PATRICK CHABVAMUPERU
and
SILAS GWESHE
and
MARTIN KAZINGIZI
and
ABEL SAMKANDE
and
INNOCENT MUDZENGERERE
versus
EDMOND JACOB
and
OLIVIA MUCHENA
and
MARBEL CHINOMONA
and
ORDO NYAMUDANGA
and
ORBERT MABVUTA

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 5 and 10 June 2008.

ELECTION PETITION

Mr L Uriri for petitioners
Mr J Mandizha for respondents.

MAKARAU JP: The hearing of argument on the preliminary points arising from this election petition was consolidated with hearings in seven other cases as the issues raised in all eight petitions were similar to a large extent and may very well call for the application of the same legal principle. In three of the petitions however, the Zimbabwe Electoral Commission was cited as a respondent, prompting the Commission to raise an objection, alleging mis-joinder. I could have issued one judgment in all eight matters but have deemed it administratively convenient to issue individual judgments in each of the election petitions.

BACKGROUND.

The five petitioners in the above petition were candidates in the harmonized elections that were held on 29 March 2008. The first petitioner stood as a candidate for the senatorial seat in Mutoko. The second petitioner stood as a candidate in the Mutoko South House of Assembly Constituency. The third petitioner stood in the Mutoko East House of Assembly Constituency while the fourth stood in the Mutoko North House of Assembly seat. The fifth petitioner stood as a candidate in Ward 10 for election to the Mutoko local authority. They all belong to one political party. Dissatisfied with the outcome of the poll, the five presented a composite petition to this court, seeking to nullify the results on several grounds, the details of which appear in their respective affidavits filed with the petition.

The petition was duly presented to court on 14 April 2008. It was purportedly served on 12 May 2008 by handing a copy thereof to one Dzora, a personal assistant to the ZANU-PF Secretary for Administration at the party's headquarters in Harare. The petition was served together with a notice setting the matter down before a Judge for a pre-trial conference and a letter offering security of costs.

The respondents filed a notice of opposition and opposing affidavits to the petition. In their respective opposing affidavits, they all took the points in *limine* that the petition had been served out of time and not at a place provided for in the statute. On the basis of this preliminary objection, they alleged that the petitioners were non- suited for failing to comply with the provisions of the Act in relation to the time within which to effect service and the place of service of the petition. Directions were subsequently given to the parties at the pre-trial conference as to the filing of heads of argument, culminating in the hearing of the points in *limine* as described above.

In the heads of argument filed on their behalf, the respondents contended that in view of the non-compliance with the provisions of the electoral law in respect of the time and place of service of the petition, the petitioners were non-suited and the petition should accordingly be dismissed. In opposition, the petitioners argued that service outside the time limit and at the headquarters of respondent's party was proper and in substantial compliance with the provision of the law. In particular, it was argued that the petitioners delayed in serving the petition as they were waiting for the amount of security to be fixed by the Registrar since the law requires them to serve the petition together with a list of their proposed sureties.

THE ISSUES.

Argument in the matter and in the other petitions proceeded on the basis that regarding the issue of service of the petitions, there were two separate issues as follows:

1. whether service of the election petitions outside the ten day period stipulated in section 169 is such non- compliance with the provision as to render the petitions invalid; and
2. whether service of the petition at the headquarters of the respondent's political party is such non-compliance with the provision as to render the petition invalid.

In my view, the two issues, while made up of two distinct components, are essentially the two sides of the same issue. Service of petitions is provided for in one section of the Act and this requires that it be done within a certain specified period and at certain specified places. It further appears to me that one cannot assess whether there was substantial compliance with the provisions of the statute by taking piece meal what the petitioners did and establishing whether each separate act was in substantial compliance with the law. A holistic approach is in my view what is called for.

However in view of the fact that argument was presented to me on the two issues as if they are separate, I shall deal with each in turn.

Whether service of the election petitions outside the ten day period stipulated in the Act is fatal to the validity of the petition.

It is pertinent in my view that at this stage I set out in full the relevant provision of the Electoral Act [Chapter 2.13], that governs the service of election petitions and the interpretation of which gave rise to the points in *limine* raised by the respondents.

Section 169 of the Act provides:

"Notice in writing of the presentation of a petition and of 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 personally or by leaving the same at his or her usual or last known dwelling or place of business."

It is common cause that the petition before me was not served within the ten days stipulated in section 169. It ought to have been served on or before 24 April 2008, having been presented to court on 14 April 2008. The petition was only served on 12 May 2008, twenty-

eight days after presentation. The crisp and immediate issue that presents itself is whether service of the petition twenty eight days after presentation is fatal to its validity.

Before I proceed to deal with the merits of the matter, there is one issue I feel constrained to comment on.

The respondents in this petition were initially represented by *Mr Hussein* who filed detailed and most useful heads of argument supporting the contention that the petition was invalid as its service was not in compliance with the law. At the hearing of the matter, *Mr Mandizha* purported to appear for the respondents. I use the word "purported" very deliberately as *Mr Mandizha* effectively abandoned the position adopted by the respondents in their opposing affidavits and advanced on their behalf in the heads filed by *Mr Hussein*. Instead, he argued the case for the petitioners that the petition was properly before the court.

The issue that exercised my mind in this matter is whether in the circumstances I still had a dispute between the parties to determine in view of the concessions made by *Mr Mandizha*.

I proceeded to determine the matter as I am of the firm view that the issue that falls for determination goes to the validity of the petition before the court and thus, to the jurisdiction of this court. The issue I formulated for myself is whether the electoral court has power to determine an election petition that has not been served in compliance with the electoral law. I am fortified in this approach by the fact that *Mr Mandizha* did not formally withdraw the objection by the respondents but simply gave me his opinion on the interpretation of section 169. Thus, the issue remained alive before me for me to consider whether the concession made by *Mr Mandizha* was properly made. Further as indicted above, the hearing of this argument was part of the hearing of seven other arguments and thus, the respondents were not prejudiced by the about turn in stance displayed by *Mr Mandizha* on the day of the hearing. I have been able to rely on the submissions that were made by other counsel for similarly placed respondents.

I now turn back to the merits of the mater.

As indicated above, there was no argument advanced on behalf of the respondents in this matter as *Mr Mandizha* for the respondents argued that the provisions of section 169 could be interpreted in such a way that it becomes directory rather than peremptory. In this regard, he submitted that he was guided by the decision in *MDC and Another v Mudede and Others*

2000 (2) ZLR 152 (SC) where the approach of assessing whether there had been substantial compliance with the statutory provision was discussed and applied. He further argued that in ascertaining the intention of the legislature in enacting section 169, reference had to be made to section 168 (3), that deals with the issue of security. The mainstay of his argument was that the petitioners could not serve their petition upon the respondents before the amount of security had been fixed by the Registrar of this court. He concluded by urging the court to use Rule 4C of the High Court Rules 1971 to condone any departure from the strict compliance with the provisions of the law.

Before I comment on the submissions made by *Mr Mandizha*, I deem is desirable that I also summarise the argument by *Mr Uriri* for the petitioners seeing that the two were on the same side of the argument.

Firstly, *Mr Uriri* refered me to the decision in *Pio v Smtih* 1986 (3) SA 145 (ZH) where the learned judge, sitting as the High Court, had to interpret a similarly worded section in the then Electoral Act. In that case, the court held that the petitioner who served his election petition two days out of time was non-suited as the part of the provision dealing with the limitation of time within which service had to be effected was peremptory and had to be complied with either exactly or so substantially that the act done could stand on its own and constitute service within ten days.

Mr Uriri was of the view that *Pio v Smith* was wrongly decided as the learned judge in that matter was relying on the old and disfavoured jurisprudence of classifying statutory provisions as either peremptory or directory.

Secondly, *Mr Uriri* argued that the degree of non- compliance in the petition before me was such that it would not defeat the object of the provision to expeditiously determine the election petition.

Finally *Mr Uriri* argued that I enjoy wide discretionary powers to grant dispensations and extend the time within which the petition could have been served.

From the submissions by both counsel in this matter, I discern three distinct propositions. The first one is that in determining whether or not the non- compliance by the petitioners to serve the election petition in terms of the provision renders the election petition a nullity, I must be guided by the substantial compliance approach. That this is the current thinking in this jurisdiction in matters as the one before me is settled. The approach has been

adopted and applied in a number of decisions of the Supreme Court and of this court. (See *Quinell v Minister of Lands, Agriculture and Rural Resettlement* SC 47/04; *MDC and Another v Mudede and Others* (supra). *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293 (S); *Kutama v Town Clerk Kwekwe* 1993 (2) ZLR 137 (S); *Chitungo v Munyoro and Another* 1990 1 (ZLR) 52 (HC) and *Pio v Smtih* (supra)).

I therefore agree fully with this submission from counsel.

It may be pertient 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 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 page 165F;

"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 10 days, the time prescribed by the section, when the petitioner personally telephoned him and 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 in 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 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 to his wife achieve these objectives? I think not."

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

It is correct that the learned judge found that the language used in the section under construction was peremptory. He however did not stop there. He proceeded to establish whether what had been done by the petitioner before him could be regarded as substantially in compliance with the requirements of the section. The approach that he took was subsequently taken by the Supreme Court in *Sterling Products International Ltd v Zulu* (supra) where at page 301 B GUBBAY JA (as he then was) had this to say:

"The categorization of an enactment as "peremptory" or "directory", with the consequent strict approach that if it be former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or

fulfillment will suffice, no longer finds favour. As was pertinently observed by VAN DEN HEEVER J (as he then was) in *Lion Match Company Ltd v Wessels* 1946 OPD 376 at 380, the criterion is not the quality of the command but the intention of legislator, which can only be derived from the words of the enactment, its general plan and objects. The same sentiment was expressed by MILNE J in *JEM Motors Ltd v Boutle and Anor* 1961 (2) SA 320 (N) at 327 *in fine* -328 B. This approach received imprimatur of the South African Appellate Division in *Maharaj & Ors v Rampersad* 1964 (4) SA 638 (A) where, after concluding that the provison with which he was concerned was imperative, VAN WINSEN AJA went on to inquire whether the failure in strict compliance therewith was fatal"

The second distinct proposition that I discern from counsels' submissions is the argument advanced mainly by Mr Mandizha in this petition and by *Mr. Gijima* in respect of other petitions in the consolidated hearing, which submissions I incorporate herein. It is that in the circumstances of this matter, there was such substantial compliance with the provisions of the Act such that the validity of the petition is thus saved.

Mr Gijima was quite clear and correctly so in my view, that the language used in section 169 is peremptory and that my task is to establish whether what had been done by the petitioners could constitute substantial compliance with the peremptory provisions of the section. He further submitted and again correctly in my view, that the approach necessitates that I first establish what had to be done in terms of section 169 and secondly, the object of the section. In the third step, I have to establish what was actually done and finally, assess whether what was actually done can stand alone and be objectively viewed as amounting to substantial compliance with the requirements of the section. In the event that I find substantial compliance, I then have to consider whether there was any prejudice as a result of the non-compliance.

The above is the step by step approach that was taken by Mc Nally JA (as he then was) in *MDC and another v Mudede and Others* (supra).

It was further submitted on behalf of the petitioners that if I follow the above four steps, I would find that what the petitioners did was in substantial compliance with the object of the provision.

With respect, I find myself unable to agree with this submission

If I take the above four steps I find myself stumbling and falling on the fourth step as I shall demonstrate.

I now take the first step.

Section 169 is quite clear as it employs clear language that admits of no ambiguity. It requires all petitioners to serve written notice of the presentation of the petition and a list of proposed sureties upon the respondent, personally, or by leaving it at his residence or place of business, within 10 days of the presentation of the petition. This is what all petitioners ought to have done or were required to do by the law.

The second inquiry I must now embark on is to establish the intention of the legislature in enacting this provision.

It is pertinent in my view to note that the provision is not new and has been part of our electoral law since at least 1985. It was part of the law that governed the second elections in this country post independence. It also pertinent in my view, to note that the provision is not peculiar to our electoral law. With slight modifications, it is part of the electoral law of most countries that were once colonized by the British.

In *Pio v Smith* supra, it was held that 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.

In *Nair v Teik*, [1967]2 All ER 34 (PC) it was stressed that it is in the public interest that election petitions be speedily resolved.

In my view, it is beyond dispute that section 169 was enacted with the object of containing the time frame within which election petitions presented to court may be determined. It is my further view that it is beyond dispute that election petitions require urgent resolution as they have the effect of disrupting the composition and the working of two of the three pillars of State, the Executive and the Legislature. That this is the intention of the legislature is not only to be read from the section under construction but from the entire part of the Act dealing with election petitions as it goes to provide the period within which petitions have to be determined both at the first instance and on appeal.

The third part of the inquiry requires me to establish what was actually done. This is the easiest part. It is common cause that written notice of the petition was only served at the headquarters' of the respondents' political parties on the 28th day after presentation of the petition to court. Together with a copy of the petition was served a letter giving the

respondents security for costs. A copy of the letter was not attached to the papers and I therefore cannot comment on its nature and contents.

It has been argued that service could not be effected within the ten days required by the Act as the amount of security had not been fixed. In the view of counsel, there was substantial compliance by the petitioners in serving the applications late as the issue of security had not been settled in strict compliance with the provisions of the Act and thus petitioners could not serve the petitions without first securing the requisite security in the form of proposed sureties. Since the amount of security was not known, the argument proceeds, they could not procure sureties as all the proposed sureties could not stand as such until they knew the amount for which they stood good.

It appears to me that the petitioners have erroneously interpreted section 169 to intrinsically link the furnishing of security with the presentation of the petition such that one cannot exist without the other. It is clear that the presentation of the petition, a thing in the exclusive domain of the petitioner has no direct link to the furnishing of security for the costs of the respondent, the fixing of which is under the control of persons other than the petitioner, save that the law requires the two to be served together. The fact that the two are to be served at the same time does not make them so intrinsically linked one to the other that service of one could not be effected in the absence of the other. In my view, the situation is analogous to the example of a situation where driver is ordered by his employer to within the hour, proceed to the airport and pick up the employer's wife. He is further ordered to purchase a bouquet of flowers to give to the employers' wife to reassure her of her husband's affection. The driver fails to find flowers at the correct price in good time. After securing the flowers, he delays for an unexplained reason while he is on his own business and instead of driving to the airport, he decides to wait for his employer's wife at the city offices of the airline, arguing that she will catch a bus from the airport or the airline will ferry her into town in due course since it is in the transport business. Facing imminent dismissal by the employer, he strenuously argues that he could not go to the airport in time as he could not find flowers at the right price and in any event, the mistress would eventually arrive home anyway as he (the driver) had substantially carried out the order given him by the employer. He is dismissed.

As the purchase of the flowers by the driver in the analogy could have clearly waited, in my view, the written notice of the petition and a copy of the petition could have and should have been served independent of the list of sureties pending the fixing of security.

In any event, even after the Registrar had fixed the amount of security on or about 23 April 2008, the petitioners still hung back and did not serve the petitions as required by law. The delay of nineteen days after security had been fixed in my view belies the genuineness of the petitioner's excuse that they could not serve the petition before the amount of security had been fixed. The further delay remains unexplained like the delay of the driver in the analogy after purchasing the flowers.

In my view, the petitioners simply did not make any reference to the Act in serving the petition and when the point in *limine* was raised, the absence of security was latched onto as a convenient excuse to explain the fatal delays.

I am therefore unable to find that the service of the election petition twenty eight days after presentation is such an act that can be construed as substantial compliance with the law. The provisions of section 169 of the Act are peremptory and require exact compliance or substantial compliance. In view of the failure by the petitioners to comply exactly or substantially with the provision, their petition is a nullity and the proceedings before the court are rendered a nullity.

As I have failed to pass the fourth step, I deem it unnecessary that I consider whether there was prejudice or not as a result of the non-compliance.

Although I have effectively found that the petition is a nullity, I will proceed to deal with the rest of the submissions made by counsel.

The third distinct submission that I discern from counsels' submissions is that I have inherent jurisdiction to condone departures from the provisions of the Act. *Mr Mandizha* has submitted that I employ Rule 4C of the High Court Rules to condone the late service of the petition. *Mr Uriri* has made reference to my inherent powers.

It is in my view trite that this court, being a creature of statute can only exercise those powers that are expressly granted to it by the enabling statute. Section 169 does not grant this court power on good cause, to extend the time within which petitions can be served. Rule 4 C of the High Court Rules is of no application as I am not dealing with a time limit that has been set in terms of the rules of court. This is a time limit set by parliament and the doctrine of

separation of state powers commands that I refrain from amending a statute from the bench as that is not my function. (See *Chitungo v Munyoro and Another* (supra)).

Whether late service of the petition at the headquarters of the respondent's political party is such non-compliance with the provision as to render the petition invalid.

As stated above, the electoral law prescribes the proper manner of serving election petitions. Service has to be personal or at the residence or place of business of the respondent. That is what the law requires.

In the petition before me, service was effected at the party headquarters' of the respondents. It was argued for the petitioners that this was substantial compliance with the provisions of the Act as the party headquarters' can be regarded as the respondent's place of "political" business.

Firstly, I regard this issue as an integral part of the first issue. Thus, I am not determining the effect of serving the petition at the party headquarters in isolation of the first issue. In my view, the correct position is to determine the effect of serving the petition at the party headquarters out of time.

I have already above expressed my views on the effect of failing to serve the petition on time. The same principles that I applied in arriving at the conclusion that the petition before me is a nullity for failing to comply with the provisions of the Act apply in respect of this issue with equal force. Service out of time is fatal to the validity of the petition. Service out of time at a place not designated by the statute can hardly save the invalid petition. In my view, late service of the petition at the party headquarters of the respondents, far from being in substantial compliance with the statute, actually compounds the non-compliance.

In any event, the inquiry becomes idle if one has regard to the fact that the Act has prescribed what constitutes proper service of a petition. "Political business" place is not one of the places where proper service of an election petition may be effected. Substituted service, again an aspect that is regulated by the inherent powers of the High Court is not applicable in election petitions.

On the basis of the above, I would hold that there was no substantial compliance with the provisions of the act and that such non- compliance renders the petitioners non-suited

before this court. In this regard, I find the concession made by *Mr Mandizha* on behalf of the respondents to have been ill advised.

In the result, I make the following order:

1. the petition is dismissed
2. The petitioners are to pay the respondents' costs.

Mbidzo Muchadehama & Makoni, petitioners's legal practitioners.
Hussein Ranchod & Company, respondents' legal practitioners.