BONFACE CHIVORE
versus
ERNEST MUDAVANHU
and
ZIMBABWE ELECTORAL COMMISSION

ELECTORAL COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, July 17, 2008

Election Petition

Mr. *Mukome*, for petitioner
Mr. *Kufaruwenga*, for first respondent
No appearance for second respondent.

CHITAKUNYE J: The petitioner was the ZANU (PF) Parliamentary candidate for the Zaka North House of Assembly Constituency in the harmonized general elections held on 29 March 2008. The first respondent was the MDC-Tsvangirai candidate in the aforesaid elections. He resides at number 7453 Tsvoritsvoto Street Chesvingo, Masvingo. The second respondent is a constitutional body responsible for the running of the elections.

As is expected in any contest there had to be a winner and a loser. Unfortunately in this case the Petitioner was the loser and the first respondent was declared the winner. The petitioner felt aggrieved by the election of first respondent and petitioned this court for the election of first respondent to be set aside and for him to be declared the winner of the House of Assembly seat for Zaka North House of Assembly Constituency. Alternatively, for the second respondent to be ordered to set down a date for the re-run of the election for the said constituency. The petition was filed with this court on 14 April 2008. The petition was purportedly served on the First respondent on 6 May 2008 through Muzuva, a security officer at Harvest House, Nelson Mandela Avenue, Harare. This is the Headquarters of the MDC-Tsvangirai party.

The respondents naturally opposed the application. The respondents raised points *in limine* that they felt were fatal to the petition.

The first respondent raised the following points *in limine;*

1) That the petition was not served on the First respondent within the time limit specified in s 169 of the Electoral Act [*Chapter 2:13*]
2) The petition was not served in the manner provided for in s 169 of the Electoral Act and

3) The Second respondent was improperly joined in the proceedings.

The Second respondent objected to being joined as respondent to the petition contending that in terms of Part XX111 of the Electoral Act second respondent is not supposed to be joined as respondent.

At the hearing Mr. *Mukome* for the petitioner withdrew the case against second respondent. Thus the issue of whether or not second defendant was properly joined was resolved. The other two issues pertaining to the period of service and manner of service on the first respondent remained outstanding.

It is trite law that for a petition to be properly before court the petitioner must comply with the provisions of the Electoral Act, [*Chapter 2: 13*].

The papers filed of record show that after the declaration of the election results the petitioner filed his petition with the registrar of this court on 14 April 2008. That petition was served on 6 May at Harvest House Harare on one Muzuva a security officer thereat. See Return of service filed of record.

Section 168 subsections 2 and 3 of the Electoral Act states that:

> "(2) An election petition shall be presented within fourteen days after the end of the election 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.
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> (3) Not later than seven days after the presentation of the election petition, security of an amount fixed by the Registrar of the Electoral Court, being not less than the amount prescribed by the Commission after consultation with the Chief Justice, for the payment of all costs, charges and expenses that may become payable by the petitioner…….shall be given by or on behalf of the petitioner."

Section 169 which deals with service of the petition states that:

> "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 election period for parliamentary elections is defined as ‘the period between the calling of the election and the declaration of the result of the poll for the last constituency in terms of s 66(1).It was common cause that the last result was declared at the end of March 2008.

The papers filed of record show that the petition was filed on 14 April 2008.

The parties were agreed that the petition was filed in time. In terms of s 169 the petition was supposed to be served within 10 days thereof. Computing the period of service in terms of the Interpretation Act [*Chapter 1:01*] the period within which the petitioner ought to have served the petition expired on 24 April 2008. In *casu* service was only effected on 6 May 2008, some 12 days outside the time frame provided for in the Act. Mr *Kufaruwenga* argued that failure to serve within that time limit was fatal to the petition and uncondonable at law. The petition was thus ill-suited and not properly before court. In this regard he referred to case authorities wherein strict interpretation of similar provisions was taken. One such case is *Pio v Smith* 1986 (3) SA 145. In that case court had occasion to deal with the interpretation of similar provisions of the Electoral Act in similar circumstances. MFALILA J after considering a number of cases, concluded at page 165-6 that;

> “The part of s 141 dealing with the limitation of time is peremptory and must be complied with either exactly or so substantially that the act could stand on its own, as would be the case, for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties; - in other words defects in the notice would not invalidate it….”

Other cases such as *Nair v Teik* (1967) ALL ER 34, *Chitungo v Munyoro and Another* 1990 (1) ZLR 52, *Douglas Togarasei Mwonzora v Paul Kadzima* E.P. 19/05 tend to confirm this approach to time limits and that the Electoral Court as a creature of statute had no authority to grant condonation for failure to adhere to the time limits. It has also been held in other cases in respect of the same general elections that the Electoral Court has no authority to condone non compliance with the Act. In *Tsitsi Veronica Muzenda vs. Patrick Kombayi and Zimbabwe Electoral Commission* HH47/08 KUDYA J held that ‘in the light of decisions such as Nyamapfeni’s case, *supra* and *Chitungo v Munyoro & Another* 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’. In *Hove v Gumbo* SC 143/2004 MALABA JA underscored this point when he said at page 19 of the cyclostyled judgment that ‘A petition is

not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else'. He proceeded to quote with approval the words of MAHAJAN CJ in *Nath v Singh and Others* [1954] SCR 892 at 895 wherein the Chief Justice said that:

> "The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law."

Clearly from the above the petitioner is required to show exact or substantial compliance with the law. Where substantial compliance is being argued the petitioner must show that which he did in an effort to comply with the statute exactly. He must have done all that he is required to do to comply with the law within the stipulated time serve for minor defects that would not invalidate the notice. A dilatory attitude or lack of diligence would not in my view assist his cause.

As regards the petitioner's contention that they could not serve in time because the registrar had not set the security required Mr. *Kufaruwenga* argued that that was without merit. Firstly, he said, the security was set on 23 April 2008 which was within the time limit the petitioner could have served the petition in compliance with the Act. The period for service was only expiring on 24 April 2008. He also argued that on the basis of *Pio v Smith* (*supra*) the petitioner could have served the notice of the petition and the petition without the security and that could have been substantial compliance. But in this case even though the security was set on or about 23 April 2008 the petitioner only served the notice of the petition and the petition on 6 May 2008, some 12 days after the last date when service should have been effected.

Mr. *Mukome* for the petitioner conceded that service of the petition was indeed done outside the 10 day period. He however argued that service and manner of service must be viewed in the circumstances surrounding the filing and setting of security. Whilst admitting that the Electoral Act did not give room for condonation he urged for judicial activism in order to achieve the intention of the legislature. Such activism would entail condoning the petitioner's failure to serve the petition within 10 days and instead serving same after 22 days from date of filing. Mr. *Mukome's* plea was not an easy one. It has already been conceded that the registrar set the security on 23 April 2008. If petitioner was genuinely ready to serve the

petition, but for the security, he would surely have served before the expiry of 24 April 2008 which was the last day. Instead of serving soon after 23 April 2008 service was only effected 12 days after the last date. In any case as stated in *Pio v Smith* (*supra*) the notice and petition could have been served without the list of proposed sureties. Equally he could have offered security in terms of section 28 of Statutory Instrument 21of 2005 with a rider to increase it should the registrar set a higher figure. The section states that "The security to be given by or on behalf of a petitioner to an election petition under section 168(3) for the payment of all costs, charges and expenses that may become payable by the petitioner shall be an amount which is not less than ten million dollars payable in cash or by bank certified cheque." This could have all weighed in favor of substantial compliance.

The authorities cited show that a stricter adherence to the time limits is in tandem with the intention of the legislature unlike otherwise. The need to adhere to the stipulated time limits is made even more imperative by the limited period within which election petitions must be determined. There is no provision for the Electoral Court to extend the periods to cater for parties who may not have diligently adhered to the time limits for what ever reason. The Honorable MAKARAU JP put it more succinctly in *Patrick Chabvamuperu and Others v Edmond Jacob and Others* HH 46/08 at page 8 of the cyclostyled judgment when she said that;

> "In my view, it is beyond dispute that s 169 was enacted with the object of containing the time 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 judicial activism suggested by Mr. *Mukome* would defeat the clear intention of legislature that such petitions be urgently resolved. If for some good reason one were to consider judicial activism there would still be need to consider the reasons for the delay. In the instant case the petitioner's reasons appeared contradictory. In paragraph 2 to 4 of the heads of arguments the petitioner gave the reason for failure to serve within the 10 day period as that the registrar had not set the security hence they were waiting for the security to be set. The full reasons were couched as follows:

> "2) Section 169 of the Act however makes it mandatory that the petitioner serves respondent the petition together with the names and addresses of the proposed sureties;

3) The registrar of the Electoral Court is obliged to fix an amount as recognizance for security not less than an amount prescribed by the Zimbabwe Electoral Commission in Consultation with the Chief Justice. The Registrar could not fix such an amount making it impossible for the petitioner to serve the petition with the recognizance for security.

4) It is respectively submitted that the petitioner should not suffer the consequences not of his own making. The omission lies squarely on the shoulder of the registrar of the Electoral Court and accordingly the petitioner should not suffer any prejudice."

In as far as the petitioner was concerned the fault was with the registrar. No where in the written arguments did the petitioner state when the security was set. The impression created was that as soon as the security was set petitioner diligently served the petition. Unfortunately security was set on or about 23 April, 2008 a date within the 10 day period, but service was not effected soon there after. In the written heads of arguments the petitioner did not state what caused the delay after the security was set. It was only in his oral submissions that Mr. *Mukome* attempted to explain this delay. His explanation was to the effect that the delay in serving the petition was due to the fact that the petitioner did not know first respondent's residential or business address. The delay was thus caused by the search for first respondents address. This was clearly an after thought which was not worth the effort. Had it been the reason it would have been stated in the petitioner's founding affidavit or at least in the heads of arguments. In any case s 188 subsection 2(b) of the Act states that:

> "Save as is otherwise specially provided in this Act and without derogation from s 40 of the Interpretation Act [*Chapter 1:01*], when any notice or other document is required to be served on any person under this Act, it may be served …by leaving it at his or her last known place of residence or any place of residence stated on a voters roll as his or her place of residence;.."

If truly the petitioner did not know the first respondents address he could easily have checked in the voters roll and served on the address indicated therein as respondents place of residence. That search would not have taken 22 days. It is clear to me that the petitioner just did not seriously endeavor to comply with the Electoral Act. He took a lackadaisical approach and it is such attitude that the time limits, *inter alia*, are intended to discourage.

The issue of compliance with service within the time limits, either exactly or substantially, is for the petitioner to prove. In this case the petitioner lamentably failed to show

that he complied with the time limits either exactly or substantially. Indeed in paragraph 7 of his written submissions Mr. *Mukome* admitted as much when he said that:

> "In fixing the number of days, the legislature meant to give directions and time frames for the fulfillment of certain requirements so that a petition is expeditiously disposed of. In view of the above, it is submitted that though there was no substantive compliance (in the strict sense) with the said section, there was indeed substantive fulfillment of the intention of the legislature."

What is required is compliance with the intention of the legislature as espoused in the enactment and not substantive fulfillment of perceived intention at a party's own lackadaisical pace. Consequently the petitioner must be visited by the consequences of non compliance with the time limits.

The other issue pertains to the manner and place of service. Section 169 of the Electoral Act provides, in pertinent part, that a petition shall "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." Clearly service was to be either personally or by leaving the papers at the respondent's usual or last known dwelling or place of business.

In *casu*, the petition and notice thereof was served on 'Muzuva a security officer at Harvest House Nelson Mandela Avenue, Harare.' It was not disputed that the first respondent is resident at number 7543 Tsvoritsvoto Street, Chesvingo in Masvingo. For such service to comply with the Act the petitioner had to show either personal service or that the place at which the petition was left was the usual or last known dwelling or place of business for the first respondent. In a bid to prove this the petitioner argued in paragraphs 8 to 11 of his heads of arguments that:

> "8) On the issue of service on respondent's party headquarters, does it amount to service upon the respondent as envisaged by s 169 of the Act? It is hereby argued that the respondent's party head quarters is a place of business in terms of the definition in the said section.
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> 9) In terms of s 169 of the Act the term place of business assumes a special meaning. Since an election relates to political business a political party head quarters is where the respondent transacts his political business. Therefore service of a petition on the respondent's political party headquarters constitutes proper service on respondent's business address under s 169. See *Pio v Smith* 1986 (3) SA 145
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> 10) It is submitted that the purpose of service is to notify the respondent of legal action against him and allow him to defend such action or application. Once the respondent has presented himself in court he can not rely on improper service to

> render a petition void. It would therefore be futile to argue that he was improperly served when the purpose has been achieved.
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> 11) It is submitted that it would lead to an absurdity if the legislature on the one hand would render valid, service at respondent's last known address which may be six or more months old or may have long been abandoned and on the other hand render null and void service at respondent's political party headquarters."

The above reasoning is faulty for a number of reasons. It is clear that the legislature intended that the respondent should get to know about the petition soonest personally. The addresses for service are such that respondent frequents them as his usual dwelling or place of business. The term usual in this instance means 'ordinarily used,' 'frequently used', 'that is in ordinary use'. The dwelling place or place of business had to be where respondent is ordinarily found or frequents or is expected to be available on a day to a day basis. Thus the place of service is not just any dwelling place or place of business for respondent; it has to be his usual dwelling or place of business. It is for the petitioner to show that the respondent frequents or is ordinarily found at the place at which service was effected. As the place at which service was effected is the headquarters of respondent's political party it was for petitioner to show that respondent who resided in Masvingo, a distance close to 300km from Harare, frequented that place and so was bound to see the petition as soon as it was left there. To merely say that a party headquarters is respondent's place of business is not good enough. Even if for instance respondent was employed by the party the party's headquarters would still not suffice if it is not where the respondent is based. This is so because it is not a place respondent frequents or is ordinarily found on a day to day basis. That is to say, it is not a place respondent conducts business on a day to day basis. Petitions are for the personal attention of the particular respondent. It is the individual and not the party whose election is being challenged and to whom the responsibility to act promptly and without delay is imposed. Such is not imposed on the respondent's party or other party functionaries. The dire consequences of failure to act promptly fall on the respondent and not his party.

One would thus confidently say that the legislature did not intend that a political party headquarters could be a usual place of business for a party member who does not work for the party at that headquarters more so, as in this case, who resides far away from the party headquarters. The provision of service at respondent's last known address is meant for situations were petitioner is unable to effect personal service and is unaware of respondent's current usual dwelling or place of business. The last known address must still have been

respondent's usual dwelling or place of business. The contention that such an address could have been abandoned 6 months ago does not arise as the petition is required to be filed within 14 days [or 30 days depending on the circumstances] from the end of the election period. In any case such could be the address in the voters roll in terms of s 188(2) (b) of the Act.

As crisply stated by MAKARAU JP in *Patrick Chabvamuperu and Others v Edmond Jacob and Others* (*supra*) at page 11 of the cyclostyled judgment,

> "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 the circumstances of this case there was clearly no compliance with section 169 of the Electoral Act either exactly or substantially in respect of both period of service and place of service.

Accordingly the petition is dismissed with costs.

Muvingi,Mugadza &Mukome, petitioner's legal practitioners
Dzimba Jaravaza &Aassociates, first respondent's legal practitioners
Chikumbirike and Associates, second respondent's legal practitioners.