TSITSI VERONICA MUZENDA
vs
PATRICK KOMBAYI
and
ZIMBABWE ELECTORAL COMMISSION

ELECTORAL COURT OF ZIMBABWE
KUDYA J
HARARE, 6 and 10 June 2008

ELECTORAL PETITION
IEG Musimbe, for the petitioner
D Kufaruwenga, for the 1st respondent
GCC Chikumbirike, for the 2nd respondent

KUDYA J: At the management meeting held on 21 May 2005, four preliminary issues were referred to trial. These were whether or not the petition was served on time; whether there was proper service on the second respondent; whether security for costs was provided and whether or not the 2nd respondent was properly joined to the petition. At the hearing, on noticing that the petition had been lodged with the Registrar of this Court on 15 April 2008, I raised the further issue of whether it was presented within the time limits set out in section 168 (2) of the Electoral Act [*Chapter 2:13*], hereinafter called the Act.

The brief facts were these. Tsitsi Veronica Muzenda, the petitioner, of the Zimbabwe African National Union (Patriotic Front) ZANU (PF) party, stood as a senatorial candidate for the Gweru-Chirumanzu senatorial constituency during the harmonized elections held in Zimbabwe on 29 March 2008. She competed for office with Patrick Kombayi, the 1st respondent, of the Movement for Democratic Change-Tsvangirai party MDC-T. The election was run and conducted by the Zimbabwe Electoral Commission, the 2nd respondent. The petitioner became aware that the 1st respondent had won the seat on 5 April 2008 and filed the petition on 15 April 2008.

It was served on 6 May 2008 by the Deputy Sheriff at Harvest House, the headquarters of the 1st respondent's political party. The return of service indicates that a court application was served on one Muzuva, a security officer who accepted service on behalf of the 1st respondent. Another copy was served on 2nd respondent at its place of

business on the same day. The petition did not show that security for costs had been furnished. The 1st respondent was not served with any recognizance. Mr. *Musimbe*, for the petitioner was to advise the Court from the bar in argument that the security for costs was paid in the sum set by the Registrar and out of an abundance of caution recognizance entered at the same time on 23 April 2008. The 1st respondent received the petition on 19 May 2008.

The petitioner provided minimal facts of the events that triggered the application. She did not provide the date on which the 1st respondent was declared the winner by the constituency election officer in terms of section 66 (1) of the Act. She referred to a recount of votes but did not provide any details on the date it was held and its outcome. Some of the facts that appear in her heads of argument were not pleaded in her founding affidavit.

The duty to present an election petition is cast on the losing candidate by section 167 of Act. Its format and period of presentation are set out in section 168 of the Act. It has to be presented within 14 days after the date on which the declaration of the result in the last constituency for senatorial elections is made. The duty is placed by the Act on the petitioner to establish this fact. It is this fact alone which triggers this legal right for her. Failure by her to establish it would be fatal to her case for the reason that she would have failed to bring her self into the protective ambit of the Act.

The facts alleged in the affidavit deal with corrupt practices which occurred before and during the election but not after the elections. It is only illegal practice as defined that occurred after the announcement by the constituency elections officer in the last constituency that triggers the 30 day notice period from the date of the alleged illegal practice that is provided in the proviso to section 168 (2) of the Act. The petitioner could only bring her petition within the 14 day period.

I, however, requested that the information that is required to initiate the petition be provided by the 2nd respondent. At the hearing Mr. *Chikumbirike,* for the 2nd respondent, produced a document from 2nd respondent which showed that the declaration of the last result in a House of Assembly constituency had been made on 4 April 2008 for the Kariba constituency. Mr. *Kufaruwenga,* for the 1st respondent, correctly in my view,

abandoned argument on whether or not the petition had been filed on time. I accept his reasoning that if the result for the House of Assembly seat was announced in Kariba on 4 April 2008, it was unlikely that the result for the senatorial constituency which incorporated the Kariba constituency would have been declared earlier given its size. The effect of 4 April was that in terms of section 33 (4) of the Interpretation Act[*Chapter 1:01*] the petitioner had at least until 21 April 2008 to present her petition as the 14 day period would have ended on 18 April, a public holiday, which was followed by a Saturday and Sunday. See *Nyamapfeni v The Constituency Registrar for Mberengwa East & Others* HH 27/2008 and the cases cited therein.

In casu, the petition having been filed on 15 April 2008 was presented on time. The issue that I raised, therefore, falls away.

I proceed to deal with the issues that were referred to trial *in seriatim*.

Whether the petition was served on time and whether proper service was done

These two issues can be conveniently dealt with at the same time. They both arise from the provisions of section 169 of the Act. In essence, they seek to answer the question whether service, firstly, outside the 10 day period; and secondly, on the political party headquarters of the 1st respondent was in compliance with section 169 of the Act. The section reads:

169 Notice of election petition to be served on respondent

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 either personally or by leaving the same at his or her usual or last known dwelling or place of business.

The petitioner is mandated by the section to serve the petition on the respondent within 10 days. These are 10 ordinary days. The petition was filed on 15 April 2008. The 10 day period expired at the close of business on 25 April 2008. Service took place on 6 May 2006. It was therefore done outside the timeframe set out in s169. *Pio v Smith* 1986(3) SA 145 (ZH) is authority for the proposition that strict compliance as opposed to substantial compliance is called for in a provision, such as this, which is designed to serve the public interest of speedily determining the controversy between the petitioner and the winner.

The Supreme Court of Zimbabwe, in *Movement for Democratic Change & Anor v Mudede NO & Others* 2000 (2) ZLR 152 (S), laid out the approach to be followed in interpreting statutory provisions which are couched in peremptory language such as the present one. McNally JA first surveyed the shift from the idea that a peremptory worded provision envisaged strict compliance while a directory one required substantial compliance before adopting the position enunciated by Gubbay J, as he then was, in *Ndlovu Ex p* 1981 ZLR 216 (G) at 217F that: "the test of whether a defect such as this (giving inadequate notice in an application for rehabilitation of an insolvent) is formal or substantive is not whether the statutory provision is directory or peremptory, but whether it aims at some definite object and whether having regard to the particular facts, non-compliance therewith will result in the defeat of that object." In the process he set out a useful four step approach which enjoins a judicial officer to consider:

1. the relevant legislation
2. what actually happened
3. whether the provisions of the relevant legislation were substantially complied with
4. whether there was any prejudice as a result of non-compliance.

I find that the application of this approach is substantially similar to the one in Pio's case and that it produces the same result.

I have already set out the relevant legislation. Notice in writing of the presentation was given. A copy of the petition was served with the notice. The names and addresses of the proposed sureties were not given and were not served with the notice and the petition, even though these had been furnished to the Registrar on 23 April. The service was done 11 days after the due date. Service was, however, done at the political headquarters of the 1st respondent. It was not personal service. The party headquarters was not his usual or last known place of dwelling.

It was common cause that the 1st respondent resides in Gweru. He operates commercial businesses in Gweru. His usual place of residence, that is, where he normally lives on a day to day basis is in Gweru. He does not live at his political party

headquarters. He is not employed by his political party. He does not work at or from his political party headquarters on a day to day basis.

The 1st respondent's objections were to the period within which service was done and to the place where it was done. I fail to perceive how the petitioner could substantially comply with the 10 day period when she accepts that she acted outside that period. She was required to abide by that period. She did not do so. Mr. *Musimbe* contented that the petitioner failed to meet the 10 day deadline because of the legal vacuum created by the inability of the Registrar to set the amount of security within the 7 day period specified in section 168(3). I found this explanation incomprehensible given that the security had been provided to the Registrar 2 days before the expiration of the 10 day period. The petitioner was therefore not affected by any perceived vacuum in the legislation. It is, in any event, difficult to apply the concept of substantial compliance to the realm of fixed time frames. Fixed time frames would appear to require strict compliance. In *casu*, the petitioner did not comply with the 10 day period. The question of substantial compliance and that of prejudice, therefore, falls away. If prejudice were required, as so ably noted by Mfalila J in the *Pio* case it arises to the public interest which requires firstly, that the law be obeyed and secondly, that electoral petitions be speedily determined.

On the question of service at the party headquarters, the issue is not whether service was done, but whether it was proper service. The petitioner and the 1st respondent competed for the Gweru-Chirumanzu senatorial seat in that constituency. The 1st respondent is domiciled and has commercial interests in that constituency. He does not operate from his party's political headquarters in Harare. The petitioner simply did not adhere to the provisions of the section. Again, the question of substantial compliance does not rise. Even if it did, the petitioner's acts were prejudicial to the 1st respondent. He saw the petition on the 9th court business day. Even if it was competent for the petitioner to give him 14 days within which to oppose, he did not have adequate time to prepare for his defence, a fact underscored by his inability to file any opposing papers by the time of the management meeting.

In the light of decisions such as *Nyamapfeni's* case, *supra* and *Chitungo V Munyoro & Anor* 1990 (1) ZLR 52(H) it is axiomatic that an Electoral Court has no powers of

condonation. Its powers are found only in the four corners of its constitutive statute. *Hove v Gumbo* SC 143/2004 underscores the fact that it has no inherent powers.

I determine the first two issues in favour of the 1st respondent. I hold that the service of the 6 May 2008 was a nullity for two reasons. Firstly it was served in contravention of the 10 day period and secondly, at the wrong place, in violation of the provisions of section 169 of the Act.

I would accordingly dismiss the petition with costs.

Whether security for costs was provided

The third issue concerns the failure to furnish security for costs. The petitioner apparently paid the amount fixed by the Registrar and out of an abundance of caution entered into the required recognizance on 23 April 2008. He should have done so by 22 April, but could not because no sum had been set by the Registrar. He did provide security as soon as the Registrar set a figure. Where a public functionary is to blame for failure to comply, even though the Supreme Court left the question open in *Pio v Smith* 1986 (2) ZLR 12(SC) at 132C-F, it has been held that a case for substantial compliance is made. See *Pio's* case at 163 J. I would find the provision of security on the 23 April in substantial compliance with the provisions of the Act in line with the example set out by Mfalila J in *Pio's* case at page 165I-J. I conceive of no prejudice to the 1st respondent who could on service of the petition object to the amount set. My view is that once the petitioner pays the amount fixed, it is not necessary for him to provide the respondent with the list and names of sureties. He only does so where he enters into a recognizance.

I would have found for the petitioner on the question of security for costs.

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 XX III 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." Mr. *Chikumbirike* submitted that the legislature deliberately defined respondent in the Act so as to exclude the 1st respondent in circumstances where it would automatically have been included by virtue of its overarching role in running and conducting elections. He advanced six reasons upon which he based his submission that the exclusion was deliberate.

Mr. *Musimbe,* for the petitioner, on the other hand submitted that 2nd respondent was properly cited because it is an interested party which is charged with the responsibility of giving effect to the order of 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. He contended that the 2nd respondent would have no obligation to give effect to the determination the Court arising from proceedings in which it did not participate. He further argued that grave injustice would visit the petitioner if the 2nd respondent's officials who are implicated in electoral malpractice are not called to testify. He seemed to believe that they could only testify if the 2nd respondent was cited as a respondent.

I am persuaded by the six reasons that were advanced by Mr. *Chikumbirike.* They clearly demonstrate that the legislature deliberately excluded the citation of the Zimbabwe Electoral Commission as a respondent in electoral petitions brought under Part XXXIII of the Act. 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.

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. I find that the force of reasoning in the *Movement for Democratic Change v Mudede*, case, *supra*, is such that in defining respondent in s 166 of the Act, the legislature intended to demonstrate beyond doubt the centrality of the winning candidate in election petitions. The challenge is to him or her. His conduct is impugned in terms of section 167 and measured against the principles set out in section 3 of the Act. Sections 155 to 157 make the winner liable for the acts of commission or omission that he or his agents or any other person commits with his or their knowledge and consent or approval. A finding that the election was tainted to such an extent as would materially affect its outcome triggers, by operation of law, the holding of a new election. The 2nd respondent does not have the authority, luxury or inclination to decline to hold such an election in those circumstances.

I therefore discern of no conceivable reason in either law or logic why the 2nd respondent should be cited as a respondent under Part XXXIII of the Act. Mfalila J was of the same view at page 166E-H in *Pio's* case. He held that the predecessor functionaries of the 2nd respondent could not be cited as a respondent under the then prevailing Electoral Act.

The reliance placed by Mr. *Musimbe* on *Tsvangirai v Mugabe and The Electoral Supervisory Commission*, *supra,* as authority for the proposition that the first respondent was properly cited was misplaced. Hlatshwayo J at p 6 based his decision for approving the joinder of the Electoral Supervisory Commission, the predecessor of the 2nd respondent, on the common law principle of *locus standi* 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. See *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 citation of the wrong party renders the petition as against the 2nd respondent void. See *Savanhu v Post Master General* 1992 (2) ZLR 455 and *Sibanda v Post Master General* HH 263/1990. 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.

I am satisfied that the petition is a nullity by reason of non-compliance with the provisions of s 169 of the Act.

It is accordingly dismissed with costs.

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.

Mutumbwa Mugabe & Partners, petitioner's legal practitioners
Dzimba, Jaravaza & Associates, 1st respondent's legal practitioners
Chikumbirike & Associates, 2nd respondent's legal practitioners