PETER MURWIRA — 1ST PETITIONER
versus
IAN KAY
and
PEARSON MBALEKWA — 2ND PETITIONER
versus
OBERT MATSHALAGA
and
STANLEY MANGUMA — 3RD PETITIONER
versus
NOEL MANDEBVU
and
RONIAS SANGO — 4TH PETITIONER
versus
CEPHAS SINDI
and
ANDREW MUDENDA — 5TH PETITIONER
versus
JOEL GABBUZA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 31 July 2008

Election Petition

Mr *Musimbe*, for 1st petitioner
Mr *Bamu*, for the 2nd, 3rd and 4th petitioners
Mr *Manjengwa*, for 1st and 5th respondent
Mr *Nyawo*, for 2nd, 3rd and 4th respondent

MTSHIYA J: Section 169 of the Election Act [*Cap 2:13*] ("the 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".

In the above matters service in some cases was either effected after the expiration of the ten days at respondent's Party Headquarters or was effected within the ten days at the

respondent's Party Headquarters. In some cases service was effected outside the ten days because the petitioner was still waiting for the Registrar to set or fix the security fees. These different situations led to the raising of a number of preliminary issues by respondents at the pre-trial conferences.

Having noted that all the preliminary issues in the above cases were anchored on the proper interpretation of s 169 of the Act, I formed the impression that there was need for the cases to be consolidated for the purposes of formulating a single judgment.

On 28 July 2008 I met the parties concerned. Except for petitioner Joel. Gabbuza all other the parties were represented at the meeting. Mr Mhike who was representing the respondent in the Gabbuza case indicated that the petitioner would not object to the consolidation. It was then agreed that the matters be consolidated and that argument be heard on 31 July 2008. On 13 August 2008 petitioner Gabbuza's legal practitioners confirmed in writing that there was no objection to the consolidation and that the petitioner would be bound by the single judgment.

Before dealing with the arguments of the parties, I shall briefly state what happened in each of the consolidated cases. (i.e 1st Petitioner – 5th Petitioner).

1st Petitioner

The petitioner contested the House of Assembly seat in the Marondera Constituency during the harmonised presidential, parliamentary and council elections which were held on 29 March 2008. He contested as a ZANU (PF) candidate and lost to the respondent who stood on the ticket of the Movement for Democratic Change (Tsvangirai) (MDC (T)). The respondent was declared winner on 2 April 2008 and on 14 April 2008, dissatisfied with the election result, the petitioner presented his petition to the Registrar of the Electoral Court. On 30 April 2008, the petitioner served the petition at the respondent's party headquarters. The petition was only brought to the attention of the respondent on 17 May 2008. That means the respondent got to know of the petition after 33 days of its filing with the Registrar of the Electoral Court. At the pre-trial conference the parties agreed that the following preliminary issues be resolved before the hearing of the petition:-

1. Whether the failure to serve a copy of the petition together with the names and addresses of sureties within 10 days of presentation of the petition as provided

for in s 169 of the Act meant that the petition was not in issue or the petitioner non-suited thereof?

2. Whether the service by the petitioner on the respondent's party's headquarters amounts to proper service in light of the provisions of s 169 of the Act?

2nd Petitioner

The petitioner was a candidate for the House of Assembly for the Zvishavane-Ngezi Constituency during the harmonised presidential, parliamentary and Council elections held on 29 March 2008. He stood on the ticket of the Movement for Democratic Change (Tsvangirai) (MDC (T)) and lost to the respondent who stood as a candidate for the Zimbabwe African National Union (Patriotic Front) (ZANU (PF)). On 30 April 2008 the respondent was declared duly elected member of the House of Assembly for the Zvishavane-Ngezi Constituency. On 14 April 2008, dissatisfied with the electoral result, the petitioner presented a petition to the Registrar of the Electoral Court. The petition was served at the respondent's party headquarters on 9 May 2008 (i.e. 14 days beyond the required ten days). At the pre-trial conference the parties agreed that the following preliminary issues be determined before the hearing of the petition.

1. What effect is the failure by the petitioner to serve the petition within the stipulated period, in accordance with s 169, of the Electoral Act [*Cap 2:13*].
2. What effect is the failure by the petitioner to serve the petition on the respondent either personally or by leaving the same at his usual or last known dwelling or place of business, in accordance with s 169 of the Electoral Act [*Cap 2:13*].

3rd Petitioner

The petitioner contested the Gutu West House of Assembly seat during the harmonised presidential parliamentary and Council elections held on 29 March 2008. He stood as a candidate for the Movement for Democratic Change (Tsvangirai) (MDC (T)) and lost to the respondent who stood as a candidate for the Zimbabwe African National Union – Patriotic Front (ZANU-PF). Dissatisfied with the result the petitioner filed a petition with the Registrar

of the Electoral Court on 14 April 2008. The petition was served at the respondent's party headquarters on 9 May 2008 (i.e. 14 days beyond the required 10 days). At the pre-trial conference, the parties agreed that the following issues be determined before the petition was heard:

1. Whether failure by the petitioner to serve the petition within 10 days as prescribed by s 169 of the Electoral Act makes the petitioner non-suited.

2. Whether service at respondent's party headquarters constituted adequate service in terms of s 169 of the Act.

4th Petitioner

The petitioner was a candidate for the House of Assembly for Gokwe Chireya Constituency. He stood as a candidate for the Movement for Democratic Change (Tsvangirai) (MDC (T)) and lost to the respondent who stood as a candidate for the Zimbabwe African National Union Patriotic Front (ZANU-PF). On 14 April 2008, the petitioner filed a petition with the Registrar of the Electoral Court challenging the validity of the electoral process. On 12 May 2008, the petitioner served the petition at the respondent's party headquarters.

At the pre-trial conference the parties agreed that the following preliminary issues be determined before the hearing of the petition:-

1. What effect is the failure to serve the petition out of time.

2. What effect is the failure to effect personal service on respondent as stipulated in s 169 of that Act (i.e. service who at respondent's party headquarters).

5th Petitioner

The petitioner was a candidate for the House of Assembly for the Binga Constituency during the harmonised presidential parliamentary and Council election held on 29 March 2008. He stood on the ticket of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and lost to the respondent who stood as a candidate for the Movement for Democratic Change (Tsvangirai) (MDC (T)). The respondent was declared winner on 2 April 2008 and on 21 April 2008 the petitioner presented his petition to the Registrar of the Electoral Court. The petition

was served at the respondent's party headquarters on 9 May 2008 (i.e. 14 days beyond the requisite 10 days).

At the pre-trial conference the parties agreed on the following as preliminary issues:-

1. Whether, in view of the fact that more than ten days after the presentation of the petition, no security amount had been fixed, service of the petition more than ten days after presentation of the petition amounts to a substantial compliance with s 169 of the Electoral Act.

2. Whether or not service of the petition on the respondent's party headquarters amounts to a substantial compliance with s 169 of the Electoral Act.

An examination of the brief facts of each case and the resultant pre-trial conference issues reveals that the common issues for determination in respect of each case stand out to be the following:-

1. Whether service of an election petition outside the ten (10) day period provided for under s 169 of the Act is fatal to the validity of the petition.

2. Whether service of a petition at the Party Headquarters of a respondent constitutes proper service in terms of s 169 of the Act; and

3. Whether service of a petition should await the fixing by the Registrar of the amount of security referred to in s 168(3) of the Act. (this issue was only raised in Case No. 5 as a reason for failure to meet the 10 day deadline).

I shall now deal with each on of the issues listed above, and in so doing I take note of the fact that it is common cause that all petitions were served out of time.

1. <u>Whether service of an election petition outside the ten (10) day period provided for under s 169 of the Act is fatal to the validity of the petition.</u>

Relying on *Pio v Smith* 1986(3) SA 145 (ZHC), *Chitungo v Munyoro* 1990 (1) ZLR 52 (HC) and *D.T. Mwonzoro v Paul Kadzima* EP 19/05, both Messrs Manjengwa and Nyawo correctly argued that the provisions of s 169 of the Act are mandatory/peremptory and should therefore be strictly complied with. They argued that the issue of substantial compliance had

been fully dealt with in both the Pio case (*supra*) and Chitungo case (*supra)*. In the Pio case, the fact that the respondent was aware of the petition, did not stop the court from rejecting the argument for substantial compliance. Similarly the good reason relating to the death of a legal practitioner in the Chitungo case (*supra*) could not sway the court into accepting that there was substantial compliance. In the main the strong argument presented was that this court, (i.e Electoral Court) being a creature of statute, cannot operate outside the four corners of the statute creating it. That statute, it was argued, does not clothe the court with the power of condonation or waiver.

On their part both Messrs *Bamu* and *Musimbe* for the petitioners, submitted that while the court is a creature of statute, it has discretionary powers which it can use in the public interest. Mr *Musimbe* emphasised that the court, as a public institution, should be able to control its own processes. To that end the court should not, he argued, confine itself to the four corners of the statute creating it. The court should be guided by the public interest.

Mr *Bamu* correctly submitted that, indeed in bringing forth the provisions of s 169 of the Act, the legislature wanted to ensure that the respondent had sight of the petition and could therefore respond to the issues raised in the petition meaningfully and timeously. He said *in casu*, despite the fact that service was out of time, the respondents in all cases were aware of the contents of the petitions and had fully responded. Given their responses, he argued, the court was in a position to proceed to determine the petitions. The legislature envisaged a speedy resolution of the petitions and hence the need for the petitions to be dealt with within a period of six months.

Whilst appreciating the reasoning of the petitioners as presented through their legal practitioners, I find myself being unable to agree to depart from recent decisions of this court. I am here referring to Patrick Chabvamuperu & Others HH 46/08 and Peter Mabika & Others HH 67/08 where this same issue was argued and determined. True, the decisions in those cases are not binding on me. However, to the extent that I subscribe to the view that this court, as a creature, of statute can only do those things which the Act creating it says it can do, I find it entirely reasonable and fitting that I associate myself with the decisions in those cases. In those cases the peremptory nature of the provisions of s 169 was highlighted and accepted leading to the dismissal of the petitions.

I was indeed almost persuaded to accept that through adopting the substantial compliance approach, which our courts have accepted, some of the petitions could survive the strict requirements of s 169 of the Act. However, I firmly believe that doing so would amount to extending the time frames set out in the Act and thus effecting amendments to the Act. This court enjoys no such powers. It is also not clothed with the powers of condonation or waiver – let alone legislative powers.

The issue of the jurisdiction of a special court was dealt with by MAKARAU J, as she then was, in a labour matter, namely *Martin Sibanda and Godfrey Moyo v Benson Chinemhute N.O. and Martindale Trading Private Limited T/A Lyons* HH 131/04 where she said the extent of the jurisdiction of the Labour Court, itself a special court, was "to be found squarely within the four corners of the statute setting it up". In support of that position she quoted with approval from *Graaf Reinet Municipality v Van Rynevvelds' Pass Irrigation Board* 1950(2) SA 420, 424 where WATERMEYER CJ, said the following:-

> "Jurisdiction means the power or competence of a court to hear and determine an issue between the parties, and limitations maybe put upon such power in relation to territory, subject matter, an amount in dispute, parties etc".

In support of the above position, MAKARAU J went on to give the following illustration:-

> "I have always visualized the difference between a court of inherent jurisdiction and one without as two buildings open to the citizenry. One has all its doors and windows open to all and for all reasons (and in all seasons), apart from those expressly and clearly forbidden entry by statute. Where a point of entry is hitherto non-existent for a member of the public in the form of a procedure, one is inherently created in the interests of justice. This is the court of inherent jurisdiction. The entry manning the gates of this building is less stern and less demanding than his counterpart at the gates of the other building. This other building representing the court without inherent powers is generally closed up apart from a few windows to allow access to those expressly defined in the statute creating the court, on certain terms and for certain specified purposes. Where the statute does not create a point of entry, the court cannot open one for anyone".

The above illustration, in my view, properly defines a "Special Court" such as this one. The Electoral Act defines the powers of this court. Clearly if the legislature does not open more 'windows' then the court remains confined to the windows created at its birth. The

requirement to serve a petition within ten days remains unchanged until the legislature thinks otherwise.

A look at the brief history of the Labour Court (a Special Court like this one) will reveal that in recent years the legislature, NOT THE COURTS, has effected a series of amendments aimed at opening more windows for the that court (i.e. increasing its powers). In like manner it is the legislature that can grant this court (the Electoral Court) the power to waive certain requirements of the Act or to condone certain departures from the strict application of its mandatory provisions such as contained in s 169. This therefore stands to reason that once it is accepted that the provisions of s 169 are peremptory or mandatory then there is no room for non-statutorily sanctioned departures. Thus in *casu* the petitioners are disabled from avoiding strict compliance with the provisions of s 169.

A petition, as accepted herein by both petitioners and respondents, is an issue of public interest. I therefore believe that it is in that vein that the legislature deemed it necessary to enact strict rules regarding any challenge to a properly run election. To that end it is only the serious minded and genuine petitioners who will dare frivolously interfere with an issue of such public interest.

Even if I were to adopt the substantial compliance approach, I would, on this issue, still find no reason to accept that there was substantial compliance with the requirements of s 169 of the Act in any of the consolidated cases herein. I therefore fully associate myself with the positions taken in both Pio (*supra*) and Chitungo (*supra*). Accordingly my finding is that failure to serve a petition on respondent within ten (10) days renders the petitioners non-suited. That is an irregularity which this court has no power to condone.

All the petitions herein, having been served out of time, are therefore invalid.

2. <u>Whether service of a petition at the party Headquarters of a respondent constitutes proper service.</u>

It is common cause that in all the consolidated cases under determination service of the petitions was effected at respondents' party Headquarters.

The Act requires that service should be personal or at respondent's residence or respondent's usual place of business. There is no other place of service mentioned, particularly in s 169 of the Electoral Act.

Counsel for the petitioners argued that what was essential was that the respondents became aware of the petitions and responded timeously and meaningfully.

I, however, believe that failure to effect personal service in compliance with the provisions of the Act is just as bad as serving the petition out of time. Accordingly that act, (i.e. of effecting service at party headquarters) would result in no service at all of the petition and therefore invalidate such petition. As ruled in the recent cases referred to herein in the last paragraph at page 6, I find it far fetched to regard the party headquarters as the respondent's place of business. There was therefore clearly an absence of proper service in all the cases (i.e. 1st petitioner – 5th petitioner) and thus rendering the petitioners non suited.

3. Whether the service of a petition should await the fixing by the Registrar of the amount of security referred to in s 168(3) of the Act.

As already indicated this issue was raised by the 5th petitioner as explanation for the delay to meet the ten (10) days deadline within which to effect service of the petition on the respondent. The aim in that argument has been to link the issue of security to the presentation of the petition. From the mere fact that the Act talks of "proposed sureties" one can discern the de-linking of the two issues. A petitioner can, in my view, competently serve a petition on the respondent with proposed securities and it is up to the respondent to raise objections in terms of s 170 of the Act. In short, and bearing in mind the fact of de-linking, a petition can be served prior to the fixing by the Registrar of the amount of security. The issue cannot therefore be raised as an excuse for failure to serve a petition within time.

In view of the foregoing, my finding is that all the petitioners in the consolidated cases dealt with herein failed to comply with the mandatory provisions of s 169 of the Act and are therefore non-suited.

In line with my findings I make the following orders:-

(a) 1st Petitioner

The petition be and is hereby dismissed with costs.

(b) 2nd Petitioner

The petition be and is hereby dismissed with costs.

(c) 3rd Petitioner

The petition be and is hereby dismissed with costs.

(d) 4th Petitioner

The petition be and is hereby dismissed with costs.

(e) 5th Petitioner

The petition be and is hereby dismissed with costs.

I.E.G. Musimbe and Partners, 1st petitioner's legal practitioners
Mbidzo Muchadehama & Makoni, 2nd ,3rd & 4th petitioners' legal practitioners
Mandizha & Company, 2nd , 3rd & 4th respondents' legal practitioners
Honey & Blanckenberg, 4th petitioner's legal practitioners
Kantor & Immerman, 3rd respondent's legal practitioners
Muzondo Chinhema, 1st respondent's legal practitioners
F.G. Gijima & Associates, 2nd & 4th respondents' legal practitioners