HILLARY SIMBARASHE
vs
ZIMBABWE ELECTORAL COMMISSION
and
MABEL CHINOMONA

ELECTORAL COURT OF ZIMBABWE
KUDYA J
HARARE, 5, 6 AND 9 JUNE 2008

ELECTORAL PETITION

K. Ncube, for the petitioner
G C Chikumbirike, for the 1st respondent
J S Mandizha, for the 2nd respondent

KUDYA J: At the management meeting that was held on 21 May 2008, three preliminary issues were referred to trial. They were framed as follows:

1. Whether the petition is out of time and if so whether this is fatal to the petition,
2. Whether the failure to file security for costs timeously renders the petition void,
3. Whether the 1st respondent was properly joined as a party.

THE FACTS

The brief facts in this matter are as follows. On 29 March 2008, the harmonized presidential, parliamentary and council elections were held in Zimbabwe. Hillary Simbarashe, the petitioner, stood as an independent candidate for the House of Assembly seat in the Mutoko North constituency. The elections were run and conducted by the Zimbabwe Electoral Commission, the 1st respondent. Mabel Chinomona, the 2nd respondent, of the Zimbabwe African National Union (Patriotic Front) ZANU (PF) was one of the candidates who battled it out with the petitioner. On 31 March 2008, she was declared the winner.

The petitioner was unhappy with the pre- election and post- election environment as well as the manner in which the election was conducted. Accordingly, he lodged the present petition with the Registrar on 16 April 2008. The date of service was not disclosed, but the 2nd respondent filed her

opposing papers on 15 May 2008. She, amongst other things, raised the first two preliminary issues referred for trial. The 1st respondent opposed the petition on the basis of misjoinder, hence the third issue.

When I set down the matter for hearing, I directed the parties to furnish me, at the hearing, with information from the Zimbabwe Electoral Commission indicating the date on which the result in the last constituency for election to the House of Assembly was announced by the constituency election officer for that constituency. This was not done. I, however, proceeded to hear the matter on the understanding that I would deliver this judgment after that information had been availed. It was only provided by Mr. *Chikumbirike,* for the 1st respondent, in the morning of 6 June 2008. He produced a document which has three columns. The first column indicates the province in which the House of Assembly seat is found, the second indicates the constituency and the last the date on which the V23 form was signed by the constituency elections officer. The signature is appended on the date on which the constituency elections officer declares the winning candidate. The last V23 form was signed on 4 April 2008 for the Kariba constituency.

The parties were therefore agreed that the declaration of the result in the last constituency was made on 4 April 2008.

THE SUBMISSIONS

Whether the petition is out of time and if so whether this is fatal to the petition

Mr. *Mandizha,* for the 2nd respondent, submitted that the petitioner is non-suited for lodging the petition outside the 14 day period. He computed the period from 31 March 2008, the date on which the 2nd respondent was declared the winner.

Mr. *Ncube,* for the petitioner, on the other hand, contended that the petition was not filed out of time. He contended in his heads of argument that the 2nd respondent had not shown that the result of the election had been notified in terms of the Electoral Act [*Chapter 2:13*] hereinafter referred to as the Act. He based this argument on the provisions of section 67 and 68 of the Act.

In his view, the effect of these provisions is to establish the date on which the winner is officially declared as such in an election of this kind. This argument was made despite the petitioner's averment in his founding affidavit that the 2nd respondent was duly declared the winner on 31 March 2008. Clearly, on the basis of this averment, his line of argument was unsustainable.

The 14 day period for the presentation of a petition is set out in sub-section (2) of section 168 of the Act. It reads:

(2) An election petition shall be presented within fourteen days after the end of the period of the election to which it relates:

Provided that, if the return or election is questioned upon an allegation of an illegal practice, the petition may be presented, if the election petition specifically alleges a payment of money or some other act to have been made or done since that day by the member or an agent of the member or with the privity of the member or his or her chief election agent in pursuance or in furtherance of the illegal practice alleged in the petition, at any time within thirty days after the day of such payment or other act.

[Subsection amended by section 79 of Act 17 of 2007]

The phrase 'period of the election' is defined in section 4, the interpretation section of the Act, as:

"election period" or "period of an election" means—

(*b*) in the case of a general election for the purpose of electing members of Parliament, the period between the calling of the election and the declaration of the result of the poll for the last constituency in terms of section 66(1).

I concentrate on the 14 day period in this judgment because the petitioner has not sought to rely on the proviso which allows the filing of an election petition within 30 days from the date on which an illegal practice as defined in Part XX of the Act occurs. The illegal practice must have occurred after the declaration of the result in the last constituency to which that election relates. In his founding affidavit, in paragraphs 36 and 37, the petitioner pleaded intimidatory practice rather than illegal practice.

The 14 day period commences to run on the day following the declaration of the result of the poll for the last constituency in terms of section 66 (1) and not on the date on which the result is notified as submitted by Mr. *Ncube* who relied on the wording of that section before it was amended by the Electoral Law Amendment Act No. 17 of 2007. While the notification of the results to the chief elections officer and the subsequent notification to the Clerk of Parliament and the gazetting of the winner are important processes, the overriding consideration for our purposes is the declaration made by the constituency elections officer of the winning candidate in the last constituency for a House of Assembly seat.

It is that date which is synonymous with the declaration of the result for the last constituency of the election to which it relates. The election, to which it relates, in my view, would be for the House of Assembly and not for the senate, even though both are elections for members of Parliament. The

parties were agreed that the declaration of the result for the last constituency was made on 4 April 2008, for the Kariba constituency.

The 14 day period for the petitioner would expire on Friday, 18 April 2008. This was a public holiday. The two days that followed were a Saturday and a Sunday. The date which followed these was Monday, 21 April 2008. In terms of section 33 (4) of the Interpretation Act [*Chapter 1:01],* the 14 day period would expire on 21 April 2008. See
Nyamapfeni v The Constituency Registrar Mberengwa East & 4 Others HH 27/2008; *Ellis & Another v Maceys Stores Ltd* 1983 (2) ZLR 17 (SC) and *Kombayi v Berkhout* 1988 (1) ZLR 53 (SC).

The petitioner filed his petition on 16 April 2008. He, therefore, did so timeously.

The effect of the information in the document that was produced by Mr. *Chikumbirike* was to dispose of the first issue in favour of the petitioner and against the 2nd respondent.

2. Whether the failure to file security for costs timeously renders the petition void.

The petitioner did not furnish security for costs within the period of seven days after the presentation of the election petition, as set out in section 168 (3) of the Act. The security is set in an amount fixed by the Registrar in a sum not less than the amount prescribed by the Commission after consulting the Chief Justice. It is benchmarked against the expected outlay of all costs, charges and expenses that may be incurred by both the petitioner and the respondent in the petition.

Subsection (4) of section 168 gives the petitioner the choice between paying the fixed amount set in subsection (3) to the Registrar and entering into recognizance with at most four sureties in the presence of the Registrar or a magistrate. It seems to me that once the petitioner has paid the security for costs he or she is not obliged to execute a recognizance. A recognizance is after all a bond entered into between the petitioner and the sureties which is made for the benefit of the respondent. This is one of the reasons why, in my view, it has to be served with the petition. The other is that it affords the respondent the opportunity to object not only to the names of the proposed subscribers but also to the format and contents of the recognizance.

The 2nd respondent objected in his opposing papers, filed on 15 May 2008, to the failure to furnish security. The petitioner produced at the hearing, from the bar, proof that the security in the amount set by the Registrar was paid on 20 May 2008. Payment was thus made after the 2nd respondent had raised it in his opposing papers.

Mr. *Mandizha* submitted that the failure to provide security rendered the petition void. He contended that as section 168(3) was framed in peremptory language, the petitioner had to strictly comply with its provisions. The late payment that he made fell outside the time limits allowed by the section under consideration. He was therefore non-suited.

Mr. *Ncube,* on the other hand, contended that the petition was deemed to be at issue because the 2nd respondent did not object to the security within the period set out in section 170 (1). He therefore submitted that the petitioner could not be non-suited.

Section 170 (1) deals with the method and grounds of objection. It also sets out the period within which to object. That period would have to depend on the directions given by the Electoral Court as there are no prescribed rules of Court at the moment. It is clear from the wording of the subsection that the creation of the recognizance precedes the objection. I fail to comprehend how the petitioner expected the 2nd respondent to object, at the time of service, to a non-existent bond.

The first contention of Mr. *Ncube* in this regard must fail.

Mr. *Ncube* further contended that as costs could only be paid at the conclusion of the petition, failure to strictly comply with the 7 day period was not fatal to the petition, as long as security was furnished before the hearing. He argued that the late payment was in substantial compliance with section 168 (3).

The aim of providing for security of costs is to guarantee the expenses that the respondent will incur in defending the petition. The petitioner is requested to guarantee payment of these costs in advance to demonstrate his seriousness in challenging the election result. The security also serves to discourage the petitioner from launching a vexatious and reckless petition. See the sentiments of Berman J in *Crest Enterprises v Barnet and Schlosberg* 1986 (4) SA 19(C) at 20D.

In *Movement for Democratic Change & Anor v Mudede NO & Others* 2000 (2) ZLR 152 (SC) at 158C-G, the Supreme Court accepted that peremptory language in statutes did not necessarily require strict compliance but could in the absence of prejudice require substantial compliance. At 154B-C, McNally JA introduced the 4 step approach to statutory interpretation which he used at page159A. He enjoined the judicial officer to consider the relevant legislation; what actually happened; whether the provisions of the relevant legislation were substantially complied with and whether there was any prejudice as a result of non-compliance.

I apply these criteria to the provision under scrutiny.

Consideration of the relevant legislation

The subsection requires the petitioner to give security to the Registrar within 7 days of the presentation of the petition.

What actually happened?

What actually happened was that the petitioner did not provide such security for costs within 7 days after the presentation of the petition. The 7 days expired on 23 April 2008. He served the petition on the 2nd respondent who filed her opposition on 15 May 2008 and indicated that the 7 day period for furnishing security had been breached. Thereafter, the petitioner paid the security to the Registrar on 20 May 2008. He was out of time by 27 days.

Did the petitioner substantially comply with the subsection?

Substantial compliance entails some positive action on the petitioner's part to provide security for costs within the stipulated period. It does not entail the absence of any action on the petitioner's part. The petitioner took no action whatsoever to provide for security in the set period. He did not attempt to follow the precepts of the subsection. He simply did not comply with the provisions of the subsection.

Whether there was any prejudice as a result of the non-compliance

In the absence of a finding of substantial compliance, it is unnecessary to make a finding on the existence of prejudice. It suffices to note that his disdain of the requirements of the subsection undermined the objective of the section to have petitions dealt with seriously and speedily. He gave the impression to the 2nd respondent that he did not wish to pursue his grievance in a lawful manner and led her to incur costs in bringing this preliminary challenge resulting in prejudice to its speedy resolution.

It seems to me that failure to comply with the 7 day period is fatal to the petition. After all, the Electoral Court is not clothed with the powers of condonation for a breach of any of the time frames that are set out in the Act. See *Chitungo v Munyoro* 1990 (1) ZLR 52 (H) at 58H and *Nyamapfeni's* case, *supra,* at page 6.

I, therefore, hold that the failure to furnish security timeously renders the petition void.

3. Whether the 1st respondent was properly joined as a party

Mr. *Chikumbirike* objected to the citation of 1st respondent in the petition. He relied on the definition of respondent found in Part XXIII in section 166 of the Act. The section reads as follows:

166 Interpretation in Part XXIII

In this Part—

"respondent" means the President, a member of Parliament or councillor whose election or qualification for holding the office is complained of in an election petition.

[Definition substituted by section 78 of Act 17 of 2007]

He invoked the maxim *expressio unius est exclusio alterius* in aid of his objection. According to Francis Bennion in his book **Statutory Interpretation**, Butterworths 1988, at p 844 the expression means "to express one thing is to exclude another." In full Bennion, *supra*, states thus:

> "The maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is an aspect of the principle *expressum facit cessare tacitum* known in short as the *expressio unius* principle, it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples or *ex abundanti cautela* or for some other sufficient reason, the rest are taken to be excluded from the proposition.
>
> The *expressio unius* principle is also applied where a formula which itself may or may not include a certain class is accompanied by words of extension naming only some members of that class. The remaining members of that class are then taken to be excluded.
>
> Again, the principle may apply where an item is mentioned in relation to one matter but not in relation to another matter equally eligible."

Mr. *Chikumbirike* submitted that the legislature deliberately defined respondent in the Act so as to exclude the 1st respondent in circumstances where it should automatically have been included by virtue of its overarching role in running and conducting elections. It did not desire that the 1st respondent be made a party in electoral petitions. He advanced six reasons upon which he based his contention that the exclusion was deliberate.

Mr. *Ncube*, on the other hand, submitted that 1st respondent was properly cited because it is an interested party which bears the responsibility to give effect to the order of the Court. He based his submission on the common law principle of joinder and relied on *Tsvangirai v Mugabe and The Electoral Supervisory Commission* HH 109/2005. Mr. *Ncube* referred to *Merchant Shipping Provisions Lowe v Dorling* 1906 (2) KB 772 at 784; *Blackburn v Flavelle* 1881 6 APP CAS 628; *Dettman v Goldfain &Another* 1975 (3) SA 385 and *Terblanche v SA Eagle Insurance Company Ltd*

1983 (2) SA 501(N) and cautioned the Court against the application of the principle in a manner that would result in grave injustice.

In his oral submissions Mr. *Ncube* indicated that the grave miscarriage of justice that would occur would be the failure by 1st respondent to obey any court order arising from the petition if it was not cited and secondly that the petition would be hamstrung and compromised by a failure to call the evidence from any of the officials of the 1st respondent who are implicated in electoral malpractice.

I agree with Mr. *Chikumbirike* that the six reasons he advanced demonstrate the full force of the *expressio unius* principle at play in the present matter. With the full knowledge of 1st respondent's mandate in election matters, the legislature firstly, in s 166 did not include it as a respondent, obviously in a bid to guarantee its neutrality in the conduct of elections. Secondly, the 1st respondent is excluded from the protective ambit of s 168 (3). Thirdly, in s 171 (3) (b) (ii) it mandated the Electoral Court to certify its determination to amongst others, the 1st respondent, which in itself would be an anomalous method of alerting a respondent who is before it of its decision. In fact the other persons who are notified are not respondents but public officials. Fourthly, in s 171 (a) and (b) the 1st respondent may be made to pay costs or a portion thereof for the culpable conduct of its officials, an obvious fate that befalls any loosing or maligned respondent. Fifthly, in section 158 as read with section 171 (4) (b) any person alleged to have committed an electoral malpractice may be called to vindicate his or her name before such a finding is made against him or her. These legislative provisions were put in place to emphasize the fact that the 1st respondent could not be a party to proceedings that relate to petitions in terms of Part XXIII of the Act.

In any event, "means" is the operative word in section 166 of the Act. It carries a different import from such words as "includes". It is peremptory in nature. Again, one resorts to the formulation in the *Movement for Democratic Change v Mudede*, case. The parties who can be cited as respondents are indicated. The legislature was aware that the 1st respondent was in charge of elections. The aim and object of defining respondent in this limited fashion appears from the very nature of an election petition. It is a challenge against the actions of the winning candidate before, during and after an election. In other words, at the center of an election petition is the winning candidate. It is designed to impugn or vindicate the winner's acts of commission and omission against the benchmarks set out in section 3 of the Act. Section 167 of the Act outlines the causes of action in an election petition. These are the absence of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever. The first two grounds arise directly from the candidate. Electoral malpractice and

irregularity may arise from the actions or omissions of the candidate, his chief election agent, his election agent or of any other person.

Part XXI, in sections 155, 156 and 157, of the Act deals with how an Electoral Court may determine petitions. It makes the winner liable for his or her own actions; for the actions of his or her chief election agent; for the actions of his or her agent; or for the actions of any person done with his or her knowledge and consent or approval or the approval and consent of his agents. Once an electoral malpractice is found to have been committed with the knowledge and consent or approval of the winner or of his agents and that malpractice materially affected the election it renders that election void and triggers the holding of a new election. The effect is that the 1st respondent is obliged to hold a new election. This is by operation of law. The 1st respondent does not necessarily require a citation in an election petition to carry out this statutory mandate.

In addition, section 158 gives the Electoral Court the power to call a person who is implicated in electoral malpractice to testify in a bid to vindicate his or her name. Officials of 1st respondent and those seconded from the Public Service are not exempt from such a summons.

What emerges from this Part of the Act is that an election is set aside for the electoral malpractice committed by the candidate whether personally or through his agents or by any other person with his knowledge and consent or approval. The 1st respondent is not a candidate in such an election. All it has to do is to await the order of the court declaring an election valid or void. There is no reason for it to be joined in as a party. No prejudice will arise to either candidate or to the 1st respondent if it is not cited. There is therefore no logical reason for citing it.

My finding is in consonance with that of Mfalila J in the *Pio* v *Smith* 1986 (3) SA 145 at 166E-H, which I quote in full for its clarity. He stated that:

> "Issue 2:
>
> Whether the petitioner must be non-suited for failing to join the presiding officer, the returning officer and the Registrar-General as parties in these proceedings.
>
> I will not dwell at length on this issue because I agree with counsel for the petitioner that the point raised therein has no merit. The petitioner cannot be non-suited for failing to do that which is not provided for or required by the statute. The question of the State officials or the State being condemned unheard does not arise, because, first, if one of the allegations is irregularities committed by State officials, these can always be called as witnesses; secondly, when it comes to the question of costs, the statute provides machinery for the State to be heard.

> There was therefore no duty on the petitioner to join any of the election officials; indeed had he done so and cited them a successful application to have them struck out could have been made, for even under s 164 of the Act, the Chief Justice has made no rules which could have provided for this.
>
> For theses reasons I answer the second issue in the negative and say that the petitioner cannot be non-suited for failing to join the presiding officer, the returning officer and the Registrar-General as parties in these proceedings."

While the nature of the application was different to the present one on the facts, Mfalila J underscored the point that an institution in the shoes of the 1st respondent could not be cited in an election petition.

I was referred to *Tsvangirai v Mugabe and The Electoral Supervisory Commission, supra,* as authority for the proposition that the first respondent was properly cited. Hlatshwayo J at p 6 based his decision for approving the citation of the predecessor to the 1st respondent in that case on the common law rule of the presence of a direct and substantial interest and rules 85, 86 and 87 of the High Court rules. The only difficult I have with reference to the common law is that an election petition is unknown to common law, per Malaba JA in *Hove v Gumbo* SC 143/2004 at page 19. Further, it does not appear to me that the rules of the High Court would supercede the definition of respondent set out in section 166 of the Act. In any event as was submitted by Mr. *Chikumbirike*, as his sixth reason, the *Tsvangirai* case is distinguishable from the present matter in that it concerned a presidential election petition while the present involves a parliamentary election petition. The Electoral Act [*Chapter 1:01*], under consideration in that case, did not in section 102 define respondent for presidential petitions. Under that old Act, petitions were referred to the High Court and not, as at present, to the Electoral Court, a special court created under the Electoral Act No. 25/2004.

Citing 1st respondent or more correctly its Chairman is not permitted by the Act in election petitions. I fail to see how citing the 1st respondent can be said to be in substantial compliance with the Act when the Act excludes it. The citation of the 1st respondent in name is contrary to the provisions of section 18 of the Zimbabwe Electoral Commission Act which incorporates the *modus operandi* set out in section 3 of the State Liabilities Act [*Chapter 8:14]* for citing government ministries and departments. It directs that the Chairman of the 1st respondent be cited. The aim of the section is to bring the suit to the attention of the 1st respondent through its head so that it can respond appropriately. It is in reality the direct opposite of what transpired in *Savanhu v Post Master General* 1992 (2) ZLR

455 and *Sibanda v Post Master General* HH 263/1990 where the two employees cited the Post Master General contrary to the stipulations of the Post and Telecommunications Act which established the Post and Telecommunications Corporation as the corporate body that was capable of suing and being sued. Lacking common law powers, I fail to see how the error can be corrected other than by withdrawing the matter and commencing proceedings afresh.

Thus even if the 1st respondent were properly joined in the petition, I would still dismiss it on the basis that the wrong party was cited.

I, however, hold that the Zimbabwe Electoral Commission was improperly joined as a party in this petition.

DISPOSITION

The petition is dismissed with costs for failure by the petitioner to furnish security for costs within the time frame stipulated in subsection (3) of the section 168 of the Electoral Act [*Chapter 2:13*].

It is declared that the Zimbabwe Electoral Commission was wrongly cited and is hereby removed as a party to this petition. The petitioner shall bear its costs.

Gill, Godlonton & Gerrans, petitioner's legal practitioners
Messrs Chikumbirike & Associates, 1st respondent's legal practitioners
Messrs Mandizha & Company, 2nd respondent's legal practitioners