HC 8189/2003

WARD NEZI
versus
JOEL BIGGIE MATIZA

HIGH COURT OF ZIMBABWE
NDOU J
HARARE, 25, 27 February, 11, 13 March 2002 and 27 August 2003

Election Petition

Adv. *H. Zhou,* with *A. Mugandiwa,* for the petitioner
Mr *F.G. Gijima,* for the respondent

J: The petitioner launched this petition in terms of section 132 of Electoral Act [*Chapter 2:01*]. He seeks an order in the following terms:

"IT IS ORDERED THAT:

1. The Respondent was not duly elected as the Member of Parliament for the constituency of Murehwa South.

2. The result of the election in Murehwa South be and is hereby set aside.

3. The seat in Murehwa South is declared to be vacant.

4. A certificate stating that the seat in Murehwa South is vacant shall be forwarded to the Speaker of Parliament.

5. A report in writing shall be forward to the Speaker of Parliament stating that the allegations of corrupt practices and illegal practices by the Respondent have been proved.

6. A report in writing shall be forwarded to the Speaker of Parliament stating that corrupt practices and illegal practices extensively prevailed at the election in Murehwa South.

7. A report in writing shall be forwarded to the Attorney-General setting out the corrupt practical and illegal practices of the Respondent.

8. It is hereby declared that, within five years of this order, Respondent shall not be registered as a voter, vote in any election or hold any public office other than public office regulated exclusively by or in terms of the Constitution of Zimbabwe.

9. The costs of this petitioner shall be paid by the Respondent on the scale of legal practitioner and client."

The salient facts of the case are that in June 2000 Parliamentary Elections took place in Zimbabwe. In Murehwa South, Ward Nezi, a businessman and Joel Biggie Matiza, an architect stood as candidates for the MDC and ZANU-PF respectively. The results of the elections were declared on 27 June 2000 as follows:-
"Joel Biggie Matiza – ZANU-PF – 13 895
Ward Nezi – MDC – 4 426
Eddyson Chiwara – UP – 404."
Mr Nezi was not satisfied with the conduct of the elections in Murehwa South constituency culminating in this petition. As a candidate in that constituency Mr Nezi has a right to present this petition in terms of section 132 of the Act. He articulated certain corrupt and illegal practices in a document files as Annexure "A" to the Petition. Because of the turn of events I do not think it is necessary to outline these alleged practices in this judgment.
The matter was set down for hearing before me for 25 February 2002. Both parties were duly notified of the date of trial. On this date Mr Nezi did turn up, however, his legal practitioner Mr *Mugandiwa* was in attendance. Mr Matiza and his legal practitioner were in attendance. Mr *Mugandiwa* applied for a postponement to a specific date. He submitted that the petitioner was not deliberately delaying the finalisation of the matter. He indicated that the delay had been occasioned by the dilatoriness of the Registrar of this court. He submitted that the latter generally delayed in setting down the forty (40) June 2000 election petitions. He submitted that all the petitions were filed in July 2000 and by December 2000 not a single one had been set down. He submitted that as of April 2001 only eight (8) petitions had been finalised with the first judgment only handed down on May 2001. It is very difficult for me to comment on these general allegations as I am seized with this petition out of the alleged forty. I am not familiar with the facts in those other thirty-nine. For the purposes of the judgment I will confine myself to the circumstances of this petition. The reasons advanced for seeking the postponement are first, that around 95% of the Mr Nezi's witnesses are subsistence farmers and with the onset of the rain season they required time for farming activities. Second, the witnesses were "displaced from their homes" and were unable to move freely in the constituency as a consequence of political violence that engulfed the area in the run up to the Presidential Elections. Third, an organisation known as Amani Trust which had originally offered to pay the witnesses' expenses during the course of the petition has since declined the said offer. The petitioner, therefore, required time to raise witnesses' expenses. The petitioner sought a postponement to 18 March 2002. Mr *Gijima,* for the respondent, strongly opposed the application. He submitted that, technically, the petitioner was in default even though his legal practitioner was present. The petitioner has not explained the reason of his absence. He indicated

that the petitioner did not seem to take his petition seriously. First, he did not attend meetings in judges' chambers where the set down logistics were discussed. Second, this date was chosen by the petitioner himself so his request for postponement should not be allowed. Third, the respondent had several times requested for a summary evidence. The petitioner failed to provide the same citing safety of he witnesses. The respondent suggested that the petitioner uses *pseudo* names to address this concern. He, however, did not receive the summary of evidence from the petitioner. Finally, he further submitted that there was a need to bring litigation to finality. In the end I granted the postponement but attached conditions thereto. I postponed the petition to 11 March, 2002. On 11 March 202 the petitioner was again not in attendance. I granted another indulgence and postponed the matter to 13 March 2002 for the petitioner to prepare his case. For the record I should point out that this application was also opposed by the respondent. I ordered the petitioner to bear wasted costs.

On 13 March 2002, Advocate *Zhou,* for the petitioner submitted that the petitioner was not available and that he had not obtained instructions from him. He conceded that he does not have any meaningful explanation for the non-attendance. He submitted that he had no meaningful basis for seeking another postponement. He, however, submitted that he had no instructions to withdraw the petition and left everything in my hands. Mr *Gijima* submitted that, as previously pointed out, the petitioner did not seem to take the matter seriously as evinced by his failure to attend in previous hearings. He submitted that the respondent had been forced to incur heavy travel and accommodation expenses of witnesses. He submitted that *Advocate Zhou'*s best route was to withdraw the petition and tender costs. As this was not done the respondent prayed that the petition be dismissed for want of prosecution with costs on legal practitioner and client. Advocate *Zhou* submitted that dismissal for want of prosecution was inappropriate. He submitted that I dismiss the petition based on default with no order as to costs. There is no provision in the Electoral Act dealing with this issue so I have to use the rules of this court to resolve this procedural point. The relevant rule is rule 62 which provides:

> "When on the calling of any case the defendant appears in court personally, or by his legal practitioner, and the plaintiff makes default, the defendant shall be absolved from the said suit or acting unless sufficient cause to postpone the same, or to make some other order therein, appears to the court." (**emphasis added)**

In casu, it is common cause that there is no sufficient cause for the postponement. The only remedy available to the respondent according to Rule 62, is absolution from the petition. Notwithstanding that the rules make no provision for dismissal, the court has the inherent power to dismiss the action in appropriate cases – see *Broughton v Manicaland Air*

Services (Pvt) Ltd 1972 RLR 350 (G). From the foregoing it is evident that, if, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant is entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfy the court that final judgment should be granted in his favour, and the court, if so satisfied, may grant such a judgment – see "*The Civil Practice of the Supreme Court of South Africa*" – L. Van Winsen, A.C. Cilliers and C. Loots, (4th ed) at 661, *Irish Co Inc v Kritzas* 1992 (2) SA 623 (W) at 623I–J; *Collins v Van der Merwe* 1908 TS 1086; *Verkouteren v Savage* 1918 AD 143 and *Morhardt v Windisch* 1926 SWA 1. *In casu,* absolution from the instance is called for.

Costs

When a defendant is absolved from the instance he should be regarded as being the successful party, and the plaintiff should be ordered to pay the defendant's costs unless there are good reasons for ordering otherwise – see *General Wholesale Suppliers (Pvt) Ltd v Aims Distributors* 1975 (1) SA 600 (RA) at 601; "*The Civil Practice of the Supreme Court of South Africa*" (*supra*) at page 685C and "*Law of Costs*" by A.C. Cilliers at page 247(c).

In the light of the above I grant the respondent absolution from the instance with costs on legal practitioner and client scale.

Wintertons, petitioner's legal practitioners.

F.G. Gijima Associates, respondent's legal practitioners.