BRIGHT KAUNGWA
versus
SYLVESTER ROBERT NGUNI

ELECTORAL COURT OF ZIMBABWE
UCHENA J
HARARE 30/6/08 AND 30/7/08

Election Petition

Mr L *Uriri* for the Petitioner
Mr *Mandizha* for the Respondent

UCHENA J The petitioner contested for and lost the Mhondoro- Mubaira constituency. He represented the Movement for Democratic Change (Tsvangirai faction), in the 29 March 2008 harmonised elections. He contested against the respondent who represented Zanu (PF). The respondent won the election. The petitioner filed a petition challenging the respondent's election. He presented it on 14 April 2008, but served it at the respondent's party headquarters on 9 May 2008.

The respondent opposes the petition and raised points in limine on the service of the petition. In particular he alleges that the petition was served after the expiry of the 10 day period stipulated in section 169 of the Electoral Act (*Chapter 2:13*) herein-after called the Electoral Act. He further alleged that serviced at his party's headquarters is not valid service in terms of s 169 of the Electoral Act.

Section 169 of the Electoral Act, 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"

An 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.

Mr *Uriri* for the petitioner submitted that the petitioner's failure to serve a notice of the petition and the petition on the respondent within 10 days of its presentation is not fatal as this court has authority to dispense with that requirement. He in his submissions agreed with the decision of MAKARAU JP in the case of *Patrick Chabvamuperu and Ors v Edmond Jacob and Ors* HH 46/08 up to page 10 but submitted that that decision is not correct where it says this court has no authority to dispense with the 10 day period. The issue of failure to comply with the provisions of s 169 of the Electoral Act and its predecessors has been subject of this court's decisions in the following cases, *Patrick Chabvamuperu and Ors v Edmond Jacob* (*supra), Tsitsi Veronica Muzenda v Patrick Kombayi* HH 47/08, *Pio v Smith* 1986 (2) ZLR 120 , *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52, and *Mwonzora v Kadzima* EP19/05. In all these cases it was held that failure to serve the respondent within the stipulated time was fatal and leads to the nullity of the petition. The same position has been taken by courts in other jurisdictions in cases like *Ahmed v Kennedy & Anor: Ullah & Others v Pagel & Another* [2002] 4 ALL ER 764 (QBD), *Ahmed v Kennedy; Ullah & Others v Pagel & Another* [2003] 2 ALL ER 440 (CA) at 451d-e, *Deven Nair v Yong Kuan Teik* [1967] ALL ER 34, *Absolom v Gillet* [1995] 2 WLR 128 (Divissiona Court). and *Williams v Mayor of Tenby* (1879) 5 CPD 135, while interpreting provisions similar to s 169 of the Electoral Act.

A similar provision was interpreted by the High Court of Malaysia in the case of *Sabdin Ghani vs Mahomed Saidi,* November 1981, where Seah J said;

> "the petitioner's failure to observe the time for service therein prescribed rendered the election petition a nullity."

The same reasoning was followed by Colin-Thome JA in the case of *Nanayakkara vs Kiriella* (Deceased) and Others Supreme Court of Ceylon, Election Appeal No 6/84, 11 September 1985 where he said;

> "I hold that the governing words "within 10 days of the presentation of the petition" in rule 15 (1) apply to all and every mode of service set out in rule 15. It is mandatory for all modes of service. The petitioner is given a choice of several modes of service so as to ensure service within a specified time limit. Under rule 15 (1) (b) where the notices are tendered to the Registrar for service, both the delivery and the service must be effected within 10 days. I hold that the failure to serve notices on first, third and eighth respondents, within, the mandatory 10 days is a fatal defect."

In view of the catena of authorities agreeing with MAKARAU JP's decision in the *Chabvamuperu case* (*supra*), I am not going to determine the issues determined in that case

and the many other cases referred to above. I will concentrate on the reason why Mr *Uriri* says that case was wrongly decided. Mr *Uriri* argued that this court has dispensing powers to extend the 10 day period or condone failure to comply with it. He relied on Marinus Wiecher's book on "Administrative Law".at page 199 where the learned author says;

> "The question that now arises is not whether the formal or procedural provision in question is peremptory or directory- because it must simply be accepted that the rule being a rule of positive law, is indeed peremptory- but whether the administrative organ that failed to comply with the rule was authorised not to comply with it or to condone the subject's non-compliance with it. 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".

Mr *Uriri* submitted that the power to grant a dispensation need not be expressly granted, but can be implied by the statute itself. He again referred the court to Marinus Wiecher's book on "Administrative Law" at page 199 where the learned author says;

> "The authority to permit dispensation with a formal or procedural statutory rule in a particular case, is an implied discretionary power conferred on the administrative organ by the statute. Like all discretionary powers, the power to dispense with formal and procedural requirements is a legal power. This means that the law lays down certain conditions and requirements for its exercise"

He stopped the quotation just before the determinant part of that paragraph, which states;

> "It is not a wide discretion based on expediency, but a circumscribed discretion which is fully subject to judicial review".

Mr *Uriri* further submitted that the petitioner's failure to serve the notice and the petition was a result of this court's Registrar's failure to fix security for costs timeously. It is common cause that the Registrar fixed security for costs on 23 April 2008. Mr Uriri therefore contented that the petitioner could not have presented his petition before the fixing of security for costs, and that service on 9 May 2008 was in substantial compliance with section 169 of the Electoral Act. He further contented that the petitioner became aware of the fixed security for costs on 2 May 2008. In further submissions he said there will be no prejudice if the court dispenses with the 10 day requirement.

Mr *Mandizha* for the respondent agreed with Mr *Uriri's* submissions. I am therefore compelled to closely examine section 169 Of the Electoral Act, to determine whether or not I have the dispensing power both parties say I have. The issue before me is a jurisdictional

factor. I am therefore at liberty to disagree with counsel for both parties as jurisdiction is conferred by statute and not by the parties.

In the Petitioners Heads of Argument prepared by Mr *Chibwana* and adhered to and added to by Mr *Uriri* it is stated that security for costs were paid into court and that in view of that fact there was no need for names and addresses of sureties to accompany the notice of the presentation of the petition and petition. That is a correct exposition of the law. If the petitioner knew that he was going to pay security in cash to the Registrar as he did, there was no need for him to await the fixing of security before serving the respondent with the notice of presentation of a petition and the petition. In such circumstances the need to provide the names and addresses of sureties falls away, there was therefore no need for the notice of the presentation of the petition to be accompanied by the names and addresses of sureties. Section 168 (4), makes the use of sureties for the provision of security optional. It provides as follows;

> "Security given in terms of subsection (3) may be by recognizance entered into by the petitioner and sureties not exceeding four in number in a form approved by the Registrar of the Electoral Court, which recognizance shall be signed in the presence of the Registrar of the Electoral Court or a magistrate."(emphasis added).

There was therefore no reason, for the petitioner to, await the fixing of security for costs before serving the respondent. He should have served the notice of presentation of the petition and the petition within 10 days and advised the respondent that he was going to deposit security for costs in cash with the Registrar as soon as it was fixed, and serve proof on the respondent. That in my view would have been substantial compliance with the provisions of section 169 of the Electoral Act, as service of the notice and security for costs, are not intrinsically linked. In the case of *Chibvamuperu* (*supra*) MAKARAU JP dealing with this issue at page 9 of the cyclostyled judgment 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."

I must now consider whether or not I have authority to dispense with the requirement that notice of the presentation of the petition should be served on the respondent within 10 days after the presentation of the petition. I have already noted that the authority to dispense "is not a wide discretion based on expediency, but a circumscribed discretion which is fully subject to judicial review". A close examination of Wiecher's book on the court or organ's dispensing power is necessary.

At page 197, he while 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 section 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 section 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 section 169 is peremptory in the sense that the language used is not directory. It requires that the petition be served within 10 days of the presentation of the petition. 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 the *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 section 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 and prejudice, 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 election of a member, of Parliament, 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* (*supr*a) and the more recent cases already referred to in this judgment are confirmation of the correct approach followed by the courts in this country.

As already indicated this is the approach followed by courts in other jurisdictions whose judgments have been referred to above.

I am therefore satisfied that I do not have authority to dispense with the requirement that the petitioner should serve notice of the presentation of the petition and the petition within 10 days of its presentation. The petitioner's failure to serve the petition within 10 days of its presentation is therefore fatal and results in the petition being a nullity. It must as a result be dismissed. The Petitioner has not applied for condonation, therefore, even if I had authority to dispense with the provisions of section 169 of the Electoral Act such authority can not be exercised in the absence of an application for condonation. In the case of *Viking Woodwork vs Blue Bells Enterprises* 1998 (2) ZLR 249 @ 251 C-D Sandura JA commenting on the need to first apply for condonation said;

> "If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for the condonation of the late filing of the application."

This in my view applies to the petitioner's failure to apply for condonation of his failure to serve notice of the presentation of the petition on the respondent within the time stipulated in section 169 of the Electoral Act.

The Petitioner's petition is therefore dismissed with costs.

Messers Mbidzo, Muchadehama & Makoni, Petitioner's Legal Practitioners.
Messers Mandizha and Company, Respondent's Legal Practitioners.