955] NZLR 271 (discussed in De Smith's *Judicial Review of Administrative Action* (4th Ed) by J M Evans at p 144). In the *Simpson* case it was held that procedural requirements should not be construed as mandatory (peremptory) if serious public inconvenience would result. Further, in his book *Interpretation of Statutes* (Juta & Co) G.E. Devenish at page 228 states that courts do frequently condone non-compliance with ostensibly mandatory provisions by weighing up all the relevant considerations such as, *inter alia*, public convenience, justice and the object of the Act. The court has to consider whether interpreting the Act in a peremptory sense would cause hardships and inconveniences to rate payers. According to Maxwell 10th Ed at page 381 provisions of a statute which relate to the performance of a public duty seem to be generally understood as mere instructions for guidance and government of those on whom the duty in imposed, that is to say as directory only, where the invalidation of actions done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and where invalidation would not promote the essential aims of the legislature.

The view attributed to the learned author Maxwell*, supra*, makes a lot of sense and should, in my humble view, be adopted in the construction of section 39(2), *supra.* Such an interpretation would be reasonable given that if the court were to make an order that by-elections be held when the relevant funds for holding such elections are not there the order would be *brutum fulmen* and this would clearly be an undesirable situation. If the government were to commit the little available funds and resources to the holding of by-elections this would result in serious general inconvenience to the general public. In the circumstances of this case it should be accepted that the provisions of section 39(2) should be understood as nothing more than mere instructions for guidance to the President when he carries out his public duty to gazette election dates. Clearly ordering the President to gazette by-elections in the absence of the required financial resources would not only disrupt the smooth running of the country but would cause serious inconvenience to the public.

Accordingly, from the facts of this case, the interpretation of the word "shall" is therefore, directory. Ms *Chimbaru,* for the 3rd respondent submitted that the 3rd respondent would have no problem in the order sought by the applicants being granted after the lapse of two months from the date of the hearing. The two months has lapsed so I have no option but grant the order. Before I grant the order I wish to make a few observations. The legal practitioners *in casu*, based their legal arguments primarily from what is not contained in the evidence filed in their respective papers. The litigants' case is really what the affidavits and annexures state and not some legal argument that is not tandem with the evidence therein. The applicants' papers were not amended to evince that the fiscus now has the requisite funds to hold by-elections. This was stated by the applicants' legal practitioner from the bar. The court cannot take judicial notice of the fiscus's ability to fund an election. The 3rd respondent's legal practitioner also made some factual submission from the bar on the government's ability to hold elections within two months. The litigants should amend their papers to reflect changed circumstances.

I accordingly, make an order in the following terms:

It is ordered that:

1. The 3rd respondent be and is hereby directed to gazette a date for elections within fourteen days of service of this order on him in the following House of Assembly constituencies, Nkayi South, Lupane East and Bulilima East.
2. There is no order as to costs.

Messrs Phulu & Ncube, applicants' legal practitioners
Civil Division, Attorney General's Office 3rd respondent's legal practitioners