VITALIS MUSUNGWA ZVINAVASHE EP 31/08
versus
EMPIRE KUFACHIKATI MAKAMURE
and
ZIMBABWE ELECTORAL COMMISSION

SHUVAI BEN MAHOFA EP 32/08
versus
ELPHSA MUKONOWESHURE
and
ZIMBABWE ELECTORAL COMMISSION

KIZITO MBIRIZA EP 79/08
versus
FLORA BUKA

TIMOTHY MATSUNGE EP 88/08
versus
FRANK NDAMBAKUHWA

ANTHONY URAYAYI CHAMAHWINYA EP 94/08
versus
FARISAI MARAMBA

ELECTORAL COURT OF ZIMBABWE
GOWORA J
HARARE, 14 July and 27 August 2008

Election Petitions

Mrs W O M Simango, for the first and second petitioners
T Chibwana, for third and fourth petitioners
T S Manjengwa, for the fifth petitioner
C Mhike, for the first and second respondents
T Nyawo, for the third fourth and fifth respondents

GOWORA J: These matters were all set down before me for the hearing of certain preliminary issues arising out of the service of election petitions subsequent to their filing by the petitioners. As the issues before me were concerned with legal disputes I found it convenient to have the matters set down for hearing at the same. In order to accommodate counsel I heard the last three matters in the morning and the first two in the afternoon. I also, for the sake of convenience, decided to do a composite judgment of all the matters. The

question in all five matters was whether or not there had been compliance with the provisions of the Electoral Act [*Cap 2:13*], ("the Act") specifically s 169 thereof.

Initially, the first two petitioners had also cited the Zimbabwe Electoral Commission as a respondent but when the matters were called I was informed that the petitioners had filed notices of withdrawal against the Commission. Thus there was no appearance for the Commission as a result of such withdrawal. I will now set out the facts in each of the petitions which are the cause of the legal dispute presented to the court.

In the matter of *Zvinavashe* v *Makamure*, the respondent was declared the duly elected member for the Gutu Senatorial Constituency. The respondent is a member of the Movement for Democratic Change ("MDC"). The petitioner who is member of ZANU-PF then filed a petition against the declaration by the Commission, alleging various wrongs arising out of the election and seeking from this court an order of reversal of the election process. The petition was filed with this court on 14 April 2008. The petitioner arranged for service of the petition on the respondent through the services of the Deputy Sheriff for Harare. The return filed by the Deputy Sheriff reveals that service was effected at Harvest House in Nelson Mandela Avenue, Harare on 6 May 2008. It is common cause that Harvest House is the headquarters for MDC. The return further shows that the petition was served on one Muzuva, who is described therein as a security officer.

I turn now to the facts in the matter of *Mahofa* v *Mukonoweshure*. The petitioner is a member of ZANU-PF whilst the respondent belongs to MDC. It is common cause that the respondent contested the election for election as a member of Parliament for the House of Assembly in the Gutu South Constituency. After the election, the respondent was declared duly elected thereto which then resulted in the petitioner mounting a challenge of the electoral process. The petition was presented to court on 14 April 2008. The petitioner caused service of the petition to be effected through the office of the Deputy Sheriff for Harare. A return from that office shows that the petition was served on one Muzuva, a security officer at Harvest House. Service was effected on 6 May at the party headquarters of the respondent's party, MDC.

In the case of *Mbiriza* v *Buka*, the latter, campaigning on the ZANU-PF political ticket, was declared duly elected as a member of the House of Assembly for the Gokwe Nembudziya Constituency. The petitioner, who contested the same election under the ambit of MDC, filed a

petition on 14 April 2008 challenging the declaration of the respondent as duly elected. According to a certificate of service filed by the petitioner's legal practitioners, the petition was served at the ZANU-PF headquarters on 12 May 2008. The papers were handed to one Dzora, described as the personal assistant to the ZANU-PF Secretary for Administration.

In *Matsunge* v *Ndambakuhwa*, the respondent a member of ZANU-PF was declared duly elected member to the House of Assembly for the Magunje Constituency. The petition had contested the same seat under the MDC umbrella. The petitioner not satisfied with the declared result then filed a petition with this court to have the results set aside. The petition was filed on 14 April 2008. His legal practitioners as part of their papers has filed a certificate of service which shows that service of the petition was effected on Dzora, a personal assistant to the ZANU-PF Secretary for Administration. Service was at ZANU-PF headquarters on 9 May 2008.

In the last matter, that of *Chamawhinya* v *Maramba*, the respondent contested for and was duly declared elected as a member of the House of Assembly for the Chilumhanzu Constituency under the aegis of ZANU-PF. The petitioner contested the same seat under the MDC ticket. He was aggrieved by the result and mounted a challenge to the declaration by way of an election petition. The petition was filed with this court on 14 April 2008. Service as in the last two was done by the petitioner's legal practitioners. The certificate of service they filed shows that the papers were served at ZANU-PF headquarters on 12 May 2008. The papers were again handed to Dzora described as personal assistant to the ZANU-PF Secretary for Administration.

In all five cases, the respondents have raised virtually the same point *in limine*, whether, in fact, the petitioners had variously complied with the provisions of s 169 of the Act. In the first two petitions it is contended in argument that the petitioners did not serve the petitions upon the respondents in terms of the provisions of the Act. The respondents further argue that the notice and the names and addresses of the proposed sureties were not served upon the respondents either personally or at their last residential address or place of business and further that in relation to the second petitioner, the petition was in contravention of the Act for failure to abide by the time limits set in s 168 thereof. Turning to the last three petitions, in heads of arguments filed on their behalf, the respondents were all in agreement that the Act required service of the petition within a stipulated period and that service had to be effected

upon the respondent either personally or at the last known address or place of business of such respondent. They all agree that service was effected outside the ten day period required by the Act but sought to have the court condone the departure from the provisions of the Act on the basis that the Zimbabwe Electoral Commission did not set the sureties in accordance with the Act and thus this delayed the service of the petitions as the enabling section required service of the petition and sureties. They all sought the condonation of the court in the failure of the petitioners to serve on time. In their view, the inability of the Commission to fix the sureties justified a finding that there had been substantial compliance thus allowing the court to determine the petitions on the merits. By the time these matters were set down a number of judgments had been handed down by this court and there was therefore a shift in the manner in which the respondents approached the matters. They did not however file additional heads of argument.

Mr Nyawo argued that the provisions of s 169 were peremptory and that service was done outside the stipulated period and also at the party headquarters instead of the residence or place of business of the respondents. He contended that service at party headquarters was not service within the ambit of the Act. He submitted that the petitioners were non-suited and the petitions should therefore fail.

It is pertinent therefore at this stage to discuss the requirements of s 169 in relation to the presentation and service of election petitions. The section is worded as follows:

> "Notice in writing of the presentation of a petition and the names and addresses of the proposed sureties, accompanied by a copy of the petition, shall, within ten days after the presentation of the petition, be served by the petitioner on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business."

The petitioners are all clear on the requirement that the notice be served within ten days of the presentation of the petition. They are also clear on the need for the petition to be served with the names and addresses of proposed sureties. They contend however, that in view of the failure by the Commission to fix the sureties within the time frame set by the Act, they were all unable to comply with the requirements of the Act and that as a result this court should, taking into account the actions of the Commission, find that they had served within the stipulated period after the Registrar had fixed the security. In other words they are asking the court to condone their inability or failure to comply with the Act.

In terms of s 168 (3) a petitioner is required to give security not later than seven days after presentation of the petition of an amount fixed by the Registrar of this court. The amount of security is prescribed by the Commission after consultation with the Chief Justice. On the papers before me, it is common cause that the Commission did not prescribe an amount for security and that this was done by the Registrar some time after the presentation of a number of petitions. If I accept their argument, as a court I would be extending the period within which the petitions had to be served. The wording of s 169 is peremptory in its terms and the court must give effect to the wording. It is not ambiguous nor would the giving of effect to the ordinary meaning of the section lead to an absurdity. None of the legal practitioners who appeared for the petitioners argued that the wording of the section was absurd in any manner. The effects of the provisions of s 169 were discussed by MAKARAU JP in the matter of *Chabvamuperu* v *Jacob* HH 46-08 in which she stated:

> "It may be pertinent at this stage to deal specifically with the point made by Mr *Uriri* that *Pio* v *Smith* (*supra*) was wrongly decided as the learned judge in that matter relied on the old classification of statutory provisions into 'peremptory' or 'directory".

I am unable to agree with this submission. In my view, it is clear that that the learned judge first found that the wording of the statutory provision was peremptory. He then proceeded to determine whether there had been substantial compliance with the peremptorily worded section. In rejecting the contention that there had been substantial compliance in the circumstances of the matter, MFALILA J had this to say at p 165:

> "In the present case Mr *de Bourbon* said that there was substantial compliance with the provisions of s 141 because the respondent was made aware of the petition within ten days, the time prescribed by the section, when the petitioner personally telephoned him through his wife.
>
> Did this action or actions by the petitioner, the deputy sheriff or the office secretary amount to substantial compliance with s 141 the sense in which I have stated, namely were they enough to achieve the objectives of the provision? The object of the requirement that a written notice of the presentation of a petition shall be served on the respondent within ten days is to give notice to the respondent in the shortest possible time so that he can start preparing his defence papers in order to have the case finalized as soon as possible. Now, could the telephone messages to the respondent and to his wife achieve these objectives? I think not."

I therefore do not think that *Pio v Smith* was incorrectly decided for the reasons advanced by Mr Uriri.'

I cannot put it any better than MAKARAU JP has. The section is peremptory and demands strict compliance. The petitions were not served within ten days from the date of presentation and have thus for that reason fallen foul of the provisions of the Act.

None of the petitions was served personally upon each of the respondents. None were served at the last known dwelling places of the respondents, but service in each case was effected at the respective party headquarters of the winning candidates. The question that has arisen now is whether or not such service is incompliance with the provisions of the Act. It is the case made out for some of the petitioners that service at the party headquarters is in fact service at the place of business of the respondent and that therefore the Act in so far as place of service is concerned has been complied with. The ingenious argument adopted by *Mrs Simango* is that the headquarters of the party is the place of business as far as political business is concerned. It is further argued that the respondent may well be involved in other businesses not known to the petitioner and accordingly it must be accepted by the court that service at the party's headquarters suffices for the effective and appropriate implementation of the provisions of the Act.

In construing a statutory provision, a court is enjoined to give effect to the intention of the Legislature and the canon of interpretation is that the court as much as possible gives effect to the ordinary meaning of the words or clauses being interpreted. In s 169 there is no qualification in the phrase 'place of business'. The court therefore must give meaning to that phrase as it appears in the section. The respondents in the first two cases have referred me to the definition in Curzon for the phrase. The definition therein is this –

> "……a professional practice and any other undertaking carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge".

Mrs Simango, on behalf of the two petitioners in the first two matters did not provide any authority for the meaning she sought to ascribe to the phrase 'place of business' and I am more inclined to accept that the definition that accords with the context is the one to be found in the reference from Curzon. If it had been the intention of the Legislature for the petition to be served at the party headquarters it would have stated so in no uncertain terms. I am especially persuaded to accept this view when it is taken into account that documents to be served under the section are concerned with the election of persons to positions in Parliament

or Government. These are usually, though not always, people who belong to political parties. With the exception of times when the persons might be independent, it would therefore, had that been the intention of the legislature, to simply provide that process be served at the party headquarters. However, as stated by MFALILA J in *Pio v Smith*[1] the object of the requirement is that a written petition be served on the respondent within ten days was so that the respondent would get notice in the shortest possible time of the petition so that he could prepare his defence. The personal service ensures that he gets the documents and thus be in a position to prepare. As MFALILA J stated the respondent would not get notice of the petition unless and until the petition itself has been served on him personally or at his dwelling or place of business. Accordingly I find that the manner of service of the petitions in all five petitions fell foul of the provisions of s 169.

Both *Mrs Simango* and *Mr Chibwana* urged me to find that there was substantial compliance in the manner in which the petitions were served. Their argument is that the petitioners were unable to comply with the Act because they were waiting for security to be set by the Commission and they then served as soon as possible after security had been set. As such the court should find that there was substantial compliance with the provisions of the Act. The question which arises then is whether this court has the power to condone non-compliance with s 169 and find that there was substantial compliance at least in so far as the time with they were served. The *locus clssicus* on this particular issue is *Pio v Smith* (*supra*). At p 165 of his judgment MFALILA J in discussing the provisions of s 141 which is now section 169 stated that the limitations on time were peremptory and had to be complied with exactly or so substantially that the act could stand on its own as would be the case in a situation where notice was served within the required period but without the list of proposed sureties. The learned judge stated as follows:

> "……The object of the requirement that a written notice of the presentation of the petition shall be served on the respondent within 10 days is to give notice to the respondent in the shortest possible time so that he can start preparing his defence papers in order to have the case finalized as soon as possible. Now, could the telephone messages to the respondent and his wife achieve these objectives? I think not. The respondent could not prepare his defence on the basis of telephonic conversations; indeed he could not exercise his rights under s 142. Indeed, the purpose of these telephonic conversations according to the petitioner was so that the respondent should not first hear of the petition from other sources. Therefore, what the petitioner had done

[1] 1986 (3) SA 145 at 165F-G

> before the expiry of the 19-day statutory period could not on its own achieve the objectives of s 141. There was for this reason no substantial compliance with the provisions of that section.
>
> The part of s 141 dealing with the limitation of time is peremptory and must be complied with either so substantially that the act could stand on its own, as would be the case for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties, in other words defects in the notice would not invalidate it."

From the statement of the learned judge it is obvious that the time period has to be complied in view of the peremptory nature of the wording and that one could only talk of substantial compliance with regard to defects in the notice itself not in the time limits set by the statute. Thus the failure to observe the time limits set by the statutory provisions which are peremptory in their terms would render the petition a nullity. See *Pio v Smith* (supra)[2]. The court accepted therein that it did not have the power to condone any failure to abide by the peremptory requirements of the Act in relation to time limitations and could only consider departures from the strict letter of the law where it might relate to the form of the petition itself as opposed to the failure to comply with provisions requiring time limitations. One can say therefore that outside a defect in the papers themselves the court ruled out any claim for substantial compliance on the part of a petitioner.

To take the matter further, this court, the Electoral Court, is a creature of statute and its powers are governed by the Act that created it. Although its powers have not been specifically stated, it is trite that a court set by an Act cannot assume unto itself powers not specifically bestowed on it. The High Court in its rules has provided for itself the power or discretion to condone departures from such rules. The High Court is a superior court with inherent discretion and thus has within its discretion the ability to make rules to regulate its functions. The Electoral Court has also been granted in s 165 the power to make rules for the regulation of its procedures or failing such rules to utilize the rules of the High Court. The difficulty I perceive in the argument put forward by the petitioners is that when the High Court condones departures from its rules, it is waiving strict compliance with provisions in rules of court, contained in subsidiary legislation enacted by itself and for its benefit. The time requirements in the High Court rules are set by the court itself which rules have been made by the court itself. The rules are by the court for the court and not the other way round, and the court is at

[2] At 166A-B

liberty to depart from them. When one considers however the statutory provisions where the time requirements are specified in an Act of Parliament different considerations apply. A court does not have the power to amend, alter or vary a statutory provision. Any extension of time requirements or limits set in a statutory provision would be a variation or amendment of such provision by the court. This is impermissible. In my view any finding on the part of this court that the petitioners were in substantial compliance with the provisions of s 169 and that their failure to abide strictly by the time limits or the manner of service should be condoned would amount to an amendment of the Act. Whatever the difficulties the petitioners may have faced it was incumbent upon them to abide strictly by the terms of the Act.

In the event I find that the petitions are null and void for want of compliance with the provisions of s 169. In the result the petitioners are non- suited and the petitions are all dismissed with costs following the cause.

Mutumbwa Mugabe & Partners, legal practitioners for first and second petitioners
Chibwana & Associates, legal practitioners for third and fourth petitioners
Wintertons, legal practitioners for fifth petitioner
Atherstone & Cook, legal practitioners for first and second respondents
Mandizha & Company, legal practitioners for third respondent
I.E.G. Musimbe, legal practitioners for fourth respondent
F.G. Gijima, legal practitioners for fifth respondent