

FLORENCE MACHINGA
versus
SIMBANEUTA MUDARIKWA

ELECTORAL COURT OF ZIMBABWE
OMERJEE J:
HARARE: 3rd and 4th July 2008

Electoral Petition

Ms P. *Chakasikwa*, for the petitioner
Mr F. *Gijima*, for the respondent

OMERJEE J: On 29 March 2008, the harmonised presidential, parliamentary and council elections were held in Zimbabwe. The petitioner stood as the candidate on behalf of the Movement for Democratic Change “MDC” for the House of Assembly seat for the Uzumba constituency. The respondent represented Zimbabwe African National Union [Patriotic Front]”ZANU PF” for the seat in that constituency. On 31 March, 2008 the respondent was declared the winner of that seat.

Aggrieved with the prevailing situation before the election as well as with the way the election was conducted the petitioner lodged the present petition with the Registrar on 14 April 2008. She seeks an order setting aside the result of the Uzumba constituency and ancillary relief, together with an order as to costs. The relief sought is opposed by the respondent. The respondent submits in *limine*, that this court determine the issue as to compliance by respondent with the electoral law in the following respects namely:-

- (1) Whether service of the petition outside the 10 day period stipulated in s 169 of the Electoral Act [*Chapter 2:13*] “the Act” is such non-compliance as to render the petition a nullity
- (2) Whether service of the petition at the headquarters of the respondent’s political party is such non compliance with the provision of the Act as to render the petition invalid.

Both issues arise from the wording of s 169 of the Act. The issues in simple terms concern firstly whether service outside the 10 day period, and secondly, at the political party headquarters of the respondent constitutes compliance with the provisions of the Act. Such finding will in turn determine, whether or not the petitioner is non suited. It is proposed to adopt this approach in dealing with this petition.

The petition was filed on 14 April, 2008. The 10 day period expired at the close of business on 24 April 2008 service of the petition it is not in dispute was effected on 12 May, 2008 some 18 days outside the 10 day limit prescribed in s 169 of the Act. The petitioner failed to adhere to the 10 day limit. The petitioner did not achieve equivalent or substantial compliance with the prescribed limit of 10 days. On the basis of *Pio v Smith* 1986(3) SA 145 (ZH) in the absence of either exact or equivalent compliance, the petition becomes a nullity.

In relation to the second issue, written notice of the petition was served at the respondent's political party headquarters. The electoral law sets out in specific and clear language the proper manner in serving election petitions. Service has to be personal or at the residence or place of business of the respondent. In the view of this court, service of the petition at the party headquarters of the respondent, does not constitute service at any of the places contemplated by s 169 of the Act. This court sitting as an Electoral Court, has no powers to condone any breach of the requirements as to time frames or as to the manner of service that are stipulated in the Act. *Chitungo v Munyoro* 1990(1) ZLR 52 (H) at 58 (H) *Hove v Gumbo* S.C.143/2004.

In the result this court finds that service of the petition on 12 May 2008 was invalid for two reasons. Firstly, the petition was served outside the 10 day period and, secondly at the wrong place in contravention of the provisions of s 169 of the Act.

In the result it is ordered as follows:-

1. This petition is a nullity by reason of non compliance with the provisions of s 169 of the Act.
2. The petitioner is to pay the respondent's costs.

Kantor & Immerman, petitioner's legal practitioners

Gijima & Associates, respondent's legal practitioners