

JOSEPH CHINGUWA
versus
CHARLES SIGUDU
and
THE CHAIRMAN FOR THE ZIMBABWE
ELECTORAL COMMISSION
and
THE ZIMBABWE ELECTORAL COMMISSION

ELECTORAL COURT

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 4 and 20 June, 2008

Election Petition

N Chikono, for the applicant
J Bhamu, for first respondent

MUSAKWA J: The petitioner challenged the respondent's election as councilor during 29 March, 2008 harmonized elections. The matter was referred to the Electoral Court for determination of the following issues:

1. Whether the petitioner is properly before the court in the absence of security for costs;
2. Whether the first respondent obtained clearance in terms of s 119 (5) of the Electoral Act [*Cap 2:13*]; and
3. Whether the election of the first respondent is valid in the circumstances.

The matter was postponed on several occasions on account of the need to establish whether security was provided in accordance with the Electoral Act. Eventually correspondence emanating from the applicant's original legal practitioners regarding the issue was availed. The letter dated 23 April, 2008 indicates that a lump sum covering all 52 petitions relating to ZANU PF was deposited with the Registrar. This then disposes of the first issue.

As regards the two remaining issues the parties confined themselves to what is set out in their papers without leading evidence. The brief facts are that the respondent is a teacher at St Theresa Nehanda Primary School in Mamina. Both the applicant and the respondent contested

for the ward 3 seat in Mhondoro-Ngezi during the harmonized elections held on 29 March, 2008. They were the only candidates who contested in the local elections for that ward. The respondent polled 708 votes and was declared the winner whilst the applicant polled 539 votes.

It is the applicant's contention that since the respondent is a member of the Public Service by virtue of being a teacher, he should have been cleared by his ministry and the Public Service Commission before participating in the elections. The applicant attached to his affidavit a letter from the respondent's headmaster confirming that he is a teacher. The letter, which is dated 31 March, 2008 also states that the respondent had been on indefinite sick leave since 17 January, 2008.

In his opposing affidavit the respondent contends that he was never disqualified at the time of nomination up to the time of election. He further contends that in the event that the applicant succeeds he should not be declared the winner. Rather, the respondent contends that the ward should be declared vacant in order for fresh elections to be held.

In his submissions, Mr *Chikono* for the petitioner contended that the respondent did not comply with the requirements of the Act as he was not cleared by his ministry in conjunction with the Public Service Commission. He also noted that the respondent does not expressly dispute that in his opposing affidavit. In relation to this lack of rebuttal Mr *Chikono* submitted that once a material averment is made, then it is incumbent on the party against whom it is made to refute it. He further submitted that s 119 of the Act is couched in peremptory terms such that non-compliance as happened in the present matter renders respondent's election fatal.

Mr *Chikono* also submitted that s 177 of the Act prescribes the circumstances under which an election can be nullified. He further argued that since the petitioner and the respondent were the only candidates, if the respondent had been disqualified during the nomination process for want of clearance by his employer, then there would have been no election. The petitioner would have been declared the winner without being contested.

Mr *Bhamu*, for the respondent acknowledged that the respondent should have sought clearance from his employer and that the opposing affidavit does not expressly state that he was so cleared. However, he contended that it has not been proved that the nature of his employment will conflict with his election as councilor. He further submitted that it has to be shown that non-compliance with the provisions of s 119 affected the outcome of the election. Thus, he concluded that there would be no justification in setting aside the election.

Section 119 (2) of the Act provides that:

“A person shall be disqualified from being nominated as a candidate for or from election as a councilor if -

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(g) subject to subsections (4) and (5), he or she holds an office of profit under the State; or

(h) ...”

It is not in issue that s 119 provides qualifications and disqualifications for election as a councilor. A reading of subs (2) shows that disqualification can arise at nomination or after election. It is common cause that the respondent is employed as a teacher as confirmed by the letter from the headmaster of St Theresa Nehanda Primary School. Mr *Bhamu* tried to argue that it has not been established that the respondent is still employed by the Public Service Commission as at the time of election he was on indefinite sick leave. This is untenable as it does not arise from the opposing affidavit.

Subsections (4) and (5) of s 119 provide as follows:

“4 For the purposes of para (g) of subs (2), a person shall not be regarded as holding an office of profit under the State –

(a) unless he or she is in the continuous and regular employment of the State in respect of which he or she receives a wage or salary;

(b) by virtue of the fact that –

(i) he or she is in receipt of a pension which is payable by the State; or

(ii) he or she is an officer or member of the Defense Forces whose services in peace-time are not wholly in the employment of the State; or

(iii) he or she is an officer or member of the Reserve Force of the Police Force whose services are not wholly in the employment of the State; or

- (iv) he or she is a consultant whose services are not wholly retained by the State; or
 - (v) he or she is a person nominated by or with the approval of the council to serve as a member of a commission, board or similar body established under any enactment; or
 - (vi) he or she is a commissioner appointed in terms of the Commissions of Inquiry Act [Cap 10:07].
- (5) A member of the Public Service shall be eligible for nomination as a candidate and for election as a councilor if the Secretary of the Ministry in which he or she is employed, with the concurrence of the Public Service Commission, has certified in the prescribed form that any of his or her duties as a councilor, should he or she be elected, would not conflict with his or her duties as an employee of the State.”

There is undisputed proof that the respondent is a member of the Public Service as evidenced by annexure (A) referred to in the applicant’s founding affidavit. The fact that he was on indefinite sick leave is not proof that he is no longer a member of the Public Service. The petitioner has correctly stated that the respondent should have been cleared by his ministry and the Public Service Commission. The petitioner has put in issue the respondent’s eligibility to be declared the winner in the absence of confirmation of clearance. In my view, nothing further is required from the petitioner.

On the other hand, the respondent chose to respond to the issue of his disqualification as follows:

“Ad Paragraph 9, 10, 11 And 12

I was duly nominated and was never disqualified at the time of nomination up to the time of election. I further deny that my election and subsequent declaration as councilor is unlawful.”

The respondent chose to generalize the issue of his qualification, and this to me is inadequate. The question of whether or not the respondent was cleared by his employer is information that is within his personal knowledge. He cannot choose to answer it obliquely as he has done. To make matters worse, the nomination or election of a member of the Public Service has to be certified in the manner prescribed in terms of subs (5). It is incumbent on the respondent to furnish that information. In the absence of that information I hold that the respondent is disqualified from holding the office of councilor in ward 3 in Mhondoro-Ngezi.

As regards non-compliance with the provisions of the Act, s 177 provides that -

“An election shall be set aside by the Electoral Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the Electoral Court that –

- (a) the election was not conducted in accordance with the principles laid down in this Act; and
- (b) such mistake or non-compliance did affect the result of the election.”

There is no doubt that the respondent’s election was not conducted in accordance with the provisions of the Act by reason of him not having been cleared by his employer. Further, I am of the view that the non-compliance did affect the result of the election in that had such information been known at the time of nomination, the respondent would not have been eligible to contest. In this respect I agree with Mr *Chikono*’s submission that if the respondent had been disqualified at the nomination stage, the petitioner would have been declared duly elected without being contested.

In the result it is ordered that:

1. The election of the respondent as councilor for ward 3, Mhondoro-Ngezi on 29 March, 2008 and his subsequent declaration as councilor on 30 March, 2008 be and is hereby declared null and void.
2. The petitioner is hereby declared the councilor for ward 3, Mhondoro-Ngezi.
3. The respondent shall pay costs of suit.

Mhiribidi, Ngarava & Moyo, petitioner’s legal practitioners
Mbidzo, Muchadehama & Makoni, respondent’s legal practitioners