ROBERT SIKANYIKA
versus
STEWART GARADI

ELECTORAL COURT OF ZIMBABWE
UCHENA J
HARARE 3 and 28 July 2008.

Electoral Petition

Mr *Nyahu*, for the petitioner
Mr *Chibwana,* for the respondent.

UCHENA J: The petitioner contested for and lost the Chinhoyi House of Assembly Constituency. He was ZANU (PF"S) candidate for that constituency, in the 29 March harmonised elections. He contested against the respondent an MDC Tsvangirai candidate, who won the right to represent that constituency. The Petitioner presented this petition to the Registrar of the Electoral Court on 14 April 2008. He sought an order of this court setting aside the respondent's election and an order declaring the seat for the Chinhoyi House of Assembly Constituency vacant plus other procedural orders which would lead to a by-election being held in that constituency.

The first respondent raised two points in limine namely;

1. That the petitioner's petition was not served on the respondent within the ten days prescribed in s 169 of the Electoral Act [*Chapter 12:13*] herein after called the Electoral Act.

2. That the petition was not properly served on the respondent, it having been served at his Party's Head Quarters instead of on him personally or by leaving the same for him at his usual or last known dwelling or place of business.

The petitioner's Counsel conceded that the petition was served on the first respondent on 29/4/08. He submitted that service on the 29/4/08 was within 10 days of the presentation of the petition as Saturdays Sundays and public holidays are in terms of rule 4A of the High Court rules not included in the computation of time. He in the alternative argued that the delay was caused by the Registrar of the Electoral Court's failure to timeously fix the amount of security for the respondent's costs. He submitted that in terms of s 169, of the Act, the petition and the security for costs, are supposed to be served on the respondent at the same time. He further

submitted that service was through the Deputy sheriff, He also concedes that the petition was served at the respondent's Party's Head Quarters, but argued that such service is within the intention of the legislature as the party's headquarters is the place where the party's business is conducted. Mr *Nyahu*, however later conceded that service at the respondent's Party's headquarters was not proper service.

Mr *Nyau's* submission that the reckoning of time should exclude Saturdays and Sundays, if accepted would bring service on 29 April 2008, within the 10 day period as the tenth day would have fallen on 29 April 2008. This issue was determined by this court in the case of *Edson Nyamapfeni v The Constituency Registrar Mberengwa East and Others* HH 27/08, where I, at page 5 of the cyclostyled judgment, while interpreting s 33 of the Interpretation Act (Chapter 1;01) and s 46 (19) (c) of the Electoral Act said;

> "The clear meaning of s 33 (1) to (4) is as follows. Subsection one spells out that s 33 defines any reference to time in any enactment in Zimbabwe. Subsection two excludes the day on which the event triggering the reckoning of time occurred, meaning the reckoning of time starts from the next day. Subsection three includes the last day of the stated period in the reckoning of time. Subsection four extends the period if the last day falls on a Saturday, a Sunday or a public holiday, to the next day which is not a Saturday, a Sunday or a public holiday. The inclusion of subsection four providing for extension to the following day if the period expires on a Saturday, a Sunday or a public holiday means Saturdays, Sundays and public holidays are included in the reckoning of time. This interpretation is confirmed in the case of *Makuwaza v National Railways of Zimbabwe* 1997 (2) ZLR 453 (S) @ 456 E-F where Mc NALLY JA said:
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> > "It was conceded on the understanding that the period from 10 May to 26 May was less than fourteen days if one excludes Saturdays, Sundays and public holidays.
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> > That may be so, but on what basis does one exclude those days? The Interpretation Act [*Chapter1:01*] does not allow it. The Labour Relations (Settlement of Disputes) Regulations (SI 30 of 1993) do not authorize it. It is only permitted in matters before the High Court and Supreme Court because the rules of those courts specifically say so (rr4A and 1 respectively)."

The same interpretation was given in the case of *Ellis & Another v Maceys Stores Ltd* 1983 (2) ZLR 17 (SC) @ 18G where GUBBAY AJA (as he then was) said,

> > "Rule 30 (a) lays down that where leave to appeal is not necessary, as in this case, an appeal is properly entered by serving notice of appeal "within twenty-one days of the day of the judgment appealed against". Does the period include "none-business" days? There is no doubt that it does. First, the ordinary

> meaning of the word "days" embraces both business and none-business days. If it were intended to exclude none-business days it would have been a simple matter to have used the expression "twenty-one business days".

In the case of *Kombayi v Berkhout* 1988 (1) ZLR 53 (SC) @ 56B KORSAH JA , referring with approval to the Ellis case (supra) said,

> "This court has repeated ad *nauseum* that the calculation of time for lodging of appeals was based on ordinary days and not court days:"

Mr *Nyau's* reliance on rule 4A was also dealt with in the Nyamapfeni case (supra), where I at page 4 said;

> "It is true that this court can rely on High court rules, but the issue to be determined is whether or not the provisions of rule 4A extend to time limits prescribed in an Act of Parliament. Rule 4A provides as follows-
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> > "Unless a contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."
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> The key words in rule 4A are "where anything is required by these rules or in any order of the court to be done within a particular number of days". This means the rule applies to anything required to be done by any rule in the High Court rules or an order of the court. It does not extend to situations not provided for by the rules or court orders. It therefore does not assist in the construction of section 46 (19) (c) of the Electoral Act, which is not a provision of the High Court rules, but a provision of the Electoral Act."

On the issue of compliance with s 169 of the Electoral Act, that is service of notice of the presentation of the petition and how and where it should be served the court should closely examine its provisions. It provides as follows;

> "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"

A literal interpretation of s 169 establishes the following;

1. The petitioner is required to give to the respondent notice that he has presented to the Electoral Court a petition challenging his election, as a member of Parliament.

2. The notice should be accompanied by a copy of the petition and the names and addresses of the proposed sureties.

3. The notice should be served on the respondent within ten days after the presentation of the petition.

4. It should be served on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business.

The points in limine raised by the respondent arise from 2, 3 and 4 above. The petitioner's counsel submitted that he was not able to serve the petition on the respondent within ten days because the Registrar of this Court had not yet fixed the amount for security of costs in terms of s 168 (3) of the Electoral Act. That in my view is not a valid excuse as security for costs was fixed by the registrar on 23 of April 2008, two days before the expiry of the ten day period. A diligent legal practitioner conscious of the need to comply with peremptory provisions of the law should have prepared all his papers and awaited the fixing of the security for costs so that all he had to do on becoming aware of the amount was to communicate it to the sureties and endorse it on the papers for immediate service on the respondent. Alternatively the petitioner could have served the petition accompanied by a letter promising to provide security as soon as it is fixed by the Registrar. That in my view would have amounted to substantial compliance. Failure to serve the petition within the stipulated period just because security for costs was still to be fixed, was commented on by MAKARAU JP in the case of *Patrick Chabvamuperu and Ors v Edmond Jacob and Ors* HH 46/08, at pages 9-10 of the cyclostyled judgment, where she said;

> "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."

As already said security was fixed two days before 25 April 2008. It was therefore possible for the petitioner to serve the respondent within the ten day period.

The issue of failure to service a petition on the respondent within ten days of its presentation and service at the respondent's party headquarters have already been determined by this court in the case of *Tsitsi Veronica Muzenda v Patrick Kombayi* HH 47/08, where KUDYA J at page 6 of the cyclostyled judgment said;

> "I hold that the service of 6 May 2008 was a nullity for two reasons. Firstly it was in contravention of the 10 day period and secondly, at the wrong place, in violation the provisions of section 169 of the Act."

I respectfully agree with KUDYA J's decision on failure to serve within the 10 day period resulting in the petition being a nullity, and serving at the respondent's party headquarters not being in accordance with the law. MAKARAU JP also arrived at the same conclusions in the case of *Patrick Chabvamuperu and Ors v Edmond Jacob and Ors* (*supra*) where she at page 10 of the cyclostyled judgment said;

> "I am therefore unable to find that 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 s 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."

I respectfully agree with the Judge President's decision which considered the issue of substantial compliance and found that there was no substantial compliance.

The facts of the present case are on all fours with the Muzenda and Chibvamuperu cases (supra) except for the difference in the period by which the 10 day period was exceeded. However the critical issue is that the statutory period should be strictly complied with, and any failure to comply is fatal to the petition. In his book on "Administrative Law" Marinus Wiechers at page 197 commenting on the effect of statutes which confer privileges, rights or exemptions subject to certain formalities says;

> "where the statute confers a privilege, right or exemption, subject to certain formalities, that right, privilege or exemption cannot be validly obtained unless the formalities have been complied with. The presence of time clauses, where the courts are not authorized to grant extension, is an indication in favour of nullity."

A reading of s 169 clearly establishes that it gives the petitioner a right and privilege to challenge the election of the respondent subject to compliance with the time limit stipulated therein. If the legislature's intention was to authorise the courts to grant extension of time limits, it would have made provision for such extension in s 169. The fact that no authority to extend the time limits, was granted means the legislature's intention was that failure to comply should lead to nullity.

The learned author at page199 went on to say;

> "The question is simply whether the organ has the power to dispense with the rule in question. In order to answer the question of the possible existence of a dispensing power, the rule itself must be examined. If the rule is peremptory, that is if absolute compliance is required, there can be no dispensing power, but if the rule is directory, there will be such a power."

In this case the wording of s 169 is peremptory in the sense that the language used is not directory. It requires that the petition be served within 10 days of its presentation. I am aware that the force of the command is not the criteria, but the intention of the legislature. (See the cases of *Quinell v Minister of Lands, Agriculture and Rural Resettlement* SC 47/04; *MDC and Another v Mudede and Others* 2000 (2) ZLR 152 (SC); *Stering 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), *Pio v Smith* 1986 (3) SA 145 (ZH) and *Chabvamuperu v Jacob* (*supra*) In this case the legislature from a reading of the part within which the section is found had in mind the timeous resolution of election petitions. In terms of s 182 a petition must be determined within 6 months of its presentation. It must also be born in mind that a pending election petition, undermines the authority of the legislature and the executive, as holders of office in the challenged constituencies will be participating in governing the nation while their election will be under challenge. Commenting on the court's dispensing powers the learned author at pages 200 to 201 said;

> "If it can be shown that non-compliance with the rule has led to real or potential prejudice, there is no dispensing power and the rule must be observed. To determine whether none-compliance with formal or procedural requirements has resulted or may result in prejudice, the content and objectives of the rule must be analysed. If the administrative organ is mistaken about the possibility of prejudice and grants dispensation when such danger in fact exists, the court may review the defective exercise of the organ's discretionary power and declare the granting of the dispensation invalid. In this regard it is of importance to mention that the obligatory nature of formal and procedural requirements often arises in electoral issues. Although the courts are inclined to overlook minor formal defects, the general approach is nevertheless to regard the rules relating to the registration of voters, nomination, the drawing up of voters rolls and so on as peremptory. Such an approach is perfectly correct, elections are the foundation upon which a democratic system is built and although irregularities in elections cannot always be judged by the criterion of individual prejudice, the prejudice consists in the fact that the legitimacy of the system of government is undermined." (emphasis added)

In my view a challenge to the propriety of the election of a member of parliament falls under the class of electoral cases which should be regarded as peremptory. Such a challenge is

more serious than a challenge to the nomination of a candidate, as the former challenges the authority of an officer of government who is already, or is about to start exercising the authority granted him by the challenged election. The weight of older authorities such as *Chitungo v Munyoro and Pio v Smith* (*supra*) and the more recent cases already referred in this judgment are a confirmation of the correct approach followed by the courts in this country.

I am therefore satisfied that the petitioners failure to serve the petition within 10 days of its presentation results in the nullity of the petitioner's petition.

In the result the petition is dismissed with costs.

Mandizha & Company, petitioner's legal practitioners.
Chibwana & Associates, respondent's legal practitioners