

JOB SIBANDA

Versus

THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

IN THE ELECTORAL COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 AND 9 MAY 2008

K Ncube and C P Moyo for the applicant
Ms U Mabhiza and Mrs M Cheda for the respondent

Judgment

NDOU J: The applicant seeks an order that the respondent be ordered to comply with the Electoral Act [chapter 2:13] and publish in the Government Gazette the sitting of the Nomination Court, in order to accept further nominations, if any, for the Pelandaba-Mpopoma Parliamentary Constituency. In short, the applicant seeks that the respondent complies with the provisions of section 39 (2) as read with section 50 of the Electoral Act. The brief facts of this matter are the following. In February 2008, following the setting of the nomination day for Parliamentary candidates by the respondent, the applicant was duly nominated as one of the candidates to contest the elections set for 29 March 2008. Applicant was to contest as a independent candidate for the Pelandaba-Mpopoma constituency in Bulawayo. The applicant was one of the eight (8) prospective candidates in the constituency. The applicant's symbol of the elections is a white dove in flight clutching a white rose in its beak. Surrounding the dove, are words "Love Peace Success" with the last word appearing below the dove. After the nomination court sitting in February 2008 and during the campaign period, the applicant travelled the length and breath of the constituency, canvassing for support. He addressed numerous meetings and gatherings. The applicant avers that his support was growing with each meeting that he addressed. He distributed thousands of fliers in an effort to sell himself to the electorate. A song was composed

in his honour and a play was written and staged. Unfortunately, a few weeks before the elections, fate intervened when one of the candidates in the constituency, one Milton Gwetu, passed away. As a result of this death, the parliamentary elections were not held in this constituency. This is presumably in terms of the section 50 of the Act. What is beyond dispute is that the House of Assembly elections did not take place in the Pelandaba-Mpopoma constituency.

The respondent raised three issues the first one being a point *in limine*. I propose to deal with the point *in limine* first. If the point is rule in favour of the respondent, then there will be no need to deal with the other issues on merits.

Did the Chief Elections Officer declare the death in terms of section 50 of the Act?

While conceding that the election in question did not take place after the death of Milton Gwetu, the respondent's case is that there was no form of declaration made by the Chief Elections Officer that he is aware of. In other words, the Chief Elections Officer did not formally make a declaration in terms of section 50(1)(b). I think there is need to understand the declaration required by section 50(1)(b) in order to resolve this issue.

Section 50 provides:

“50. **Death of candidate**

(1) If -

- (a) the Chief Elections Officer is satisfied that a duly nominated candidate for election for a constituency died before the poll commenced or if the poll has commenced, before the close thereof; or

the proceedings relating to an election for a constituency have been stopped in terms of subsection (2); the Chief Elections Officer shall, so far as concerns that constituency, declare that all proceedings relating to that election are void and all

proceedings relating to that election shall be commenced afresh in the same manner as if a vacancy had occurred.:

Provided that no fresh nomination shall be necessary in the case of a candidate who was duly nominated at the time when the proceedings

were declared void, if such candidate or his or her chief election agent notifies the constituency elections officer in writing of his or her intention to remain a candidate.

- (2) If a nomination officer is satisfied that a duly nominated candidate for election in that constituency died before the close of the poll in that constituency, he or she shall stop all proceedings relating to that election and forthwith notify the Chief Elections Officer.” (emphasis added)

The provision does not say that the declaration has to be in writing. In fact, the nature of the declaration is not prescribed. In my view, the stopping of the Pelanda-Mpopoma Constituency elections by the Chief Elections Officer, whether by word of mouth or in writing constitutes such a declaration. This is the interpretation attributed to the Chief Elections Officer and the Zimbabwe Electoral Commission by their legal practitioner which resulted in the application against them being dismissed on account of misjoinder in HB 17-08. The applicant conceded that there was a misjoinder of the Chief Elections Officer and the Zimbabwe Electoral Commission and withdrew against them purely on that understanding. Although the Chief Elections Officer was not forthcoming on the exact date that the declaration was made, it is beyond dispute that it was before 30 March 2008. This is so because the declaration stopped the election on that date. The reckoning of the fourteen (14) day period can commence on that date for the purposes of section 39(2) of the Act.

Another issue to be determined is whether the Chief Elections Officer has an obligation to notify the respondent of this declaration.

Section 39 provides:

“39 **Vacancies and by-election**

- (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 President of the Senate or the Speaker of the House of Assembly, as the case may be, as soon as possible after the President of Senate or the Speaker of the House of Assemble becomes aware of the vacancy.

The president shall, within a period of fourteen (14) days after –

- (a) he or she has been notified in terms of this section of a vacancy in the membership of Parliament; or

a declaration is made by the Chief Elections officer in terms of section fifty; or 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 provided in section thirty-eight in regard to a general election and the provisions of this Act shall apply accordingly. ...” (emphasis added)

From these provisions it is clear that there is no duty placed on the Chief Elections Officer (as is the case with the President of the Senate and Speaker of the House of Assembly when there is a vacancy in membership of parliament - section 39(1) and 39(2)(b)) to notify the president in writing of his or her declaration made in terms of section 50. In the circumstances, the Chief Elections Officer did all that was expected of him or her in terms of sections 39(2)(b) and section 50. It is now up to the respondent to act in terms of section 39(2). Even without knowing the exact date that the declaration was made by the Chief Elections Officer, at least the reckoning of the fourteen day period can commence running from 30 March 2008. In the circumstances the point *in limine* raised by the respondent must fail.

i. **Section 39(2) Peremptory or Directory?**

The wording used is “(2) The President shall, within fourteen days ...”

(emphasis added).

It is trite that language of a predominantly imperative nature is taken to be indicate of peremptoriness. The verb “shall” is one such word – *Messenger of the*

Magistrates’ Court, Durban v Pillay 1952(3) SA 678(A) at 683; *Feinberg v*

Pietermaritzburg Liquor Board 1953(4) SA 415 at 419; *R v Busa* 1959(3) SA 385(A)

at 390 and *Maharaj v Rampersad* 1964(4) SA 638 (A) at 644. In this case, there is nothing in the Act that suggests otherwise and accordingly section 39(2) is peremptory and the respondent is required to act in terms of section 39(2) within fourteen days. Such fourteen days have already lapsed from 30 March 2008. Ms Mabhiza raised an issue of an exception to this general rule. She cited a New Zealand authority, *Simpson v Attorney General* [1955] NZLR 271 discussed *de Smith's Judicial Review of Administrative Action* (4th Ed) by J M Evans at page 144. In the *Simpson* case the court held that procedural requirements should not be construed as mandatory if serious public inconvenience would result. Before I decide whether this legal principle is applicable in this jurisdiction, I feel that I am to determine whether respondent has established that serious public inconvenience would result. If I decide that there is nothing showing a serious public inconvenience, it will not be necessary for me to determine this legal issue.

The issue of the Zimbabwe Electoral Authorities not having funds to run this particular election

Ms Mabhiza, submitted from the bar, that the respondent is of the view that the electoral authorities do not have sufficient funds to conduct this election “properly and efficiently”. She further submitted that the Zimbabwe Electoral Commission is not ready to hold the elections in the time frame proposed by the applicant on account of lack of funds. As alluded to above, this information is from the bar. There is no affidavit by the respondent or his agent to that effect. This being an urgent application I will not use this against the respondent. The main problem is that the Zimbabwe Electoral Commission was initially a party of these proceedings. They sought to be excluded from these proceedings instead of pleading such lack of funds. Once they succeeded in their misjoinder application they cannot be heard through the agency of the respondent raising such issues. There is nothing in this case that shows that the Zimbabwe Electoral Commission mandated the respondent to act on its

behalf. In the absence of such mandate, the Zimbabwe Electoral Commission is autonomous of the respondent as enshrined in section 61(5) of the Constitution of Zimbabwe. In the circumstances, the respondent cannot use this argument of lack of resources to ward off the order sought in this application. It is really up to the Zimbabwe Electoral Commission to fight its battles, so to speak. In the circumstances, this argument of lack of funds should fail. In any event, section 38 of the Act, gives the Zimbabwe Electoral Commission sometime to raise funds for the elections.

The parties have agreed that I grant a final order instead of an interim one as I have already heard argument from both sides. I propose to do so.

It is ordered that:

1. The respondent be and is hereby ordered and directed to take steps to publish in the Government Gazette in the shortest possible time, but not more than fourteen days of this order, the sitting of the nomination

court in order to accept nominations for the Pelandaba-Mpopoma Parliamentary Constituency.

2. The respondent take all such steps as are necessary in accordance to section 39(2) of the Electoral Act to have a by-election conducted in the Pelandaba-Mpopoma Constituency.

The respondent, shall bear the costs of this application.

Kossam Ncube & Partners and Moyo and Nyoni, applicant's legal practitioners
Civil Division, Attorney-General's Office, respondent's legal practitioners