PAUL KADZIMA
versus
WILLARD CHIMBETETE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 20 August 2008

Election Petition

Mr *Nyawo*, for petitioner
Mr *Mwonzora*, for respondent

MTSHIYA J: The issue for determination *in casu* is whether or not service of a petition on respondent's legal practitioner is proper service in terms of the Electoral Act [*Cap 2:13*] ("the Act"). I want to quickly state that an affirmative answer to the issue raised depends on whether or not there is clear evidence that the respondent chose that course.

Section 169 of the Act provides as follows:-

> "Notice in writing of the presentation of a petition and of the names and address 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 or last known dwelling or place of business".

The petitioner *in casu* was a candidate for the House of Assembly seat in the Nyanga South constituency in the harmonized Presidential, parliamentary and Council elections held in Zimbabwe on 29 March 2008. He stood on the ticket of the Zimbabwe African National Union (Patriotic Front) (ZANU (PF)) party and lost to the respondent who represented the Movement for Democratic Change (Tsvangirai) (MDC (T)). The election result was announced on 2 April 2008 and on 14 April 2008 the petitioner filed a petition with the Registrar of the Electoral Court challenging the result of the election on certain grounds. The petition was served on the respondent's legal practitioners within the stipulated time (i.e on 21 April 2008).

On 22 may 2008 both parties attended a pre-trial conference before MAKARAU JP, where it was agreed that the petition was served on time. The matter was then set for trial on 3 June 2008.

On 3 June 2008 the parties appeared before me in chambers represented by the same legal practitioners who had appeared before MAKARAU JP. Mr *Nyawo* for the petitioner

indicated that the Zimbabwe Electoral Commission, which had been cited as a second respondent, had raised objection and the issue was yet to be resolved. He said it was necessary for the legal position to be spelt out. He therefore asked for a postponement. The application for a postponement was not opposed. I then postponed the matter to 10 June 2006.

Prior to 10 June 2008 the petitioner had already withdrawn his application against the second respondent, the Zimbabwe Electoral Commission. A withdrawal notice was filed on 21 May 2008. An attempt was, however, made on 30 may 2008 to re-join the second respondent in the name of the Chairperson of the Electoral Commission of Zimbabwe. The said application for a re-jonder was, however, also withdrawn on 21 July 2008.

On 10 June 2008 the parties met me, in chambers and Mr *Mwonzora* indicated that in view of MAKARAU JP's ruling in Patrick Chabvamuperu and Others HH 46/08, a new preliminary issue had come to light. He said the effect of the ruling was that service at a respondent's party headquarters was no service at all in terms s 169 of the Act. He said *in casu* service had been effected on respondent's legal practitioners. That being the case, he explained, the respondent would now raise it as a preliminary issue. Mr *Nyawo* indicated that he had not yet seen the ruling.

On 21 July 2008 the parties agreed to present argument on the issue of service and indeed arguments were finally heard on 30 August 2008.

In paragraph 4 of his heads of argument Mr *Nyawo* had this to say:-

> "Whether the Honourable Court has powers to *mero motu* raise the issue of non-compliance with the provisions of the Electoral Act. In this regard, it is submitted that the Electoral Court is a creature of statute. Consequently it can only do those acts that are expressly mentioned with the four corners of the statute establishing it. See *Chitungo v Munyoro supra and Nyamapfeni v The Constituency Registrar Mberengwa East and 4 others HH 26/08* The Electoral Court has held in the P. Chabvamuperu case (*supra*) that is has no powers to condone non-compliance with the provisions of the Act. A **fortiori the Electoral Court cannot *mero motu*** raise the issue of non-compliance with its provisions of the Electroral Act since the enabling Act does not expressly grant it powers to do so".

In view of the above submission, I felt it was necessary to clear the issue raised in the above submission before I proceeded to hear full argument on the issue of service and hence the background of the case for the period 22 May 2008 to 21 July 2008. Consequently, upon explanation of the said background Mr *Nyawo* abandoned the issue.

I must, however, still point out that it is proper and procedural for the court to ascertain whether or not a petition before it is properly so placed. It is this court's duty to ensure that the

procedures required for a petition to be placed before it are properly followed. To that end, the court can *mero motu* raise legal issues.

I now return to submissions made on the issue of service on the respondent's legal practitioner.

Mr *Mwonzora*, relying on the ruling in Chabvamuperu (*supra*), submitted that, apart from the manner of service stipulated in sections 169 and 188(2) of the Act, there is no other address of service or manner of service given in the Act.

Section 188(2) of the Act provides as follows:-

"1. ……..

2. Save as is otherwise specially provided in this Act and without derogation from s 40 of the Interpretation Act [*Cap 1:01*], when any notice or other document is required to e served on any person under this Act, it may be served-

(a) by delivering it to the person to whom it is addressed: or
(b) 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; or
(c) by sending it to any place of residence referred to in paragraph (b) through the post by registered letter marked upon the outside "electoral notice letter" and, unless the contrary is proved, the notice or other document shall be deemed to have been served at the time at which such registered letter would have been delivered in the ordinary course of post".

He said that was the only other section in the Act that dealt with the issue of service. He said in case of failure to effect service in terms of s 169 of the Act, the legislature had, in terms of s 188(2), provided for service at respondent's address as appears in the voter's roll. That was the only other prescribed manner of service.

Dealing with the issue of the court's lack of power of condonation, Mr *Mwonzora* submitted that since the petitioner conceded that s 169 of the Act is peremptory, the court could not proceed to allow a departure from strict compliance with the provisions of the law. He said such a move would amount to giving the parties the power of legislation. Relying on a number of authorities such as *Tighly v Putter* 1949(1) S.A. 1087; and *Mwonzora v Kadzima* EP 19/05, he submitted that as a creature of statute, the court could not assign to itself any power of condonation or waiver.

Mr *Mwonzora* further submitted that the legislature was fully aware of the existence and importance of legal practitioners but it had chosen not to include them for purposes of proper service. This, he said, was so because of the need for the legal practitioner to be given a

mandate before proceeding with a matter. *In casu* the petition had been "discovered" by the respondent's legal practitioners and all the respondents had done was to ask his legal practitioners to ascertain its existence. There were no specific instructions to accept service on behalf of the respondent.

On the issue of substantial compliance, Mr *Mwonzora* said the issue should be looked at in terms of the strict legal requirements in the Act. He said the fact that, through diligence, the respondent had responded to the petition, should not be used to circumvent the peremptory provisions of the law. All in all, he argued, the petitioner was ill-suited for failure to effect service on the respondent in terms of s 169 of the Act.

Mr *Nyawo* for the petitioner, submitted that s 188(2) of the Act referred to by the respondent did not cover service of a petition but other public documents as was clear from the heading of the section. He said service of a petition was specifically provided for in s 169. Whilst conceding that the court has no power to condone non-compliance, he submitted that the court should make its own inquiry as to whether or not there was substantial compliance. It was his view that under the concept of substantial compliance the petition *in casu* could be served. To support that view, he argued that with service having been effected at respondent's legal practitioners, there was indeed in turn a meaningful response made timeously. There was therefore, in his view, no prejudice.

I indicated from the outset that this issue depends on the availability of clear evidence to the effect that that the respondent directed/instructed the petitioner to effect service at his legal practitioners offices.

A perusal of the Act reveals that for the purposes of service of a petition and other documents, the legislature spells out the manner and places of service only through sections 169 and 188(2) of the Act. A legal practitioner's office is not one of those places. It does appear to me that if there is failure to effect service at places mentioned in s 169, then service can be effected at the respondents' address appearing in the voter's roll. To that end, I would agree with respondent that s 188(2) of the Act would apply *in casu*. Clearly even in a last resort situation, the office of a legal practitioner is not availed to the petitioner as a proper place of service.

The issue of mandate on the part of a legal practitioner is very important. In the main a legal practitioner will only act upon being given instructions to do so; and in some cases he or she may act only upon being placed in funds. This may be an impediment to the realisation of

personal service. There is nothing in the Act which demands of the respondent that he or she should respond through a legal practitioner. That becomes the respondent's election upon being personally served with the petition.

In the main, personal service, as envisaged by the Act, entails total personal control of the petition process by both parties. It is only through that process that a petition, an issue of public interest can be determined within the time frame spelt out in the Act.

All the places of service indicated in the statute clearly demonstrate the need for personal service. Accordingly I would, *in casu* associate myself with the recent decisions of this court in Chabvamuperu (*supra*) and Peter Mabika and others HH 67/08 in emphasizing the need to adhere to the manner of service prescribed in s 169 of the Act. Failure to strictly comply with the mandatory provisions of that section of the Act is fatal to a petition.

True, the doctrine of substantial compliance has found way in our jurisdiction. However, *in casu* all we know is that the petition was 'discovered' by the respondent's legal practitioners. There is no evidence to show that the respondent had infact instructed/advised the petitioner to serve the petition on his legal practitioners. No certificate of service was ever filed. In the absence of that evidence I cannot make an opinion on whether or not there was substantial compliance.

In view of the foregoing my finding is that the petitioner is non-suited for failure to effect personal service on the respondent as provided for s 169 of the Act. I therefore make the following order.

The petition be and is hereby dismissed with costs.

Mandizha & Company, petitioner's legal practitioners
Mwonzora & Associates, respondent's legal practitioners _