SAMSON NJANINA AND OTHERS
versus
ZIMBABWE ELECTORAL COMMISSION
and
CANDIDATES TO THE MARCH 29 2008
HARMONISED ELECTIONS IN ZIMBABWE
ZANU PF AND MDC CANDIDATES AND OTHERS

ELECTORAL COURT OF ZIMBABWE
MAKONI J
HARARE 27 October and 31 October 2008

ELECTION PETITION

Ms J. Majome for MDC T
Mr F.G. Gijima for ZANU PF

MAKONI J Samson Njanina filed the matter, before this court, with the Registrar of the Electoral Court on the 18th July 2008. ZANU PF and MDC T Political parties contested the matter by filing notices of opposition. The 1st respondent did not respond.

A pre-trial conference was held where the parties agreed on the following preliminary issues.

a) Whether the petitioner has locus standi to present the petition

b) whether 2nd respondents have adequately been cited.

c) whether the form of the application before the court is appropriate.

d) whether the petition was filed within the time limit provided for in the Act

e) whether the petition complies with the provisions of the s169 of the Electoral

Act Chap 2.13.

The papers filed by Njanina reflect on the Index and on p 3 of the record that it is an election petition. On page 1(a) it is indicated as a Chamber application and on p 2 as a court application. The papers further reflect that, he seeks a provisional order. The Provisional order is not in

the proper form. The above comments give rise to the issue whether the form of the application before the court is appropriate.

Njanina submitted that the papers that he filed were an election petition to nullify the presidential election. He filed it in the form of a chamber application so that the matter be heard on an urgent basis. He referred the court to Order 1 rule 4 D and Order 32 rule 229c. He admitted that the procedure was wrong and asked the court to condone his failure to file the application in the proper form.

Ms Majome submitted that the form of the papers filed by Njanina is not provided for in terms of s 168 and s 171 of the Act pertaining to the procedure of election petitions. She further submitted that the subject matter in the petitioner's papers is of substantial and critical importance and requires to be dealt with in a thorough and proper manner.

Mr Gijima submitted that the petitioner's papers are confused and it is not clear whether it is chamber application, court application or Election petition. He further submitted that the provisional order is not in the proper form and that the terms of the order sought are untenable at law. It is also procedurally incorrect. He further submitted that this court is a creature of statute and does not have inherent jurisdiction. It does not have power to condone the petitioner's acts. He submitted that r 229c applies to court applications in the High Court and not in the Electoral Court.

S 165(4) of the Act provides;

> 4 "until rules of court for the Electoral Court are made in terms of this section the rules of the High Court shall apply, with such modification as appear to the Electoral Court to be necessary, with respect to election petitions and an other matters over which the electoral court has jurisdiction"

In terms of the above provision High Court rules apply to the petition and therefore r 229 c applies. This court has power to condone the form of the application in terms of rule 229C. In my view, the interested parties in this matter were in no way prejudiced by the petitioner's failure to

institute the application in the proper form. They were able to file notices of opposition which dealt with pertinent issues raised by Njanina. In any event the Act, in s 168 and 179 does provide the form of election petition.

However the relief that the petitioner seeks presents problems. He seeks a Provisional Order which cannot be granted by the Electoral court in terms of part XXIII of the Act as it would entail granting interim relief which would then be confirmed later. Njanina did not amend the relief that he seeks. I therefore make a finding that the relief that the petitioner seeks is therefore inappropriate.

All along, I deliberately refrained from referring to Njanina as he is cited in his papers. It was not clear whether to refer to him an applicant or petitioner. In view of my ruling above, I will henceforth refer to him as the petitioner.

Where Petitioner has locus standi to presend the Petition.

It was submitted by Ms Majome that the petitioner has no locus standi to petition this court as he was neither a candidate nor had a right to be elected in the Presidential election in question. She referred the court to s 111(1) of the Act. She further submitted that in paragraph 8 or this founding affidavit the petitioner states that he failed to submit his nomination papers as he, among other things failed to raise the required nomination fees.

For the petitioner to be qualified to file a petition in respect of the Parliamentary and Local Government elections, he should have personally been a candidate for the election. The petitioner does not claim to have seen a candidate for the elections. He therefore does not have locus standi to petition this court in respect of those elections. The same arguments were advanced by Mr Gijima on behalf of ZANU PF.

Section 111(1) reads.

“An election petition complaining of an undue return or an undue election of a person to the office of President by reason of irregularity or any other cause whatsoever may be presented to the Electoral Court within

thirty days of the declaration of the result of the election in respect of which the petition is presented by any person.

a) claiming to have had a right to be elected at the election, or

b) alleging himself or herself to have been a candidate at such election.

The petitioner does not fall into the category of persons defined above. He does

not allege that he was a candidate neither has he established a right to be elected in the Presidential election. Such a right can be established when one acts in a matter that puts him in the election process. This is done by the process of filing nomination papers. As was correctly submitted by Ms Majome, the petitioner is no different from any other member of the public petitioning the court to nullify the Presidential election. From his own papers, he failed to file nomination papers because he could not raise the required deposit. The petitioner does not therefore have the locus standi to present the petition.

S 167 reads

> "A petition complaining of an undue return or an undue election of a member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever may be presented to the Electoral Court by any candidate at such an election".

S 167 is clear and unambiguous. Only a candidate in the Parliamentary election has locus standi to present the election petition. The petitioner was not a candidate at the election and therefore is non-suited to present an election petition challenging the Parliamentary elections.

I could have dismissed the petition at this stage but will proceed to deal with all the issues for the benefit of the petitioner who is a self actor.

Whether 2nd respondents have adequately been cited.

It was submitted, on behalf of the 2nd respondents that the citation of the respondents is vague and embarrassing. No particular legal persona were cited. The court was referred to s 166 and s111(4) of the Act.

The petitioner submitted that he cited the 2nd respondent in such a manner as the Presidential election took place at same time with other elections. One cannot invalidate the presidential election and leave out the others as the complainant of corrupt practices applies to all the elections. He further submitted that the petition was targeted at Robert Mugabe and Morgan Tsvangirai. He cited them by name in a Pre-Trial Conference minute filed on the 26 August 2008 and the court should rely on that minute for proper citation of the parties.

S 166 reads

In this Act-

"respondents means, the President, a member of Parliament or councillor

whose election or qualification for holding the office is complained of in an election petitioner.

The petitioner cites the respondents as "Candidate to the March 29 2008 harmonised elections in Zimbabwe (ZANU PF and MDC Candidates and others).

This falls foul of s 166 of the Act which clearly spells out the persons who can be cited as respondents. The petition is therefore not directed at any specific legal or natural person. The respondents have the right to be heard before the court can interfere with their election citing. They must be properly cited. Citing a Political party as a respondent does not comply with s 166 as a respondent does not necessarily have to belong to a political party. Political parties throw their weight behind a candidate who contest the election as an individual.

In my view, this is a petition which ZANU PF and MDC T could have safely ignored. Assuming the court were to err and grant the order in the form it is, it would have been of no force or effect. It could not be enforced against the President, any member of Parliament and any of the councilors as they had not been cited. It would have been a brutum fulmen.

In Ganya Safaris (Pvt)ltd v Van Wyk 1996(2)ZLR 246 H at 252 G the Court stated

"A summons has legal force and effect when it is issued by the PL against

an existing legal or natural person. If there is no legal or natural person answering to the names in the summons as being those of the defendant, the summons is null and void ab initio"

The situation does not change on the basis that ZANU PF and MDC T filed responses to the petition. In JDM Agro consult and Manufacturing (Pvt)Ltd v Editor of the Herald Newspaper and Anor HH 61/07 the court stated

'The process of filing pleadings under those names would not have issued the summons with any form of legality. There was no summons for them to plead to given that there were no persons answering to the names on the summons. They cannot be identified as such. This is not a mis-description which can be amended by alteraction of the names on the summons, nor is it substitution. You cannot amend or substitute some thing which does not exist."

The above comments apply with equal force to the present petition despite the fact that they were made in an action. The petition is therefore a nullity. The petitioner cannot possibly correct the defect by filing a Pre-Trial Conference minute which now reflects the names "Robert Mugabe" and "Morgan Tsvangirai" in brackets. The citation remains the same. The issue of citation of parties is critical at the inception of the petition and cannot be correct by later pleadings. As a consequence of the above, the provisions of s 169 were not complied with. As they were no identifiable respondents, they were not served with the process as is provided for a terms of 5169.

Whether the petition was filed within the time limit provided for in the Act.

The petition was presented on the 18 July 2008. If it is a petition challenging the Presidential election, it must be presented within thirty days of the declaration of the result of the election in respect of which the petition is presented see s 111(1). If it is challenging the Parliamentary Election it must be presented within fourteen days

after the end of the period of the election to which it relates. See s 168(1). It is only in cases where an illegal practice, as defined, occurs after the announcement of the result in the last constituency that it can be filed within thirty days of the occurance of the illegal practice. Non of the parties ventilated the issue of when the Presidential election results were declared. In view of that I cannot determine the issue whether the petition was filed within the prescribed time or not. The petitioner is challenging the March 29 Harmonised election and not the June 27 Presidential run off. One wonders why he would challenge the one and leave the other.

In Tsitsi Veronica Muzenda vs Patrick Kombayi and Zimbabwe Electoral Commission HH 47/08 the court found that the last result in a House of Assembly constituency was announced on the 4th April 2008. If the petition relates to the House of Assembly it was filed way out of time. It should have been presented on 21 April 2008.

The issue as to when the last result in the Senatorial and Council elections were announced was again not ventilated. I cannot therefore make a determination whether the petition was presented in time or not

The MDC T asked for costs on the ordinary scale. ZANU PF asked for costs on a higher scale. On the basis that the petitioner dragged it to court unnecessarily.

It was hinted to the Petitioner at Pre-Trial Conference level that his petition was still born and that he should seek legal assistance. He did not see reason and continued pursuing the matter.

As I have already alluded to earlier in my judgment, ZANU PF and MDC T brought themselves before the court unnecessarily. They could have ignored the petition as they had not been cited. I will therefore not make an award of cost in their favour.

In the result I make a finding that the petitioner was non-suited to present the petition and that the petition is a nullity in that the order that he seeks is not competent, he did not cite the respondents properly and as a result did not effect service in terms of the Act, and that it was filed out of time.

Accordingly I make the following order

1. The petition is dismissed with no order as to costs.