

REPORTABLE

(5)

GIFT MACHOKA KONJANA
v
DEXTER NDUNA

SUPREME COURT OF ZIMBABWE
PATEL JA, BHUNU JA & BERE JA
HARARE: JULY 29, 2019 & MARCH 23, 2021

T. Mafukidze, for the appellant
T. Zhuwarara, for the respondent

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Civil Appeal Case No. SC 837/18

PATEL JA: This appeal emanates from an election petition

lodged with the Electoral Court to nullify the election of the respondent and to declare the petitioner (the appellant herein) duly elected as the Member of Parliament for Chegutu West. The disputed election was held on 30 July 2018.

Background

After the relevant election forms were collated and compiled, the respondent was declared duly elected by 10,932 votes as opposed to 10,828 votes attributed to the appellant. The appellant asserted that the Zimbabwe Electoral Commission (ZEC) officials made mistakes in capturing data from the ward centres. He lodged a complaint with the ZEC District Elections Officer after the discovery of the mistake which was then

admitted by ZEC. Before the Electoral Court, the appellant sought the correction of the erroneous declaration. The respondent took various points *in limine*.

Judgment of the Electoral Court

The court *a quo* considered the provisions of the Electoral (Applications, Appeals and Petitions) Rules 1995 (S.I. 74 of 1995). It found that r 21 of the Rules sets out certain peremptory requirements pertaining to the form and content of an election petition. Amongst other things, r 21 requires the petitioner to state the grounds of the petition and the exact nature of the relief sought on the face of the petition. The court took the view that r 21 is peremptory and must be strictly complied with and that substantial compliance is not acceptable. Consequently, a petition that fails to comply with the form and content as set out in r 21 is fatally defective.

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In the instant case, the court found that the exact relief sought by the appellant was clear *ex facie* the petition and that the appellant was entitled to bring the petition in terms of s 167 of the Electoral Act [*Chapter 2:13*] to rectify the alleged irregularity. The court further found that the relief seeking the nullification of the declaration by ZEC of the appellant as having been duly elected was competent by virtue of s 171 of the Electoral Act. The court accordingly dismissed the points *in limine* taken by the respondent on these three aspects.

As regards the fourth point *in limine*, the court reiterated that it was imperative for a petitioner to follow the format prescribed in r 21. In *casu*, the appellant

brought the petition on notice and therefore fell foul of r 21. The form and content of the petition did not comply with r 21, rendering it fatally defective. The appellant had failed to present his case in the proper format required by law. There was therefore no valid petition before the court. In the event, the court could do nothing to salvage the situation, even where the petition might appear to have merit. The court's residual power to condone infractions in electoral matters was curtailed. The petition was accordingly dismissed with costs. Additionally, the Registrar was directed to serve copies of the order on ZEC and the Clerk of Parliament.

Grounds of appeal and respondent's preliminary objections

The gravamen of the appeal against the judgment *a quo* is threefold. The first is that the petition was not fatally defective for having been brought on notice as s 169 of the Electoral Act makes such notice mandatory. The second is that the court *a quo* could have condoned non-compliance with the Rules as s 17(9) of the Electoral Act vests the court with such competence to condone. The third is that the court failed to consider the merits of the petition despite ZEC having acknowledged the error that resulted in the undue return complained against.

On 12 April 2019, the respondent gave written notice, in terms of r 51 of the Supreme Court Rules 2018, that he intended to rely on two preliminary objections in the proceedings. The less consequential objection is that the relief sought in the notice of appeal is both incompetent and defective in seeking that the matter be referred to trial on the merits before a different judge of the Electoral Court. The more significant and

weighty objection is that the adjudication of the present appeal is now statute barred on account of s 182(2) of the Electoral Act. At the hearing of the appeal, following an exchange with the Court, counsel did not motivate any argument on the former point and focused their submissions on the latter objection.

Submissions by counsel

Mr *Zhuwarara*, for the respondent, submits that s 182(2) of the Electoral Act imposes a clear statutory bar on the adjudication of an electoral appeal. Once the prescribed period of 3 months has expired, the Court has no jurisdiction to entertain the matter. The appellant was the *dominus litis* and was required to ensure that the matter was heard within the prescribed period by approaching the Registrar to expedite the matter.

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Mr *Mafukidze*, for the appellant submits that s 182 of the Electoral Act does not operate to bar the Court from determining this appeal since the appellant has already filed process and the matter is pending. No directions were issued in this matter, as provided by s 182, and the provision was not intended to non-suit a litigant who is already before the Court. There is no provision barring the Court from hearing and determining a matter that is already pending before it. The Court should adopt a reasonable interpretation that is constitutionally compliant. Any provision ousting the Court's jurisdiction must be clear and unequivocal and restrictively interpreted. There is nothing in s 182 to oust the Court's jurisdiction in clear terms. The appellant herein acted timeously by filing the appeal and his heads of argument in time. It was the duty of the Chief Justice or Judge President to issue the directions envisaged in s 182(3) of the Act.

Such directions should have been issued generally for dealing with all election petitions and appeals as soon as s 182(3) was introduced.

In response, Mr *Zhuwarara* reiterates that the petitioner in an electoral matter is the *dominus litis* and cannot simply sit back. What is involved is a party driven process. The appellant's interpretation gives rise to the absurdity that an electoral appeal can be dealt with whenever a petitioner deems fit, even after the challenged electoral term of office has expired. Section 182(3) of the Act requires that the directions in question must meet the timeframes stipulated in s 182(1) and s 182(2). These time limits are immutable and must be complied with. If the prescribed time limit is extended beyond 3 months, then the rule of law is violated. Where a statutory power is being exercised, the Court cannot assume and exercise its inherent powers beyond or outside the governing statutory provision. In this case, the appellant did nothing to expedite the appeal process. Section 182(3) of the Act does not envisage the issuing of general directions. The directions should be specific to each case having regard to the particular circumstances of that case. Lastly, Mr *Zhuwarara* submits that s 182 of the Act is not directory but peremptory and the prescribed timelines must be strictly complied with. Rule 4 of the Supreme Court Rules 2018 only applies to departures from the Rules. It does not allow any departure or condonation for breach of a statute unless that statute specifically allows such departure or condonation.

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Following the foregoing submissions by counsel on the import of s 182 of the Electoral Act, the Court reserved judgment on the preliminary objection relating to compliance with the time limits stipulated in that provision.

Timeous disposal of election petitions and appeals

Section 182 of the Electoral Act governs the time within which election petitions and appeals are to be determined. The provision that was originally in force was repealed and substituted by s 34 of the Electoral Amendment Act, No. 6 of 2018. Section 182 in its present form stipulates as follows:

- “(1) Every election petition shall be determined within six months from the date of presentation.
- (2) An appeal under section 172(2) shall be determined within three months from the date of the lodging of the appeal.
- (3) For the purpose of ensuring that an election petition or an appeal is determined within the time-limit prescribed in subsection (1) or (2), as the case may be—
- (a) the Judge President of the High Court or the presiding judge of the Electoral Court, in the case of an election petition; and
 - (b) the Chief Justice or the senior presiding judge of the Supreme Court, in the case of an appeal from a decision on an electoral petition;
- may, notwithstanding any other enactment, give such directions as to the filing of documents and the hearing of evidence and argument as will, in his or her opinion, ensure that the time-limit is met, and the parties shall comply with those directions.”

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The interpretation and application of the provisions of s 182 raise the following questions for consideration in *casu*: Upon whom does the duty lie to ensure compliance with the time limits stipulated in that section and how is that duty to be

performed? And what are the consequences of the failure to meet the prescribed time limits?

Both questions were fully canvassed and definitively determined in the recent judgment of this Court in *Sibanda & Anor v Ncube & Ors / Khumalo & Anor v Mudimba & Ors* SC 158/2020 (handed down on 20 November 2020). In addressing the first question, it was held, at p. 12:

“..... it is incumbent upon all the players involved in the adjudication of electoral matters to ensure compliance with the time limits stipulated in subss (1) and (2) of s 182. That this is so is made abundantly clear by the provisions of subs (3) of s 182. What is not explicitly articulated is the extent to and manner in which each player is expected to carry out his or her respective role in the adjudicative process. These are matters to be inferred from other relevant statutory provisions and from the rules of practice and procedure generally.”

It was further held, at p. 13:

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“Ultimately, it seems to me that it is for the parties themselves, and the petitioner or appellant in particular, *qua dominus litis*, to initiate the process of seeking and obtaining the requisite directions envisaged in s 182(3) of the Act. It is they and their legal practitioners who should be especially vigilant in monitoring and managing the progress of their own cases in order to meet the stipulated time limits. And it is the parties, through their lawyers, who should take the initiative to approach the relevant Registrar to apprise him or her of the specific difficulty that may have been encountered in complying with the provisions of subss (1) or (2) of s 182, as the case may be. Indeed, this is entirely consistent with prevailing practice in the conduct of litigation generally insofar as concerns adherence to the procedural timelines set out in all our rules of court.”

The answer to the second question hinges upon a consideration of whether the stipulated time limits are mandatory or purely directory. Having regard to the relevant rules of statutory interpretation, the Court held as follows, at pp. 19-20:

“The legislative history of these provisions, captured in their genesis and subsequent development, makes it abundantly clear that the purpose for which they were designed was to expedite the final determination of electoral petitions

and appeals and thereby curtail the perceived mischief of interminable electoral proceedings. In addition, the discretionary powers conferred by subs (3) were deliberately inserted in 2018 so as to achieve and secure that legislative purpose and design. To construe the provisions of s 182, taken as a whole, as being merely directory would only serve to frustrate and defeat the clear intention of the legislature and the objective that it sought to attain. It follows, in my view, that the provisions of subs (1) and (2) are imperative and therefore mandatory and that the time limits stipulated in those provisions cannot be exceeded under any circumstances. It also follows that any adjudicative proceedings that may be conducted beyond those time limits are rendered nugatory and must be regarded as being null and void. Put differently, the courts are not at liberty to entertain such proceedings outside the mandated timelines.

To conclude this aspect of the matter, the foregoing construction of s 182 as demanding strict compliance with its prescribed time limits, although seemingly draconian in effect, substantially accords with its plain and grammatical meaning. In this respect, I am unable to perceive any glaring absurdity or inconsistency in the adoption and application of that construction.”

With reference to the constitutional dimension, in particular, the possible violation of the right to a fair hearing, the right of access to the courts in all civil matters and the associated entitlement to challenge election results, enshrined in ss 69 and 157(1)

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(g) of the Constitution, the Court, at p. 20, was not persuaded by the argument that the strict interpretation of s 182 operated to violate any interpretive or substantive norm of the Constitution. In this regard, the Court took the view, at p. 21, that:

“the restrictions imposed by s 182 are eminently ‘fair, reasonable, necessary and justifiable in a democratic society’, taking into account the relevant factors delineated in s 86(2) of the Constitution. In particular, they are necessary in the general public interest to secure the expeditious determination of electoral challenges. Furthermore, given that the timeframes stipulated are not unduly attenuated, they do not operate to impose any greater restrictions on the rights concerned than are necessary to achieve their intended purpose. Lastly, I am unable to conceive any less restrictive means of achieving the purpose of the limitations imposed by s 182.”

The Court accordingly concluded as follows, at p. 22:

“To conclude my analysis of s 182 of the Electoral Act, I take the view that the time limits imposed by that provision on the determination of election

petitions and appeals are mandatory and must be strictly complied with. Moreover, the adoption and application of this strict construction does not entail any contravention or violation of constitutional rights and freedoms.”

Disposition

The petition in *casu* was lodged with the Electoral Court on 10 August 2018. It was determined and dismissed by the court *a quo* on 18 October 2018, not on the merits but on a preliminary point relating to non-compliance with the Electoral Rules. The present appeal was lodged on 2 November 2018. The appellant’s heads of argument on the merits were filed 4 months later on 7 March 2019 and the respondent’s preliminary objections were noted on 12 April 2019. The appeal was first set down for hearing on 24 May 2019 and then later reset to be heard on 29 July 2019. In terms of s 182(2) of the Electoral Act, this appeal should have been determined within 3 months of its having been lodged, *i.e.* by 2 February 2019, a month before the appellant filed his heads of argument.

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I am unable to perceive any cogent basis for departing from the reasoning and consequent judgment of this Court in the *Sibanda / Khumalo* case, *supra*. This is so notwithstanding the seemingly meritorious case instituted and presented by the appellant in the proceedings before the court *a quo*. In the result, the respondent’s point *in limine*, challenging the continued adjudication of this appeal beyond the time limit prescribed by s 182(2) of the Electoral Act, is sustained and must be upheld. Consequently, the appeal can no longer be heard or determined by this Court for want of jurisdiction.

As regards costs, there can be no doubt that the disposition of this appeal revolves around a point of great public importance. It was heard on 29 July 2019, only a few days after the hearing of the appeal in the *Sibanda / Khumalo* matter. In the event, I fully agree with the position taken by Mr *Zhuwarara* that each party should bear its own costs, whichever way the preliminary objection *in casu* was eventually determined.

It is accordingly ordered that the present appeal, having ceased to be properly before this Court by reason of the time limit stipulated by s 182(2) of the Electoral Act having been exceeded, be and is hereby removed from the roll with each party to bear its own costs.

BHUNU JA	:	Judgment No. SC 05/2021 Civil Appeal Case No. SC 837/18 I agree
BERE JA	:	(No longer in office)

DNM Attorneys, appellant's legal practitioners

Chambati, Matoka & Makonese, respondent's legal practitioners