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Itula and Others v Minister of Urban and Rural Development and Others

2020 (1) NR 86 (SC)

By

Dunia P. Zongwe¹

At the heart of this electoral case lies deep questions about what it means exactly to ‘know’ something and about a few steps that judges should avoid when reasoning from unknowns. In short, the court refused to cancel a presidential election because those who challenged that election in court failed to prove that the absence of verifiable paper trail changed the outcome of the election. If a judge lacks evidence of any claim put forth by the parties, they cannot lean on the absence of evidence to arrive at any conclusion, except to conclude that they do not know whether the claim conveys the truth. Likewise, if an election body cannot verify the votes, a judge cannot maintain that people should trust that election or those votes. Another way of saying that absence of evidence is not evidence of absence.

So how should the Supreme Court have handled the absence of paper trail in the *Itula* case? The court rejected the applicants’ request that the court invalidate the election, but jurists will discover that this rejection defies logic and science itself. And this commentary shows how.

The facts

This case concerns the latest presidential election in Namibia, which took place on 27 November 2019 amidst a sagging economy and a fresh corruption scandal brewing in the fisheries sector. The incumbent and candidate of the ruling party, Dr. Hage Gottfried Geingob, won the election, but with the lowest majority that the ruling South West Africa People’s Organization (SWAPO) has ever managed to garner since independence.² As a consequence, SWAPO lost its super-majority in the main house of Parliament.³ Independent candidate Dr. Panduleni Itula came second and managed to win as much as 38% of the vote. Namibia resorted to electronic voting machines (EVMs).

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² See also Henning Melber, ‘Namibia’s Parliamentary and Presidential Elections: The Honeymoon Is Over’ (2020) 109 *The Round Table* 13, 19 (noting that, for the first time since 1990, SWAPO’s presidential candidate earned less votes than the ruling party itself).

³ In other words, SWAPO lost its two-thirds majority in the National Assembly.

However, an issue arose, partly because the applicants alleged irregularities in the use of these EVMs, but mostly because the Electoral Commission of Namibia (ECN) used the EVMs without a paper trail to verify the votes. Itula and representatives of opposition parties (hereinafter referred to as ‘the applicants’) sued the Minister of Urban and Rural Development (hereinafter the ‘Minister’), and the ECN, among other respondents,⁴ for the way the general elections were conducted. In particular, Itula and the other applicants applied to the Supreme Court of Namibia to challenge the constitutionality of the action by the Minister, who had ‘selectively promulgated’ the provisions of section 97 of the Electoral Act 5 of 2014 (or the ‘Act’).⁵ To remedy the alleged unconstitutionality of the Minister’s action, the applicants asked the Court for declaratory orders that included setting aside the 2019 presidential election and directing a rerun of that election without undue delay.

Section 97 authorized the election body to use EVMs during elections, but sub-sections 97(3) and (4) subjected the use of EVMs to a verifiable paper trail. When the Minister brought the Act into operation, he excluded those two sub-sections,⁶ making it possible for the election body to resort to EVMS during the 2019 election but without any paper trail to verify the votes.

The parties’ arguments

The applicants submitted that the Minister’s ‘selective promulgation’ violated the constitutional principle of separation of powers.⁷ They also contended that the selective promulgation trampled on certain democratic principles under Articles 44,⁸ 56,⁹ and 94B¹⁰ of the Constitution.¹¹ They further complained that the EVMs malfunctioned and alleged several irregularities during the 2019 election.¹²

The respondents countered the applicants’ submissions with several preliminary points. They disputed the jurisdiction of the Supreme Court to hear the matter as a court of first and final

⁴ The 29 respondents in this matter comprised the Minister of Urban and Rural Development, the Attorney-General of Namibia, the Electoral Commission of Namibia, the Chairperson of the Electoral Commission of Namibia, and the President of the Republic of Namibia.

⁵ *Itula and Others v Minister of Urban and Rural Development and Others* 2020 (1) NR 86 (SC) [8].

⁶ *ibid.*

⁷ *ibid.*

⁸ On legislative powers.

⁹ On assents to bills.

¹⁰ On the ECN.

¹¹ *Itula* (n 5) [8].

¹² *ibid* [9].

instance¹³ and they accordingly claimed that the applicants should have approached the High Court of Namibia before the ECN organized the 2019 presidential election. The respondents also submitted that the applicants delayed their decision to launch the proceedings and that the applicants should have commenced suit within a reasonable time after the Minister selectively brought the Electoral Act into force.¹⁴ Furthermore, they denied the irregularities alleged by the applicants.¹⁵

Interestingly, the respondents relied on an earlier High Court ruling on EVMs. In that case, the High Court dismissed a claim that called into question the lawfulness of elections and by-elections held in 2014 in which the ECN utilized EVMs without a paper trail.¹⁶ The respondents in *Itula* thus argued that the High Court ruling binds the Supreme Court and made it lawful for the ECN to use EVMs without paper trail.

The Supreme Court's holdings

With respect to the respondents' objection to the Supreme Court's jurisdiction, the court held that it could hear the challenge brought by the applicants because the legislature intended the phrase 'any challenge' in section 172(1) of the Electoral Act to have a wide meaning.¹⁷ In addition, the court considered the country's constitutional democracy and its history to conclude that it had to interpret section 172(1) broadly and purposively.¹⁸

The Supreme Court agreed with the respondents that the applicants delayed in raising the issue of EVMs without paper trail, but it condoned the delay because the applicants raised "an issue of profound constitutional importance" and because their challenge had sound merits.¹⁹ The court therefore found that the condonation of the applicants' delay served the interest of justice.²⁰

The Court ruled for the applicants when it concluded that the Minister breached the constitutional principle of separation of powers. The court held that section 97(3) and 97(4)

¹³ *ibid* [22]

¹⁴ *ibid* [23].

¹⁵ *ibid* [25].

¹⁶ *Maletzky and Others v Electoral Commission of Namibia and Others* 2015 (2) NR 571 (HC).

¹⁷ See *Itula* (n 5) [44], read with [46].

¹⁸ *ibid* [44].

¹⁹ *ibid* [61].

²⁰ *ibid*.

condition the operation of sections 97(1) and 97(2) (which authorizes the ECN to use the EVMs) on compliance with sections 97(3) and 97(4) (which subjects the use of EVMs to a verifiable paper trail).²¹ In light of this, the Minister’s selective implementation exceeded the Minister’s powers under section 209 to selectively put in force the power to use EVMs.²² The Court ruled that, in selectively implementing section 97, the Minister “effectively deleted (for the time being) the safeguards enacted by Parliament”, thereby usurping Parliament’s role and breaching the separation of powers provided for in the Constitution.²³

The Supreme Court declared that, by exceeding his powers and flouting the separation of powers doctrine, the Minister’s selective implementation of section 97 is “unconstitutional and therefore invalid as a consequence.”²⁴ Nonetheless, the court decided that the setting aside of the Minister’s determination and the declaration of constitutional invalidity would only take place on 21 March 2020, and not on 17 October 2014 when the Minister determined the commencement of section 97. In postponing the effect of the invalidity order, the court considered that, though afforded the opportunity to adduce evidence concerning the impact and timing of the invalidity order, the respondents chose not to do so.²⁵ In addition, the Court scheduled the coming into effect of the invalidity order for 21 March 2020 because a prospective date would not render the order “meaningless”.²⁶

Based on the above, the Supreme Court found that the applicants had the right to a declaratory order to the effect that the Minister’s determination violated the Constitution and that the court had to set it aside.²⁷ At this point, the Court’s reasoning starts to reveal huge cracks. The Court reasoned that, because the applicants did not prove that irregularities occurred and that the absence of a verifiable paper trail had adversely affected their right to vote, particularly with reference to the irregular use of EVMs or their unreliability. In the end, the Supreme Court deemed it inappropriate to declare the election invalid and order a rerun of it.²⁸ In so ruling, the Court took into account the applicants’ delay in bringing the electoral challenge,²⁹ they also

²¹ *ibid* [74].

²² *ibid*.

²³ *ibid*.

²⁴ *ibid* [76].

²⁵ *ibid* [106].

²⁶ *ibid* [108]. In so ruling, the Supreme Court relied on *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd and Another* 2018 (3) NR 664 (SC). Hereinafter ‘CRAN’.

²⁷ *Itula* (n 5) [76].

²⁸ *ibid* [107].

²⁹ *ibid* [101]-[105].

factored in their decision the lack of evidence by the applicants concerning the impact and the timing of any order of invalidity.³⁰

Significance

Like the court realized, the *Itula* case involved an “an issue of profound constitutional importance”. At the same time, lawyers in Namibia will probably remember *Itula* as one of the Supreme Court cases that people contested the most.

In particular, for several reasons, jurists will dispute the Supreme Court’s decision to decline the applicants’ request that the court nullify the 2019 presidential election and order a rerun. To begin, the court wrongly assumed that the ECN had no duty to prove that the absence of verifiable paper trail did not adversely affect the election. While the default position in civil cases holds that he who alleges must prove, the Electoral Act imposes a duty on the ECN to organize, manage and control the conduct of elections in a credible manner.³¹ This duty creates a positive obligation on the ECN to demonstrate that the elections they conduct are credible. Given this duty, the default position in civil cases or, in this specific instance, the lack of evidence regarding the credibility of elections cannot play out in the ECN’s favor. In light of this, the ECN had to establish that the Namibian people could trust the conduct of the 2019 election, which it could not establish precisely because of the absence of any verifiable paper trail. On this ground, the court should have invalidated the election.

Second, and considering the point explained immediately above, the Court’s reasoning in *Itula* proceeded in a circular fashion. The court refused to invalidate the election because it found that the applicants failed to show that the absence of paper trail negatively affected the election, yet the absence of verifiable paper trail is the very reason why the ECN had to prove that people could trust that election, and not the other way around. In essence, the Court held that the absence of a paper trail did not affect the election, and to prove that it did not affect the election the court held that no paper trail exists to verify that effect. And yet the effect of that absence on the election is precisely what the ECN needs to establish!

³⁰ *ibid* [106].

³¹ Electoral Act 5 of 2014, s 3.

Another way of seeing the Supreme Court's stance towards the absence of paper trail suggests that, by denying the applicants the relief they sought, the court merely appealed to people's ignorance. An appeal to ignorance works by positing that, because a person cannot prove that X is false, then X must be true. Applied to *Itula*, this reasoning insists that, because the applicants cannot prove that irregularities occurred during the election, then the election must have taken place free of such irregularities. Appeals to ignorance such as the one used in *Itula* poses a major problem: A person cannot draw any conclusion from ignorance or the absence of evidence. This means that the Supreme Court cannot rely on such ignorance or absence of evidence to conclude either that the irregularities did not negatively impact the election or that they did indeed have such a negative impact. This implies that, while the ignorance and the lack of evidence would not have justified the Court in invalidating the election and ordering a rerun, they do not justify the Court's decision to deny the invalidation and the rerun either.

Conclusion

The *Itula* case puts the Supreme Court at the heart of one of the most contentious cases it had ever to decide. Although the Supreme Court headed by Shivute scored a lot of points in terms of independence and effectiveness, people will likely remember *Itula* as one of the most controversial in the jurisprudence developed by the Shivute court. Not least because the Court could not disentangle the concept of "selective implementation" from "selective promulgation".³²

The court rightly ruled that it must see the challenge mounted by the applicants "within the profound constitutional importance of a presidential election, to [sic] the right to vote and the principle of democracy".³³ However, the court did not seem to have factored such importance into their crafting of an appropriate remedy. Article 17(2) of the Constitution entitles every citizen aged 18 and above to vote – a right that democracy cannot dispense with. Why did the court not deploy these constitutional values to nullify the election and order a rerun? Instead,

³² See, for example, the court's interchangeable use of 'selective promulgation' [*Itula* (n 5) [7]-[8]] and 'selective implementation' (ibid [8],[13],[39],[63], and [71]). In the Namibian legal system, the President of the Republic 'promulgates' Acts of Parliament whereas a body or a person (often a Minister) designated by a given Act of Parliament 'implements' the provisions of the Act. The designated body or person typically implements the provisions of the Act by publishing a notice in the Government Gazette to that effect. The body or the person can thus implement the provisions of the Act entirely or selectively. In that system, government ministers do not 'promulgate' Acts; they 'implement' them.

³³ *Itula* (n 5) [46].

the court considered the absence of paper trial and the parties' delay in launching the proceedings to deny the applicants' request.

Did the Supreme Court not undermine the outcome of its own decision regarding the appropriate remedy when it found that the Minister breached the constitutional principle of separation of powers? Indeed, the consequence of a declaration of constitutional invalidity is that the conduct in question becomes a nullity as soon as the actor performed it. By the same token, after the Supreme Court ruled that the Minister's selective implementation of section 97 of the Act offended the Constitution, the Court's ruling had the effect of nullifying selective implementation.

However, relying on *CRAN*,³⁴ the court chose to postpone the invalidity order. The court took this route notwithstanding the fact that the *CRAN* precedent only warranted an invalidity order that operates *ex nunc* [i.e., 'from now on'],³⁵ as opposed to an invalidity order that comes into operation on a prospective date.

If the court had ruled that selective implementation was null and void from the beginning (i.e., from 17 October 2014), section 97 would have entered into force without selection, and the ECN would have remained bound to use EVMs together with a verifiable paper trail. Thus, the mere fact that the ECN deployed EVMs without a verifiable paper trail would have made the conduct of the 2019 election unlawful and illegal.

But the court followed the judgment in *CRAN* to rule out an *ex tunc* invalidity order.³⁶ All the same, the *CRAN* case constituted clear authority for issuing an *ex nunc* invalidity order. The court should have ordered the ECN to redo the election.

³⁴ *CRAN* (n 26).

³⁵ *ibid* [105]-[106] and [109].

³⁶ When an invalidity order operates *ex tunc*, it operates "from the beginning".