CANISIO DENGU
versus
BEDROCK NYAUDE
and
ZIMBABWE ELECTORAL COMMISSION.

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

Electoral Petition

Mr *I G Musimbe,* for the Petitioner
Miss *Musara,* for the 1st Respondent
Mr *G Chikumbirike,* for the 2nd Respondent

UCHENA J: The petitioner and the first respondent were contestants for the Bindura South house of assembly constituency in the March 29 harmonised elections. The petitioner was ZANU (PF's) candidate. The first respondent was MDC Tsvangirai's candidate. The first respondent won the election. The petitioner is challenging the first respondent's election. The second respondent was responsible for the running of the elections and is being sued in that capacity. At the hearing of the preliminary issues the petitioner withdrew against the second respondent. I will therefore refer to the first respondent as the respondent as he is now the only respondent in this case.

The parties appeared before KARWI J for a case management meeting and agreed to the referral of the following preliminary issues for hearing;

1) The effect of the petitioner's failure to serve the petition on the respondent, within 10 days of its presentation, in terms of s 169 of the Electoral Act [*Chapter 2;13*] which will in this judgment be referred to as the Electoral Act.

2) The effect of the petitioner's failure to serve the petition on the respondent either personally or by leaving it at his usual or last known dwelling or place of business in terms of s 169 of the Electoral Act.

3) That the petition was not accompanied by the names and addresses of sureties, and

4) That the petition did not comply with s 168 (3) of the Electoral Act.

The facts from which these facts arise are as follows. The petitioner presented his petition to the Registrar of the Electoral Court on 14 April 2008. He thereafter paid security for costs

on 24/4/08. Security for costs, were paid as party of his party's composite payment for all petitions it had presented. On 2 May the petitioner instructed the Deputy Sheriff to serve the petition on the respondent. The Deputy Sheriff did so on 6/5/08. The petition was not accompanied by the names and addresses of sureties as provided by s 169 of the Electoral Act.

The fact that security was paid in cash means, there was no need for the notice of the presentation of the petition to be accompanied by the names and addresses of sureties. In terms of s 168 (3) security should be given not later than seven days after the presentation of a petition. 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."

This in my view means the recognizance need not be by way of sureties. It can be paid in cash as was done in this case. When it is paid in cash, there will be no sureties whose names and addresses should accompany the notice of the presentation of the petition and the petition. Issue 3 therefore falls away because security was given in cash form.

On the petitioner's failure to give security not later than seven days, after the presentation of the petition, Mr *Musimbe* submitted that, that was because the Registrar had not yet fixed security for costs. It is now common cause that the Registrar fixed security for costs on 23 April 2008. In his heads of arguments Mr *Musimbe* had submitted that security was fixed on 2 May 2008. That can not be true in view of his own oral submission in which he said the petitioner's party paid the composite security for its petitions on 24 April 2008. That means security had been fixed earlier than the 24th April 2008.

A period of seven days after the presentation of the petition on 14 April 2008, expired on 21 April 2008. Security was therefore given 3 days out of time. The explanation for the delay is satisfactory. An official of this court caused the delay. The issue is whether or not this court has authority to grant condonation, and if it has whether the petitioner has applied for condonation. The petitioner has not applied for condonation. In the case of *Viking Woodwork v Blue Bells Enterprises* 1998 (2) ZLR 249 @ 251 C-D SANDURA JA 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."

It is therefore not necessary to consider whether or not this court can condone failure to comply with s 168 (3) of the Electoral Act. That issue has however been considered in the case of *Edson Nyamapfeni v The Constituency Registrar Mberengwa East and Others* HH 27/08 at page 6 of the cyclostyled judgment where I said;

> "It must also be stated that the Electoral Court is a creature of statute. Its jurisdiction is restricted to what is provided in the Electoral Act, which does not provide for condonation. It therefore cannot condone the appellant's failure to comply with the provisions of s 46 (19) (c) of the Electoral Act."

Section 168 (3) like section 46 (19) (c) does not provide for condonation. Therefore failure to comply with its provisions is fatal to the petition. In the case of *Chitungo v Munyoro and Another*1990 (1) ZLR 52 @ 56H-57 B SMITH J said;

> "Counsel unexpectedly died on 16 March before he had attended to the instructions. There was an unavoidable delay in retrieving the instructions and briefing other counsel. The draft petition was returned by counsel on 29 March and presented on 30 March. The explanation was satisfactory and accordingly would justify condonation if this court had authority to condone the late presentation of the petition.
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> Section 140 (2) of the Electoral Act provides that an election petition shall be presented within thirty days after the day on which the result of the election has been notified in terms of this section. There is no provision conferring on the High Court authority to condone the late presentation of a petition."

My understanding of Chintungo's case (supra), is that, the court must look for its authority in the wording of the section under consideration. In his book on "Administrative Law" Marinus Wiechers at page 197 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."

At page 199 the learned author says;

> "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."

Section 168 (3) clearly requires the petitioner to give security not later than seven days after the presentation of the petition. It is party 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.

The respondent's counsel submitted that the petitioner did not comply with the peremptory provisions of s 169. He submitted that failure to comply with s 169 of the Electoral Act is a fatal irregularity, and the petition is therefore a nullity and must be dismissed. On the service of the notice and petition at the respondent's Party's headquarters in Harare he submitted that such service is not in accordance with the provisions of s 169 of the Electoral Act.

On the issue of failure to serve the notice and the petition on the respondent within 10 days as required by s 169 of the Electoral Act, Mr *Musimbe* submitted that this was due to the Registrar's failure to timeously fix the amount to be paid as security for costs. That submission does not explain why notice was only served on 6 May 2008 when security was set on 23 April 2008 and the petitioner paid it on 24 April 2008. In my view if the petitioner had exercised the diligence he displayed in paying security just a day after it was set he could have served the notice in time. On the other hand one expects the petitioner to have known how he was going to pay security for costs. He therefore knew he was going to deposit cash with the Registrar. There was therefore no need for him to serve the notice and petition together with the names and addresses of sureties. He therefore cannot hide behind sureties he knew he did not need as security was to be given in cash.

Mr *Musimbe* further submitted that failure to comply with s 169 is not fatal to the petition and that service at the respondent's party head quarters was sufficient compliance with the provisions of s 169 of the Electoral Act.

Section 169 which provides for service of the petition and how and where it should be served 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"

A literal 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.

The issue of failure to service a petition on the respondent within ten days of its presentation and service at the respondent's party headquarters have already been decided on, by this court in the case of *Tsitsi Veronica Muzenda v Patrick Kombayi* HH 47/08, where KUDYA J at page 6 of the cyclostyled judgment said;

> "I hold that the service of the 6th May 2008 was a nullity for two reasons. Firstly it was in contravention of the 10 day period and secondly, at the wrong place, in violation the provisions of s169 of the Act."

I respectfully agree with KUDYA J's decision on failure to serve within the 10 day period resulting in the petition being a nullity, and serving at the respondent's party headquarters not being in accordance with the law. MAKARAU JP also arrived at the same conclusions in the case of *Patrick Chabvamuperu and Ors v Edmond Jacob and Ors* (supra) where she at page 10 of the cyclostyled judgment said;

> "I am therefore unable to find that service of the election petition twenty eight days after presentation is such an act that can be construed as substantial compliance with the law. The provisions of s 169 of the Act are peremptory and require exact compliance or substantial compliance. In view of the failure by the petitioners to comply exactly or substantially with the provision, their petition is a nullity and the proceedings before the court are rendered a nullity."

I again respectfully agree with the Judge President's decision which considered the issue of substantial compliance and found that there was no substantial compliance.

The facts of the present case are on all fours with the Muzenda and Chibvamuperu cases (*supra*) except for the difference in the period by which the 10 day period was exceeded. However the critical issue is that the statutory period should be strictly complied with, and any

failure to comply is fatal to the petition. In his book on "Administrative Law" Marinus Wiechers at page 197 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 s 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 s 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 says;

> "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 s 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 s 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 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 authority of an officer of government 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* (supra) and the more recent cases already referred in this judgment are a confirmation of the correct approach followed by the courts in this country.

I am therefore satisfied that the petitioners failure to serve the petition within 10 days of its presentation results in the nullity of the petitioner's petition. It must as a result be dismissed.

I should however comment on the petitioner's counsel's submission that service on the 1st respondent's party headquarters was intended by the legislature. Section 169 provides for; service "on the respondent either personally or by leaving the same at his or her usual or last known dwelling or place of business," Reference to "personally" and "his" or her usual or last known dwelling or place of business" could never have been intended to refer to the respondent's party's place of business. The clear intention of the legislature was that if service can not be effected personally on the respondent then the petition and accompanying documents must be left at the respondent's dwelling or place of business and no where else. I am therefore satisfied that service at the respondent's party head quarters is not in terms of s 169. While the correct approach in the case of improper service is to require the party who

failed to effect proper service to effect proper service in this case that will not help as the subsequent service will be way out of time and can not comply with the requirement of service within 10 days of the presentation of the petition.

In the result the petitioner's petition is dismissed with costs.

IEG Musimbe and Partners, petitioner's, legal practitioners.
Mbidzo Muchadehama & Makoni, 1st respondent's, legal practitioners.