CHIEF NDLOVU

Versus

SITHEMBISO GILE NYONI

And

MANDLA NDLOVU

And

SITHABISIWE MATHEMA

And

CHAIRPERSON, ZIMBABWE ELECTORAL COMMISSION

And

ZIMBABWE ELECTORAL COMMISSION

And

SITHABISILE NCUBE

And

NKOSILATHI NCUBE

And

VIRGINIA NDLOVU

And

JUDAH NDLOVU

And

ANDREW DUBE

And

NKEMEZULU SIBANDA

And

FUNDANI DUBE

And

ZEBRON NCUBE

IN THE ELECTORAL COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 5 February 2024 & 15 February 2024

Election petition

Prof. L. Madhuku with K. Ngwenya for the petitioner
Kanengoni for the 4th and 5th respondents
N. Ndlovu for the 1st, 6th – 13th respondents

DUBE-BANDA J:

[1] This is an election petition presented in terms of the provisions of Part XXIII of the Electoral Act [Chapter 2:13] ("the Act"). On 23 August 2023 Zimbabwe held general elections for the election of the President, members of the National Assembly and Councilors. The challenged election relates to the member of the National Assembly for Nkayi North Constituency in Matabeleland North Province ("the Nkayi North Constituency"). The election result of this Constituency was announced on 24 August 2024.

[2] The petitioner was a candidate for member of parliament for the Nkayi North Constituency in the general election. He was sponsored by a political party called Movement for Democratic Change-Tsvangirai ("MDC-T"). The Zimbabwe Electoral Commission ("ZEC") declared the first respondent a candidate sponsored by a political party called ZANU (PF) duly elected as a member for the Nkayi North Constituency. The second and third respondents were candidates for the election of member of parliament for Nkayi North Constituency. These two respondents neither filed opposing papers nor participated in these proceedings. I therefore take it that they have chosen to abide by the decision of this court.

[3] The fourth respondent is the chairperson of ZEC appointed in terms of s 239 of the Constitution of Zimbabwe (Amendment No. 20) Act of 2013 ("the Constitution"). The fifth respondent is the ZEC established in terms of s 238 of the Constitution. ZEC has the following functions, *inter alia* to prepare for, conduct and supervise elections to the office of

President and to Parliament and to ensure that those elections are conducted efficiently, freely, fairly, transparently and in accordance with the law.

[4] The petitioner contends that the sixth to thirteen respondents are joined in this petition solely for compliance with r 21(f) of the Electoral (Applications, Appeals, and Petitions) Rules, 1995 ("the Electoral Rules"). The petitioner contends that these respondents are guilty of the corrupt and illegal practices that are complained of in this petition.

[5] The respondents took a number of preliminary objections. With the consent of the parties the court heard submissions only in respect of the preliminary objections. Indicating at that stage that should the preliminary objections find favor with the court the matter will be disposed on the basis of the objections. However, should the objections be dismissed the matter would then be set down for hearing on the merits.

[6] The respondents took the following preliminary objections; that the petition was presented outside of the time-line allowed by s 168(2) of the Act and it is improperly before court and must be dismissed; that the petition is fatally defective on account of non-compliance with r 21 of the Electoral Rules; that the citation of the sixth to thirteen respondents is not in terms of the law; and that the petition does not comply with ss 168(3) and 196 of the Act i.e., that the petitioner failed to give security for costs within the time-line allowed by the law. The respondents sought that the objections be upheld and the petition be dismissed.

The law

[7] The jurisprudence in election petitions is that the Electoral Court is a creature of statute. It cannot operate beyond or outside the provisions of the enabling statute and the rules made thereunder. In *Kambarami v 1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21 GUVAVA JA said the Electoral Court "is a creature of statute and its powers are confined to the four corners of the Act." The Electoral Court can only do that which the law permits it to do, and no more. It is not a court with inherent jurisdiction. In *Hove* v *Gumbo* (Mberengwa West Election Petition Appeal) 2005 (2) ZLR 85 at page 92A the court stated as follows:

> "A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else."

[8] An election petition must comply with the mandatory provisions of the Electoral Act [Chapter 2:13] as read with the Electoral (Applications, appeals and petitions) Rules, 1995. Failure to comply with any of the mandatory requirements will render a petition fatally defective and null and void. See (1) *Sibanda & Anor v Ncube & Ors* (2) *Khumalo & Anor v Mudimba & Ors* 2019 (1) ZLR 19 (E).

[9] In *Mutinhiri v Chiwetu; Makanyaire v Mliswa* ECH -11-13 the court said:

> "A petitioner is obliged to render strict compliance with the Rules, failure of which the court has no option but to invalidate the petition. The electoral court, being a creature of statute, is strictly bound by the four corners of the enabling Act."

See *Moyo v Nkomo* SC 67/14; *Nkonjani v Nduna* SC 5/21; *Chitungo v Munyoro & Anor* 1990 (1) ZLR 52 (HC).

[10] It is on the basis of these legal principles that these preliminary points shall be assessed and determined.

<u>The citation of the fourth and fifth respondents</u>

[11] The first issue to be put off the way is the joinder of ZEC and its chairperson. In the notice of opposition, the fourth and fifth respondents objected to their joinder as respondents in this petition. It was contended that the electoral law excludes their joinder as respondents in an election petition governed by the provisions of Part XXIII of the Electoral Act [Chapter 2:13]. It was contended further that in terms of s 166 of the Electoral Act 'respondent' in an electoral petition means the president, member of parliament or councilor whose election or qualification for holding the office is complained of in an election petition. The parties that can be cited as respondents in an election petition are fully spelt out in s 166 of the Act. The fourth and fifth respondents sought that they be removed as respondents in this petition. The petitioner conceded that the joinder of the fourth and fifth respondents is not in terms of the law. In the circumstances the two i.e., the Chairperson of ZEC and ZEC were removed as respondents in this petition.

<u>Whether the petition was presented out of the time-line allowed by s 168(2) of the Electoral Act</u>

[10] At the commencement of the hearing in respect of this preliminary objection Mr. *Ndlovu* counsel for the respondent contended that this petition was presented outside the time line allowed by s 168(2) of the Electoral Act. The basis of this contention was that the election was held on 23 August 2023 and the result for the Nkayi North Constituency was announced on 24 August 2023. In terms of s 168(2) of the Act an election petition shall be presented within fourteen days after the end of the period of the election to which it relates. It was submitted that a calculation of fourteen days from 24 August 2023 shows that the presentation of election petitions ended on 7 September 2023. As this petition was presented on 11 September 2023, its presentation fell outside the time line allowed by the law.

[11] Per *contra* Prof. *Madhuku* counsel for the petitioner submitted that the petition was presented within the fourteen days period allowed by s 168(2) of the Act. Counsel further submitted that the petition was presented on 8 September 2023, not 11 September 2023 as contended by the respondent. Counsel submitted that the end of the election period as defined in 4(b) of the Act was not 24 August 2023 the day the result of the Nkayi North Constituency was announced but the day the result of the poll for the last constituency was announced.

[12] Mr. *Ndlovu* conceded that the petition was presented on 8 September 2023. And that the calculation of the fourteen days allowed to present a petition must start after the end of the election period, not the day the result of the Nkayi North Constituency was announced. The only issue that remained was the date the election period ended. Counsel agreed that they will liaise with ZEC and get the actual date the election period ended and inform the court by letter. On 7 February 2024 Mr *Ndlovu* informed the court by means of a letter that the last declaration of constituency results for parliamentary elections was made on 25 August 2023, marking the end of the election period. Therefore, the end of the election period as contemplated by s 168(2) and as read with s 4(b) of the Act was 25 August 2023. Mr *Ndlovu* conceded that the petition was presented within the time line allowed by the law and abandoned this preliminary objection.

The joinder of the sixth to thirtieth respondents

[13] Mr *Ndlovu* submitted that the sixth to thirtieth respondents have been wrongly joined in this petition. It was submitted that these respondents were not candidates in the election and

therefore their joinder in this petition is fatally defective. Counsel placed reliance on s 166 of the Act.

[14] Prof. *Madhuku* s submitted that the joinder of these respondents is sanctioned by r 21 (f) of the Electoral Rules which provides that an election petition shall state, where the petitioner relies on a corrupt or illegal practice, the full name and address, if known, of every person whom the petitioner alleges was guilty of such a practice. Counsel further submitted that the only way to comply with r 21(f) of the Electoral Rules was to join these respondents in this petition. Counsel could not envisage any other way of complying with this rule, other than the joinder of those persons accused of corrupt and illegal practice.

[15] The convenient starting point in this inquiry is s 166 of the Electoral Act, which says:

> "In this Part 'respondent' means the President, a member of Parliament or councillor whose election or qualification for holding the office is complained of in an election petition."

[16] Section 166 of the Act is clear and admits of no ambiguity in that in an election petition respondent means the President, member of Parliament or councillor whose election or qualification for holding office is complained of. Rule 21(f) requires an election petition to state where the petitioner relies on a corrupt or illegal practice, the full name and address, if known, of every person whom the petitioner alleges was guilty of such a practice. I take the view that stating the name of a person in a petition does not mean joinder of such person as a respondent. If the legislature had intended that such persons accused of corrupt and illegal practices be respondents, s 166 of the Act would have said so in clear terms. It does not. Mr. *Ndlovu* submitted that r 21(f) must be read in conjunction with s 158 of the Act. I agree. Section 158 says:

> 158. Hearing of person accused of corrupt practice or illegal practice
> Before any person, not being a party to an election petition or a candidate on behalf of whom the seat is claimed by an election petition, is found by the Electoral Court to have been guilty of any electoral malpractice, the Electoral Court shall cause notice to be given to such person and, if he or she appears in pursuance of the notice, shall give him or her an opportunity of being heard and of calling evidence to show why no such finding should be recorded against him or her.

[17] Section 158 of the Act gives the person stated in the petition in terms of r 21(f) of the Rules the right to be heard on the matter, that is, to put his or her case at the hearing. Rule 29 of the Rules provide the procedural route to cause a person stated in the petition in terms of r 21(f) of Rules to enjoy his or her right to be heard in terms of s 158 of the Act, in that it requires in peremptory language that notice be served on the person liable to be found guilty of a corrupt or illegal practice not later than five days before the hearing of the election petition concerned.

[18] An assessment of the legislative terrain relating to joinder of respondents in an election petition shows that only persons mentioned in s 166 of the Act must be joined as respondents. Those persons who are accused of corrupt and illegal practices must not be joined as respondents but have their names and addresses stated in the petition. The stating of their names and addresses activates a s 158 of the Act as read with r 29 of the Rules response. Therefore, persons accused of corrupt and illegal practices cannot be joined in the petition as respondents as such would contravene s 166 of the Act which is clear and unambiguous as to who should be a respondent in an election petition. Therefore, the joinder of the sixth to thirteen respondents is irregular in that it is not in terms of the provisions of the law. In the circumstances these persons are removed as respondents in this electoral petition.

[19] The mis-joinder of the sixth to thirtieth respondents, though irregular and not in terms of the law is not dispositive of this matter, in that there is still a respondent before court, i.e., the first respondent. The matter shall proceed as against the first respondent.

Whether there was non-compliance with r 21 of the Electoral (Applications, Appeals, and Petitions) Rules, 1995

[20] Mr *Ndlovu* submitted that an election petition brought on notice is fatally defective for want of compliance with the peremptory requirements of r 21 of the Rules. Counsel further submitted that in this matter, the form and content of the petition does not comply with r 21, in that the petition was brought on notice and it is therefore fatally defective. Counsel further submitted that a reading of s 169 of the Act shows that the presentation of an election petition is a separate process from a notice in writing of the presentation of a petition. In terms of s 169 of the Act a notice of an election petition is served upon the respondent within ten days after the presentation of the petition. Counsel argued that the petition is not the notice. In

essence counsel was attacking the form of the election petition. Counsel relied on the case of *Konjana v Nduna* SC 5/21.

[21] Prof. *Madhuku* submitted that the respondent has misunderstood the case of *Konjana v Nduna* SC 5/21. Counsel further submitted that the difference between a court application and an election petition is that in the petition the grounds upon which the petitioner seeks to have the election set aside must appear *ex facie* the petition. Counsel further submitted that the grounds must not appear only in the founding affidavit, but in the petition itself. Counsel asked that this preliminary point be refused.

[22] The convenient starting point in the determination of this issue is r 21 of the Rules which says:

> Form of election petition
> 21. An election petition shall be generally in the form of a court application and shall state—
> (a) the petitioner's right to present the petition in terms of section 12517 of the Act; and
> (b) the date on which polling took place in the election concerned; and
> (c) the date on which the result of the election was announced in terms of section 66 of the Act; and
> (d) where the petition relates to—
> (i) an election of chiefs, the electoral college by which the election was held;
> (ii) an election of any other member of Parliament, the constituency in which the election was held; and
> (e) the grounds relied on to sustain the petition; and
> (f) where the petitioner relies on a corrupt or illegal practice, the full name and address, if known, of every person whom the petitioner alleges was guilty of such a practice; and
> (g) the exact relief sought by the petitioner.

[23] As far as the form of petition is concerned, the case of *Moyo v Nkomo* SC 67/14 is imperative. The Supreme Court dealt with an appeal involving a petition arising from parliamentary elections. The main argument was that the form taken by the petition did not comply with statutory requirements. See Mutangi T "The Judiciary and Electoral Adjudication in Zimbabwe" in Tsabora J (*ed) The judiciary and the Zimbabwean Constitution* (University of Zimbabwe Pres 2022) 175. The *ratio decidendi* of the decision is that a petition that is lodged on notice is fatally defective to the extent of its non-compliance

with the rules. A petition cannot be brought on notice and the supporting affidavits are not contemplated in the Rules. The court said:

> "In our view r 21 is not only specific and peremptory but it also clearly and adequately sets out the requirements regarding the form and content of a petition. Specifically, the grounds relied on and the exact relief sought must all be apparent ex facie the petition. There is no provision for these details to be substantiated in supporting affidavits or other attachments to the petition ……..….."

See *Konjana v Nduna* SC 5/21.

[24] In *casu* the petitioner substantiated the grounds of attack by means of a founding affidavit and further substantiated the relief sought by means of a draft order. Such procedure is not provided for in the rules. The petitioner lodged the petition on notice and therefore fell foul of r 21. A notice is served after the presentation of the petition and is served in terms of s 169 of the Act, which says:

> s 169 Notice of election petition to be served on respondent
> 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.

[25] The form and content of the petition does not comply with r 21, rendering it fatally defective. Therefore, the petitioner failed to present his petition in the proper format required by law. It is fatally defective. See *Moyo v Nkomo* SC 67/14; *Konjana v Nduna* SC 5/21. There is therefore no valid petition before the court.

Whether the petitioner failed to comply with s 168(3) of the Act

[26] For completeness the objection anchored on s 168(3) of the Act must be considered and determined. The respondent contends that the petitioner has not complied with s 168(3) of the Electoral Act. It was submitted that in terms of the law a petitioner must give security within seven days of the presentation of the petition. It was submitted further that the petition was presented on 11 September 2023 (counsel later agreed that the petition was presented on 8 September 2023), and security was paid on 20 September 2023. Mr *Ndlovu* submitted that the

time frame is mandatory and failure to abide by it renders the petition a nullity. It was submitted that this preliminary point be upheld and the petition be dismissed with costs on an attorney-client scale.

[27] Per *contra* Prof. *Madhuku* submitted that non-compliance with the seven-day time-line does not render the petition fatally defective. Counsel submitted that there is no authority that says non-compliance renders the petition fatally defective. Counsel urged this court to take judicial notice of the challenges in the economy particularly regarding making payments. Counsel submitted that the petitioner faced challenges in giving security and only succeeded two or three days after the due date. Counsel sought a dismissal of this preliminary point.

[28] The parties agreed that the petition was presented on 8 September 2023. The security was given on 20 September 2023 i.e., twelve days after the presentation of the petition and five days the expiry of the statutory period allowed to give such security. Prof. *Madhuku* conceded that security was given outside the time-line, and attempted the explain the cause of the delay. Section 168 (3) of the Electoral Act says:

> Not later than seven days after the presentation of the election petition, security of an amount fixed by the Registrar of the Electoral Court, being not less than the amount prescribed by the Commission after consultation with the Chief Justice, for the payment of all costs, charges and expenses that may become payable by the petitioner —
>
> (a) to any person summoned as a witness on his or her behalf; and
>
> (b) to the respondent;
>
> shall be given by or on behalf of the petitioner.

[29] The explanation for the delay was not controverted. It is satisfactory. It appears that the delay was caused by circumstances beyond the control of the petitioner. In *Dengu v Nyaude & Anor* HH 66-2008 the court said:

> "Section 168 (3) clearly requires the petitioner to give security not later than seven days after the presentation of the petition. It is party (*sic*) of the sections which establishes the petitioner's right to challenge an election petition. It provides a time limit, and peremptory language was used. I am satisfied that even if condonation had been applied for this court does not have authority to condone none compliance with the provisions of s 168 (3) of the Electoral Act."

[30] Failure to give security within the time line decreed by s 168(3) of the Act renders the petition fatally defective and invalid. See (1) *Sibanda & Anor v Ncube & Ors* (2) *Khumalo & Anor v Mudimba & Ors* 2019 (1) ZLR 19 (E). It is for these reasons that this preliminary point has merit and must succeed.

Disposition

[31] The jurisprudence in this jurisdiction is that an election petition is not an application to be supported by affidavits. It is a stand-alone petition and the r 21 requirements must appear *ex facie* the petition itself. All the matters required by r 21 are of equal importance so that failure to state one of them renders the petition invalid. There must further be compliance with the mandatory provisions of the Electoral Act. Failure to comply, the petition becomes fatally defective and invalid. This election petition does not comply with r 21 of the Rules and s 168 (3) of the Electoral Act. Compliance with r 21 and s 168(3) is mandatory. The election petition is fatally defective and therefore invalid. In the circumstances it is not necessary to consider the merits of the petition.

Costs

[32] Mr *Ndlovu* sought costs on a legal practitioner and client scale as against the petitioner. This submission was anchored on the basis that the petitioner was alerted in the opposing papers that the joinder of the sixth to thirteen respondents was irregular and improper. He did not concede this point until the issue had to be argued in this court.

[33] A court may award attorney and client costs against an unsuccessful party where his conduct has been unworthy, reprehensible or blameworthy or where he has been actuated by malice or has been guilty of grave misconduct either in the transaction under enquiry or in the conduct of the case. See *The Law of Costs*, AC Cilliers, Butterworths paragraph 4.50. The scale of attorney and client costs is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in an indubitably, vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium. See *Public Protector* v *South African Reserve Bank* [2019] *ZACC* 29.

[34] Costs on a legal practitioner and client scale cannot be punishment for holding a legal position which does not find favour with the court. A litigant has a right to prosecute its claim or defence without the fear of being mulct with punitive costs should its position not find favour with the court. This would have a chilling effect on litigants who intend to pursue or defend claims, and will undermine the principle of the rule of law upon which this jurisdiction is founded. A case has not been made for costs on a legal practitioner and client scale.

It is accordingly ordered as follows:

i. The preliminary points on non-compliance with r 21 of the Electoral (Applications, appeals and petitions) Rules, 1995, in that the form used is irregular and the failure to give security within the time-line provided for in s 168(3) of the Electoral Act [Chapter 2:13] are upheld.
ii. The election petition is fatally defective, invalid and be and is hereby dismissed with costs.
iii. In terms of s 171(3)(a) of the Electoral Act [Chapter 2:13] in the general election held on 23 August 2023 Sithembiso Gile Nyoni was duly elected as member of National Assembly for Nkayi North Constituency in Matabeleland North Province.

It is so ordered.

Lovemore Madhuku, petitioner's legal practitioners
Nyika, Kanengoni & Partners, 4th and 5th respondent's legal practitioners
Cheda & Cheda Associates, 1st, 6th-13th respondents