PETER MABIKA
versus
ELLIOT MANYIKA

STELLA MUZHINGI
versus
ROSEMARY GOTO

GODFREY NYAMUCHENGA
versus
PADDINGTON ZHANDA

SIMON CHENGAHOMWE
versus
ACQUILINA KATSANDE

AMOS MIDZI
Versus
ELIA JEMBERE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
Harare 30 June & 24 July 2008.

ELECTION PETITION

Mr. Halimani, for, 1st, 2nd, 3rd & 4th petitioners
Mr. Nyawo, for 5th petitioner
Mr. Hussein, for 1st, 2nd & 3rd respondents
Mr. Mukome, for 4th respondent
Mr. Bhamu, for 5th respondent

CHATUKUTA J: All the five petitioners filed petitions challenging the results in the elections held on 29 March 2008. The petitions were presented and lodged with the Registrar of the Electoral Court (the Registrar) on 14 April 2008 in terms of section 168 of the Electoral Act [*Chapter 2:13*] (the Act). At the Pre-Trial Conferences held in respect of each petition, the following issues were referred to trial:

1. Whether service of the election petitions outside the ten day period stipulated in section 169 of the Act is fatal to the petitions; and

2. Whether service of the petitions at the respondents' political party headquarters is service contemplated in section 169 of the Act.

As the issues are the same, I have considered it expedient to issue one judgment in all the matters.

The background to the petitions is that all the five petitioners before me were candidates in the harmonized elections that were held on 29 March 2008. The first petitioner stood as a candidate in the Bindura North, House of Assembly Constituency. The second petitioner stood as a candidate in the Hwedza South, House of Assembly Constituency. The third petitioner stood in the Goromonzi North House of Assembly Constituency. The fourth petitioner stood in the Mudzi West House of Assembly Constituency. The fifth petitioner was a candidate in the Epworth House of Assembly Constituency. The five respondents also stood as candidates in the respective constituencies. They were declared the winners.

The following facts are common cause. Each petitioner presented a petition to this court, in which they sought to have the results of the elections nullified on several grounds as appears in their respective affidavits filed with the petitions. All the petitions were duly presented to court on 14 April 2008. The Act requires that each petition should have been served within ten days of presentation. Service should therefore have been effected on or before 24 April 2008. The first four petitions were served at the ZANU (PF) Headquarters and the fifth petition was served at Harvest House, the MDC (Tsvangirai) Headquarters. The first two petitions were served on 12 May 2008. The third petition was served on 9 May 2008. The fourth petition was served on 6 May 2008.

The only dispute of fact relates to the date of service of the fifth petition. The fifth petitioner alleged that service was effected on 29 April 2008. However, the respondent contended that service was on 6 May 2008 at his party headquarters and upon him personally on 19 May 2008. It is my view that the dispute does not detract from the issues for determination in that service on either of the dates was outside the ten days prescribed by the Act.

The respondents filed notices of opposition raising the same issues, that the petitions had been served out of time and not at any of the places provided for in the statute. As a result of the non-compliance with the provisions of the Act all the petitioners were non- suited. It is on the basis of these points *in limine* that the petitions were referred for hearing.

1. Whether service of the election petitions outside the ten day period stipulated in the Act is fatal to the petitions.

The service of a petition is provided for in section 169 of the Act. It provides:

> "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 personally or by leaving the same at his or her usual or last known dwelling or place of business."

Before I proceed to deal with the submissions by the parties, it is necessary at this stage to note that heads of argument had been filed by IEG Musimbe and Partners for the first and second respondents. In those heads of argument, the respondents were conceding that whilst there was non-compliance with the provisions of the Act, it was not the petitioners' fault but that of the Registrar who had not timeoulsy fixed security in terms of the Act. *Mr. Hussein* submitted that the respondents were abandoning those heads of argument and adopting the third respondent's heads. He submitted that it was not in the interest of the respondents to argue on behalf of the applicants.

It was contended on behalf of the respondents that section 169 was peremptory and therefore required strict compliance. In view of the apparent non-compliance with the provisions of the electoral law the petitions should be dismissed. In this regard, the court was referred to various cases. In particular, I was referred to the following cases: *Nair v Teik* 1967 (2) ALLER 34, *Mfanebadza Hove v Joram Gumbo* SC 143/04, *Patrick Chabvamuperu & ors v Edmond Jacob & ors* HH 46/08. It was submitted that in all

these cases it was held that failure to comply with the time requirements specified in electoral laws was fatal to an election petition. The court was urged to adopt the approach in theses cases. It was further contended that section 169 is a stand alone section and cannot and should not be read together with section 168(3). Had the legislature intended that the sections be read together, then the Act would have specifically provided so.

The submissions by *Mr. Mukome*, for the fourth respondent and by *Mr. Bhamu*, for the fifth respondent, were substantially the same as those by *Mr. Hussein*. In support of the submissions that the fourth and fifth petitioners were non-suited, counsel referred the court to the matter of *Pio v Smith* 1986 (3) SA 145, *Hillary Simbarashe v Zimbabwe Electoral Commission and Anor* HH 45/08 and *Tsitsi Muzenda v Patrick Kombayi & Anor* HH 47/08.

Mr. Halimani, for the first four petitioners, submitted that he abided by the submissions in the petitioners' heads of argument. The submissions were that section 169 should be read together with section 168. He contended that the petitioners could not serve the petitions within the time specified in the Act because the Registrar had not fixed the security payable in terms of the Act. It was submitted that in terms of section 168 (3) a petitioner is required to pay security of an amount fixed by the Registrar. Whilst section 169 requires that a petitioner serves the petition together with a list of their proposed sureties, they could only identify the proposed sureties after being made aware of the security and determine then whether or not the proposed sureties would be in a position to act as such. The Registrar fixed the amount on 23 April 2008. This was only communicated to the legal practitioners through the Law Society of Zimbabwe on 2 May 2008. The delay in serving the petitions was as a result of the delay by the Registrar in communicating the fixed security. The petitioners should therefore not be penalized for the delays in the Registrar's office. It was further contended that, whilst section 169 was couched in peremptory language, it could be considered as permissive. It was submitted that both the time and manner of service were in substantial compliance with the Act.

Mr. Halimani was referred to the cases cited by the respondents. He conceded that all the cases were correctly decided. He however, indicated that he was constrained to abandon the petitioners' heads of argument as he did not have instructions to do so.

Mr. Nyawo, for the fifth petitioner, commenced his submissions by abiding by the heads of argument filed of record. However, he too like *Mr. Halimani*, later abandoned the heads of argument in view of the cases that had been referred to by *Mr. Bhamu*.

It appears to me that the Supreme Court in *Mfanebadza Hove v Joram Gumbo*, *supra*, adopted the strict approach to the interpretation of electoral law. In *Patrick Chabvamuperu & ors v Edmond Jacob & or, supra, Hillary Simbarashe v Zimbabwe Electoral Commission and Anor, supra* and *Tsitsi Muzenda v Patrick Kombayi & Anor*, *supra*, the High Court adopted the substantial compliance approach set out in *Movement for Democratic Change & Anor v Mudede N.O. & Ors* 2000 (2) ZLR 152.

Although the two approaches are different, I am of the view that on the facts presented before me either of the approaches would arrive at the same conclusion. Therefore, it appears to me that the concessions by *Mr. Halimani and Mr. Nyawo* on the correctness of the decisions in the cases cited are proper.

It appears to me that the proper approach to be taken when dealing with electoral matters is as set out in *Mfanebadza Hove v Joram Gumbo*, *supra* at p19. MALABA JA had this to say:

> "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.
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> In *Nath v Shing and Ors* [1954] SCR 895 MAHAJAN CJ said
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> > "The General rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but it is purely statutory proceeding unknown to the common law and that the court possesses no common law power. It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law."

About twenty years later the same principle was reiterated by CHANDRACHUD CJ in *Sahu's* case *supra*, where at p39 he said:

> "The right arising out of elections, including the right to contest or challenge an election are not common law rights. They are creatures of statutes which create, confer or limit those rights. Therefore, for deciding the assertion whether an election can be set aside on any alleged ground, the courts have to consult the provisions of the law governing the particular election. **They have to function within the framework of that law and cannot travel beyond it**."""(**own emphasis**)

Therefore in determining the issue at hand, I must be guided by the provisions of the Act. It is my view that the Act is very clear as to the time limits within which certain acts have to executed. The purpose of the time limits set out in section 169 has been explained in *Pio v Smith supra*, where it was held that the service within ten days is intended to give notice to a respondent in the shortest possible time so that he or she can start preparing his or her response in order to have the case finalized as soon as possible. (See also *Nair v Teik, supra* and *Patrick Chabvamuperu & ors v Edmond Jacob & ors, supra* where it was stressed that it is in the public interest that election petitions be speedily resolved.) The need for the urgent resolution of the petition is more apparent in view of the recent amendment of the Act by the Electoral Amendment, Act No 17 of 2007 which now provides that an election petitions must be completed within six months from the date of presentation. It is my view that because of the exigency to expeditiously deal with electoral matters, the time limits set out in the Act must be strictly adhered with.

It is my view that the adoption of the substantial compliance approach would amount to condoning a departure from the provisions of the Act. This court, as alluded to earlier, being a creature of statute, is limited to the four corners of the Act. The Act does not make any provision for condoning any departure from the provisions of the Act. The granting of condonation would mean that this court would be extending the time within which the service of the petition on the respondent can be effected. In *Nair v Teik, supra*, the court held that unlike common law cases, the court does not have power to condone or extend the time set in the electoral law. LORD UPJOHN, at p40 stated that:

> "in contrast, for example, to the rules of the Supreme Court in this country the Rules vest no general powers in the election judge to extend the time on the grounds of irregularity, their Lordships think that this omission was a matter of deliberate design. In cases where the Judge should have power to amend proceedings or postpone the enquiry it was expressly conferred upon him." (See also **The Registrar General of Elections v Combined Harare Residents Association & Anor SC 7/08**) .

In the result, it is my view that the petitioners are non suited as a result of their failure to serve the petition within ten days of presentation of the petition as is required by section 169.

Even if I were wrong in adopting the strict approach in the interpretation of the Act, I am of the view that I would have arrived at the same decision were I to adopt the substantial compliance approach. In *Pio v Smith* (*supra*) at 165I-166C, MUFALILA J, in dealing with a similar provision, stated that:

> "The part of section 141 dealing with the limitation of time is peremptory and must be complied with either exactly or so substantially that the act could stand on its on, as would be the case, for instance, in a situation where the notice was served within 10 days but without the list of proposed sureties; in other words defects in the notice would invalidate it."

The approach has also been adopted and applied in *Quinell v Minister of Lands, Agriculture and Rural Resettlement* SC 47/04; *Movement for Democratic Change and Another v Mudede and Others supra, Sterling 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), and most recently in *Patrick Chabvamuperu & ors v Edmond Jacob & ors, Hillary Simbarashe v Zimbabwe Electoral Commission and Anor* and *Tsitsi Muzenda v Patrick Kombayi & Anor* (*supra).* The four steps required to establish whether there was substantial compliance are that the court must establish what had to be done in terms of section 169, the purpose or object of the section, what was actually done by the parties and lastly whether there was prejudice.

In *Patrick Chabvamuperu & ors v Edmond Jacob & ors* MAKARAU JP concluded, after considering the four steps, that the petitioner had not substantially complied with the requirements of section 169. The decision in that case was based on almost similar facts and issues to the present matter. The petition in that case related to the same elections of 29 March 2008. The petition had been presented on 14 April 2008. It ought to have been served on or before 24 April 2008, having been presented to court on 14 April 2008. It was purportedly served on 12 May 2008 at the respondents' party's headquarters in Harare filed out of time. The case is therefore on all fours with the present matter.

In the present case, the petitions were presented on 14 April 2008. Therefore in terms of section 169, the petitions were supposed to have been served on the respondents on or before 24 April 2008. The purpose of the provision has remained the same as stated in *Nair v Teik*, *supra*, and *Pio v Smith*, *supra*, that is to give a respondent the shortest possible time so that he can prepare his response to the petition in order to have the case finalised as soon as possible and that the petition be speedily resolved. Whilst previously no time had been set within which a petition should be resolved, that has since changed. A petition must now be resolved within six months of presentation.

The petitioners did not serve the petitions within the required ten days period. The first two petitions were served on 12 May 2008, which is 18 days after the expected date of service. The third petition was served on 9 May 2008, fifteen days after the due date. The fourth petition was served on 6 May2008, twelve days after the due date. The fifth petition was served on 29 April 2008, 5 days after due date (if one is to accept the contention by the petitioner). If one is to go by the fifth respondent's submissions, service was on 6 May 2008, twelve days after the due date. In either case, the fifth petitioner served after the ten days required by section 169. It should be noted that in *Pio v Smith supra*, the court held that the petitioner who served his election petition two days out of time was non-suited. The period was far less than in the present petitions.

It is therefore my view that the applicant did not substantially comply with section 169. I have, as held in *Patrick Chabvamuperu & ors v Edmond Jacob & ors*, also found

it not necessary to consider the last step whether or not there was prejudice as a result of the non-compliance.

The petitioners advanced the argument that service could not be effected within the ten days required by the Act as the amount of security had not been communicated to the parties. I am in agreement with the findings in *Pio v Smith* (*supra* at 162I-163164C and *Patrick Chabvamuperu & ors v Edmond Jacob & ors* (*supra* at pp9-10) that section 169 is not intrinsically linked to the furnishing of security under section 168(3). It is a stand alone provision. Had the legislature intended that they be connected, this should have been specifically provided for in the Act. Both counsel for the petitioners rightly conceded, in my view, that the issue was adequately and properly ventilated in those two cases. I therefore do not consider it necessary to belabour the point.

In any event, all the parties were agreed that the Registrar fixed the amount of security on or about 23 April 2008. As noted above, the petitions were supposed to have been served on or before 24 April 2008. Service of the all the petitions was well after security had been fixed. The parties did not advance any reasons why they did not inquire with the Registrar whether or not security had been fixed yet they were required peremptorily to comply with the provisions of section 169.

2. Whether service of the petition outside the ten day period stipulated in the Act at the headquarters of the respondents' political party complies with the Act.

In terms of the Act, service of a petition must be personal or at the residence or place of business of the respondent. It was argued for the petitioners that service at the respondents' party headquarters was in compliance with the provisions of the Act. The petitioners contented that the respondents conduct their political business at their party headquarters. Therefore the headquarters can and should be considered as the respondents' places of business as envisaged in the Act.

It is my view that a contextual and purposive approach to interpretation of statutes should be adopted. The purpose of requiring that service be personal or be at the respondent's place of residence or place of business is to enable the respondent to have

sight of the petition at the very earliest convenience. It is clear from section 169 that the legislature intended that service be on the respondent personally, failing which it should be at a place where he or she can receive the petition as early as possible. The places where service would be received expeditiously would be place of abode or where one conducts his or her daily business. By providing for service at these places, a respondent would receive the petition as soon as possible thereby allowing her or him, time to prepare his response to the petition expeditiously. It is my view that it is in this context and purpose that the phrase "place of business" should be understood. It appears to me that the phrase should be given its ordinary meaning, that is the place where the respondent ordinarily conducts his day to day business and can be located expeditiously. It was not contended that any of the respondents are employed at or can be found ordinarily at the headquarters of their political parties. Adopting the interpretation of the provisions of the Act as suggested by the petitioners without reference to their legislative purpose, would, in my view, not be proper. The legislature identified the places where service would be effected. Had the legislature intended that service be effected at the party headquarters, I believe it would have specifically stated so in the Act. Members of the legislature are themselves members of political parties and would have provided accordingly had they considered it expedient to do so. In view of the above, the petitioners cannot be said to have complied with section 169.

Further, four of the respondents in this case were contesting in Bindura, Hwedza, Goromonzi and Mudzi. As observed in *Patrick Chabvamuperu & ors v Edmond Jacob & ors*, service of the petitions at the party headquarters in Harare for candidates from these constituencies cannot be said to be in compliance with section 169.

In the result, I make the following order:

IT IS ORDERED THAT:

1. In case No. EP 45/08:
   (a) The petition is dismissed.
   (b) The petitioner shall pay the respondents' costs.

2. In case No. EP 51/08:
   (a) The petition is dismissed.
   (b) The petitioner shall pay the respondents' costs.

3. In case No. EP 91/08:
   (a) The petition is dismissed.
   (b) The petitioner shall pay the respondents' costs.

4. In case No. EP 115/08:
   (a) The petition is dismissed.
   (b) The petitioner shall pay the respondents' costs.

5. In case No. EP 106/08:
   (a) The petition is dismissed.
   (b) The petitioner shall pay the respondents' costs.

Mbidzo Muchadehama & Makoni, 1st, 2nd, 3rd & 4th petitioners' legal practitioners

Mandizha and Company, 5th petitioner's legal practitioners

Hussein Ranchod & Company, 1st, 2nd and 3rd respondents' legal practitioners

Muvingi, Mugadza & Mukome, 4th respondent's legal practitioners
Mbidzo Muchadehama & Makoni, 5th respondent's legal practitioner