DANIEL SHUMBA
versus
THE CONSTITUENCY REGISTRAR
MR MUSHANGWE
and
CHAIRMAN OF ZIMBABWE ELECTORAL
COMMISSION

ELECTORAL COURT OF ZIMBABWE
UCHENA J
HARARE 27 FEBRUARY 2008

Mr Chinyama for the Appellant
Mr G Chikumbirike for the Respondents.

ELECTORAL APPEAL

UCHENA J: The appellant was an aspiring Presidential candidate in the 29 March 2008 harmonized elections. On the 15th of February 2008, he presented his nomination papers, to the 1st respondent who refused to accept them. He alleges that he arrived at the Nomination Court at around quarter to four while another aspiring candidate Advocate Justin Chihota was being attended to. He approached the 1st respondent who told him to await his turn as he the 1st respondent was attending to another candidate. He alleges that in spite of his having been asked to await his turn he was eventually told that he could not be attended to as the nomination court had closed at 16.00 hours. It was contented on his behalf that the 1st respondent's conduct was contry to the provisions of the Electoral Act (Chp 2.13) herein after called the Electoral Act.

The 1st respondent is the constituency registrar, who presided over the nomination court for Presidential candidates. The 2nd respondent is the chairman of the Zimbabwe Electoral Commission, which over sees the conducting of elections, in Zimbabwe.

Before the hearing of the appeal, Mr *Chikumbirike* for the respondents raised a point in limine. He submitted that the appeal was out of time as it was lodged

after the four days prescribed by section 46 (19)(c) of the Electoral Act. Section 46 (19) (C) provides as follows:-

> "if no appeal in terms of paragraph (b) is lodged within four days after the receipt of notice of the decision of the nomination officer, the right of appeal of the candidate shall lapse and the decision of the nomination officer shall be final."

Mr *Chikumbirike* for the respondents referred to this court's decision in the case of Edson Nyamapfeni versus The Zimbabwe Electoral Commission and 3 others E/P 7/08, in which I held that the time within which an appeal should be noted is reckoned from the second day after the day on which the candidate's nomination is rejected, and that the period includes Saturdays and Sundays.

In Heads of Argument prepared by Mr Samkange but argued in chambers by Mr *Chinyama* it was contented that the filing of the urgent application which was dismissed by Guvava J interrupted the running of prescription and the four days prescribed by section 46 (19) (c) only started running on the 21st February 2008, the day GUVAVA J dismissed that application.

The Heads of Argument do not indicate which section of the Prescription Act (Chapter 8:11)hereinafter called the Prescription Act the appellant is relying on. A reading of the Prescription Act leaves no doubt that only Part IV would apply to prescription through the lapsing of time periods prescribed in statutes. Sections 13 (1) (a) and (b) and 14 refers.

The Appellant's Counsels' argument is not consistent with the provisions of section 19(2) and (3) of the Prescription Act, which provides for judicial interruption of prescription as follows:-

> (2) "The running of prescription shall subject to subsection (3) be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."
>
> (3) "Unless the debtor acknowledges liability the interruption of prescription in terms of subsection (2) shall lapse and the running of prescription shall not be deemed to have been interrupted, if the creditor:-
>
> a) Does not successfully prosecute his claim under the process in question to final judgment; or

b) Successfully prosecutes his claim under the process in question to final judgment, but abandons the judgment or the judgment is set aside."

It is clear from subsection (2) that the service of process interrupts prescription. That is however subject to subsection (3) which makes the confirmation of such interruption subject to:-

(1) The debtor acknowledging liability in which case the proceedings need not result in a final judgement in the Creditors favour, or

(2) The creditor successfully prosecuting his claim to final judgment, which means the creditor, should win the case.

If the above does not happen as was the case in the application which was dismissed by GUVAVA J, prescription is not interrupted.

In this case the respondents who are the debtors did not in the application proceedings acknowledge that the appellant then applicant's nomination papers had been incorrectly refused. On the contrary, the respondents successfully raised points in limine which led to the dismissal of the appellant's application. Success was therefore not on the appellant's side, yet that is what could have interrupted the running of prescription against him. Therefore since the appellant did not succeed to final judgement in his favour in the application proceedings and the respondents did not concede that he should have been nominated, the interruption of prescription by service of the application lapsed, and the running of prescription is not deemed to have been interrupted. The appellant's claim that the running of prescription against the four day period was interrupted could only have succeeded if he had succeeded in the application proceedings to final judgment. I therefore find that the period during which the appeal should have been lodged lapsed on the 19th February 2008 two days before this appeal was lodged.

Mr *Chinyama* also argued that in view of the provisions of section 165 (4) of the Electoral Act and Order 1 Rule 4A of the High Court Rules, Saturdays and Sundays are not included in the reckoning of time. Mr *Chikumbirike* for the respondents submitted that, that issue had already been decided in the Nyamapfeni case (supra), and stressed that rule 4A refers to time periods within which "anything is required by these rules or an

order of court to be done". Mr *Chinyama* persisted with his argument and asked for time so that he could identify a rule in the High Court rules which specifies time periods for the noting of appeals which is relevant to these proceedings. An adjournment was granted after which he came back conceding that he could not find the rule and was no longer persisting with his argument.

In the Nyamapfeni case (supra) at pages 3 to 4, commenting on the provisions of section 165 (4) of the Electoral Act and Order 1 Rule 4A of the High Court rules, I at page 4 said :-

> "It is true that this court can rely on High Court rules, but the issue to be determined is whether or not the provisions of rule 4A extend to time limits prescribed in an Act of Parliament."

I thereafter commenting on rule 4A said:-

> "The key words in rule 4A are "where anything is required by these rules or in any order of the court to be done within a particular number of days." This means the rule applies to anything required to be done by any rule in the High Court rules or an order of the court. It does not extend to situations not provided for by the rules or court orders. It therefore does not assist in the construction of section 46 (19) (c) of the Electoral Act, which is not a provision of the High Court rules, but a provision of the Electoral Act."

I am therefore satisfied that Mr *Chinyama* has properly conceded that his argument on this point is untenable.

Mr *Chikumbirike* for the respondents sought costs on the legal practitioner and client scale against the appellant, the appearing legal practitioner and the instructing law firm. He submitted that the same issue has been before GUVAVA J as an urgent application instead of an appeal because of the appellant's legal practitioner's failure to correctly apply the provisions of section 46 (19) (a) (b) and (c) of the Electoral Act.

In that application the respondents raised preliminary issues on the inapplicability of the Urgent Application procedure as it is not provided for in section 46 of the Electoral Act. The appellant's legal Practioners persisted with that application until it was dismissed by GUVAVA J with costs on the legal practitioner and client scale. Mr

Chiyama did not dispute that the application was dismissed because it had not been lodged in terms of section 46 (19) of the Electoral Act.

The provisions of section 46 (19)(b) and (c) of the Electoral Act are clear. They provide for an appeal, not an application. If the appellant and his legal Practioners were acting reasonably they would have withdrawn the application and immediately lodged the appeal instead of persisting with the application until it was dismissed with costs on the higher scale on the 21st February 2008. This appeal was lodged on the day the urgent application was dismissed. At the hearing of this case the appellant's counsel exhibited the same unreasonable persistence in the face of clear facts that the appeal was out of time. I am satisfied that the costs sought by Mr *Chikumbirike* should be granted.

It is therefore ordered that:-

The appellant's appeal be and is hereby dismissed with costs on the Legal Practitioner and client scale against the appellant, the appearing Legal Practitioner and the Law Firm jointly and severally the one paying the others to be absolved.

Byron Venturas and Partners, appellant's legal practitioners
Chikumbirike & Associates, 1st and 2nd respondent's legal practitioners