

PATRICK DUBE

Versus

OMPHILE MARUPI

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 22 & 29 FEBRUARY 2024

Election Petition

M.E.P Moyo, for the petitioner
M Ndlovu, for the respondent

MANGOTA J: The petitioner and the respondent are political party activists. The former is a member of a political outfit which is known as Citizens for Coalition Change. The latter is a member of the Zimbabwe African National Union-Patriotic Front. These are respectively referred to as CCC and ZANU (PF), for short.

Both parties successfully filed their nomination papers with the Zimbabwe Electoral Commission (“ZEC”). They were sponsored by the political parties to which they are members. Both of them participated in the harmonized election which took place on 23 August, 2023. They were each vying for a parliamentary seat for Gwanda South Constituency (“the constituency”). The respondent made it to Parliament following a declaration of results of the constituency. The petitioner failed to garner sufficient votes for his election into Parliament.

The petitioner filed this petition in terms of sections 66, 167 and 168 of the Electoral Act (Chapter 2:13) (“the Act”). He moves me to set aside the result of the election which ZEC announced on 24 August, 2023 declaring the respondent as the winner of the seat of Parliament in the constituency. His grounds for the motion are, in substance, that the electoral process for the constituency was marred with:

- A) voter intimidation and malpractice;
- B) rigging- and
- C) vote-buying.

The petitioner's narrative is that, prior to the day of voting, he appointed one Simbarashe Tasaranarwo ("Tasaranarwo") as his chief election agent for the constituency. He avers that Tasaranarwo's duties were to ensure representation of his interests during the electoral process. He states that Tasaranarwo's responsibilities comprised accurate collation and verification of returns from every polling station at district level as well as maintaining that accuracy when the returns were moved to the constituency level. Tasaranarwo, he claims, discharged his duties alongside a team of roving agents for the constituency.

He states that, as an aspirant to the parliamentary seat for the constituency, he, on polling day, moved around the constituency observing voting by the general public and coordinating with his chief election officer and election agents. It is his testimony that, when polling commenced, he was stunned to see ZANU (PF) branded tables within 300 meters of the polling stations. He alleges that, at some of the tables, one Rosemary Maphosa of Chief Nhlamba, Zengezane Village, Gwanda, manned one such a table and was recording a register of names of people as they entered and left polling stations. The persons manning the tables, he states, were telling voters that they should vote for ZANU (PF) and not any other party. The tables, he claims, were located in all the eleven (11) wards. The actions, he insists, were not only unlawful but were also against the provisions of the Act. He alleges that some voters who are known to him told him about threats of violence and intimidation from ZANU (PF) agents who allegedly told them that, if they did not vote for ZANU (PF), they would be killed or made to disappear. He states that some voters told him that, if they voted for him, they would not be given mealie-meal and other benefits purportedly supplied by ZANU (PF) in the period leading to the election. He claims that he discovered that some members of ZANU (PF) party had infiltrated themselves into ZEC and were purporting to be polling officers who assisted voters to vote for ZANU (pf). This, he avers, intimidated voters during voting. He states that some ZANU (PF) activists were giving food and drinks to villagers who were near polling stations as they campaigned and urged voters to vote for ZANU (PF). These, he states, were told to get their names registered at FAZ desks. He insists that the election in the constituency was marred by gross electoral malpractices, irregularities and other causes which resulted in an undue election and an undue return. It is his testimony that the election which was so fundamentally flawed did not amount to an election at all. He accuses ZEC officials of mismanaging the election in the constituency.

The petitioner's chief election agent, Tasaranarwo, and five others deposed to affidavits in support of the petition. The five comprise one Ntuntuko Nyathi who alleges that he was a polling agent for the petitioner, one Elves Nare another polling agent for the petitioner, one Pumani Mleya who claims that he was the petitioner's chief election agent in the constituency, one Sikhumbuzo Ndlovu, a registered voter and resident of Funungwe Village, Gwanda and one Eva Dube, another registered voter who is a resident of Sengezane Village which is in Gwanda.

The petitioner couched his draft order in the following terms:

1. It is declared that the declaration by the constituency elections officer of Omphile Marupi as the duly elected member of the National Assembly for Gwanda South constituency in the harmonized elections held on 23rd August, 2023 is hereby nullified.
2. It is declared that the national assembly election at Gwanda South constituency produced an undue return and is nullified.
3. It is ordered that the Zimbabwe Electoral Commission is ordered to conduct a fresh national assembly election at Gwanda South constituency.
4. The registrar of the Electoral Court be and is hereby directed to serve a copy of this order on the Zimbabwe Electoral Commission and the Clerk of Parliament of Zimbabwe.

The respondent opposes the petition. He raises three preliminary matters before he proceeds to address the substance of the petition. His three *in-limine* matters are that:

- i) The petition fails to comply with the *dies* which is stated in Rule 25(1) of the Electoral Court Rules, 1995. The petitioner, he states, gave a *dies* of ten (10), instead of fourteen (14), days within which he had to file his notice of opposition to the petition.
- ii) The petition fails to comply with Section 168(2) of the Act. It should, he insists, have been filed within fourteen (14) days which are reckoned from the date of the end of the election.
- iii) The petition fails to comply with Rule 24(1) of the Electoral Court Rules, 1995.

The respondent insists that the fatal defects which the petition allegedly suffers render the same to be a nullity which disposes of the petition as a whole. He, on the stated score, moves me to dismiss the petition with costs.

The respondent denies, on the merits, all the allegations which the petitioner raises in the petition. He states that the petition fails to meet the requirements of Sections 66, 167 and 168 of the Act. He avers that the election was conducted in a fair and peaceful manner. He denies the existence of intimidation, rigging and/or vote-buying as having characterized the conduct of the electoral process in the constituency. He avers that he was within the constituency on election day and he denies having seen ZANU (PF)-branded tables at or near polling stations. He challenges the petitioner to have reported the existence of such, if such existed, to the police. He further challenges the petitioner to have obtained evidence of ZANU (PF)-branded tables in the form of pictures and/or videos, if such was the case. The allegations, he insists, are not supported by evidence. He denies having ever instructed anyone to intimidate voters or to record their names in any register. He denies witnessing such conduct on election day. He states that the petitioner's agents signed the V 11 forms as an indication of the voting process which took place on the date in issue. The petitioner, he states, failed to lay out a case for nullification of the results of the election. He moves me to dismiss the petition with costs which are at attorney and client scale.

It has become fashionable for litigants whose cases are lined up for hearing at court to file, together with the substance of their cases, what are often referred to as preliminary matters. These are points of law which legal practitioners who represent litigants craft for those whom they represent. In the majority of cases, preliminary issues which are not well thought out or properly considered are a waste of the court's valuable time and its very busy schedule. It is therefore not desirable, generally speaking, for litigants to raise preliminary issues unless, of course, where those matters are, properly speaking, capable of disposing of the case which is placed before the court. Where such is the case, the *in-limine* matter will not unnaturally deserve the attention of the court. Otherwise it does not.

The respondent in *casu* raises three *in-limine* matters. At the hearing of the petition, I had to ascertain from counsel for him if the matters which he raised in his notice of opposition as well as in his Heads had the effect of disposing of the petition. His answer was in the affirmative. He premised it on the allegation that the petitioner violated preemptory provisions of the Act and the Electoral Court Rules, 1995. He insisted that such violations had the effect of rendering the petition a nullity.

It is, accordingly, on the strength of the position of counsel for the respondent that I did not remain constrained to hear arguments on the preliminary matters which the respondent is raising. As a prelude to a consideration of the *in limine* matters which the respondent placed before me, I am persuaded to associate myself with what Bhunu J (as he then was) was pleased to state when he remarked in *Mutinhiri v Chiwetu* and *Makanyaire v Mliswa*, ECH 11/13 that:

“The Electoral Act (Chapter 2:13) incorporates the Electoral Court Rules, 1995. For that reason alone, 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.”

The Supreme Court defined and refined the *dictum* of BHUNU J in a clear and succinct manner. It did so in *Moyo v Nkomo*, SC 67/14 in which it stated that:

“...our Electoral Court is a creature of statute. It cannot operate beyond or outside the provisions of the enabling statute and the rules made thereunder”.

The meaning and import of the above-cited case authorities are clear and straightforward. They are to the effect that the Electoral Act and the Electoral Court Rules assume dominance in such a matter as the present one. They, in short, guide the court in its onerous task of hearing and determining a petition which is placed before it.

The respondent’s bone of contention is that the petition falls foul of peremptory provisions of the Act and its rules. He, in short, alleges that the petition violates:

- i) section 25 (1) of the Electoral Court Rules;
- ii) section 168 (2) of the Electoral Act – and
- iii) section 24 (1) of the Electoral Court Rules.

A consideration of each of the above therefore follows. Rule 25(1) of the Electoral Court Rules, 1995 (“the rules”) offers a respondent who intends to oppose an election petition which is filed against him a period of fourteen (14) days within which he (includes she) should file such. The rule allows him to file the same outside the fourteen-day period where he seeks and obtains leave of a judge to do so. The rule reads:

“ If a respondent wishes to oppose an election petition, he shall, within fourteen days after the petition is at issue or within such further time as a judge may allow, file with the Registrar-

(a) a notice of oppositionand

(b) any counter-application which he wishes to bring in terms of Rule 26”.

According to the rule, it is obligatory for a respondent in an election petition to file his notice of opposition within fourteen days of service upon him of the petition. If he fails to do so and fails to obtain leave of a judge to file his opposing papers, any notice of opposition which he files outside the stated parameters remains a nullity which renders his opposition a non-event.

Because the rule states as such, it follows that the petitioner cannot accord to the respondent what the rule does not confer upon the latter. Both the petitioner and the respondent must comply with the letter and spirit of the rule. The petitioner cannot, for instance, invite the respondent to file his notice of opposition more than the stipulated fourteen days. Nor can he invite the respondent to file his opposing papers in a period which is less than fourteen days. The correct position is for both of them to remain within the letter and spirit of the rule which governs filing of papers which relate to election petitions. They, as parties to the petition, cannot create their own rules. All what they can do is to abide by what the law enjoins them to follow.

The Supreme Court clarified the position of the law on the point which is under consideration. It did so in *Reverend Clement Nyathi v The Trustees for the Time Being of the Apostolic Faith Mission of Africa & Ors*, SC 63/22 in which it remarked as follows:

“The applicant’s failure to accord the proper notice period to the respondent was a fatal defect which rendered the application a nullity. A nullity cannot be condoned. There is therefore no proper application before me”

The above-cited *dictum* of the court remains on all fours with the case of the petitioner. He failed to give a proper notice to the respondent. The proper notice would have been for him to employ the notice which is provided for in Form 23 of the High Court Rules, 2021 and to incorporate in the same the *dies* which is stipulated in Rule 25 (1) of the Electoral Court Rules,

1995. The notice which he accorded to the respondent is inherently fatally defective. This renders the petition a nullity which cannot be condoned.

The Notice which the petitioner prepared and allowed to accompany the petition reads, in part as follows:

“If you intend to oppose the confirmation of this petition, you will have to file a notice of opposition in Form 29A, together with one or more opposing affidavits with the Registrar of the Electoral Court at Bulawayo within ten (10) days after the date on which this notice was served at your place of residence/place of business.....

If you do not file an opposing affidavit within the period specified above, this Application (sic) will be set down for hearing in the Electoral Court at Bulawayo without further notice to you and will be dealt with as an opposed (sic) petition”.

A number of matters which form the basis of the respondent’s complaint are evident from a reading of the notice. One of them is that the petitioner invites the respondent to file a notice of opposition in Form 29A. The form referred to does not exist in the Electoral Court Rules or in the High Court Rules. It used to exist in the repealed High Court Rules, 1971 but it is no longer existent. The observed error, in my view, arises from counsel who did not give time to the case of the petitioner to read and understand that the form which he employed means nothing to an application or a petition. If he had taken the time and trouble to plough through the High Court Rules from which he alleges he borrowed the format of the notice, he would have realized that Form 29A was repealed and replaced by Form 23. The second error of the notice is the ten-day period within which the petitioner invites the respondent to file his notice of opposition. This is contrary to what the relevant rule accords to the respondent. It follows, from a reading of the notice, that if the respondent failed to file his notice of opposition within the ten-day period which the petitioner laid down for him to act, the petition would be heard in the respondent’s absence as an unopposed matter. Such an observed set of circumstances would have been highly prejudicial to the respondent on whom the rule confers a discretion to file his notice of opposition within, or less than, fourteen days. The third error which is apparent from the contents of the notice is that it refers to an application as opposed to a petition. The contents which read ‘this Application will be set down for hearing in the Electoral Court at Bulawayo’ speaks to the observed error. The fourth error relates to the last words which are in the notice.

They read ‘...and will be dealt with as an opposed petition’. This should have read ‘will be dealt with as an unopposed petition’.

Whilst the last two errors are of an insignificant nature and are only pointed out as a way of inviting counsel to remain alive to them in his future work which is, by no means, an easy one, the first two errors go to the root of the petition. The submission of counsel for the petitioner which is to the effect that he borrowed the format of the notice from the High Court Rules because the electoral court rules do not have such is without merit. He cannot have me believe that he failed to appreciate the meaning and import of Rule 33 of the Electoral Court Rules which allows him to borrow the format of the High Court Rules subject to necessary changes in respect of an election petition. Rule 33 of the Electoral Court Rules states, in clear and categorical terms, that:

“The High Court Rules shall apply, *mutatis mutandis*, in regard to any matter not provided for in these rules”.

Nothing, in my view, prevented him from adopting the format which is provided for in Form 23 of the High Court Rules and marrying the same to the *dies inducae* which is stipulated in Rule 25(1) of the Electoral Court Rules, 1995.

The respondent’s first preliminary matter is with merit and it is, accordingly, upheld.

Section 168 (2) of the Act is my next port of call. It reads:

“An election petition shall be presented within fourteen days after the end of the period of the election to which it relates:

Provided that, if the return or the election is questioned upon an allegation of an illegal practice, the petition may be presented, if the election petition specifically alleges a payment of money or some other act to have been made or done since that day by the member or an agent of the member or with the privity of the member or his or her chief election agent in pursuance or in furtherance of an illegal practice alleged in the petition, at any time within thirty days after the day of such payment or other act.”

The first important thing to note is that an election petition must be filed within fourteen days after the day which follows the day of the announcement of the results of an election. That fact is not only clear and straightforward. It is also mandatory. The proviso which appears in the section, in my view, qualifies the main provision of the section. It allows the petitioner,

in some circumstances which are defined in the proviso, to file his petition after fourteen days but not later than thirty days. It is therefore upon the proviso that the argument of the parties on this aspect of the case hinges.

The submission of the respondent in respect of the above-cited section is that the petition was filed out of time and it is, therefore, a nullity. According to him, the result of the election was announced on 24 August, 2023 and the petition was filed on 22 September, 2023. He insists that it should have been filed on 7 September, 2023. He refers me to Rule 3 of the Electoral Court Rules which computes the reckoning of time to include Saturdays, Sundays and/or public holidays. He submits that the petition was filed out of time by fifteen days and is, therefore, a non-event.

The petitioner, in response, places reliance on the proviso to the section which he alleges gives him thirty, and not fourteen, days within which he had to file the petition. A clear and concise interpretation of the *proviso*, therefore, becomes a *sine qua non* aspect of resolving the dispute of the parties on this aspect of the case.

In interpreting the *proviso*, the rules of interpretation of statutes come into play. They are to the effect that words which appear in a statute must be given their ordinary, grammatical meaning except where such leads to absurdity, repugnance or inconsistency with the letter and spirit of the statute as a whole: *Hofrho (Pvt) Ltd & Anor v UDC LTD*, 200(1) ZLR 58. The other principle of interpretation which, it appears, assists in the resolution of the dispute of the parties on this *in limine* matter is the *expressio unius est exclusio alterius* rule which the court had the occasion to consider in *Makone & Anor v Chrmn, ZEC & Anor*, 2008 (1) 230. The maxim, roughly translated, means that the express mention of a thing in a statute or document excludes the thing which is not mentioned in the same.

A reading of the proviso shows that the catch-words in the same make reference to ‘an illegal practice’. The phrase is defined in Part XX of the Act. What this means is that anything which is defined in the said Part of the Act, as an illegal practice, is covered by the proviso and it therefore enjoys the stipulated thirty -day period. By parity of reasoning, it follows that whatever is not covered in the Part is excluded from the thirty-day period which is stipulated in the proviso.

The petitioner makes three allegations against the respondent. These, as has already been stated, refer to voter intimidation and malpractice, vote-buying and rigging. These are excluded from the definition of illegal practice as contained in the relevant sections of the Act.

The petitioner, it is observed, places reliance on section 147 (1) (b) of the Act. The section prohibits the canvassing of votes. He insists that the same accords to him the opportunity to file his petition within thirty, and not fourteen, days as is stipulated in the Section 168 (2) of the Act. However, his reliance on the said section is unfortunately misplaced. It is misplaced in the sense that he does not raise that matter as one of his grounds in the petition. He raises it in his founding affidavit.

Rule 21 (e) of the Electoral Court Rules is relevant in the above-mentioned regard. It reads:

“An election petition shall.....state –

- a)and
- b)and
- c)and
- d)and
- e) The ground relied upon to sustain the petition; and
- f)and
- g) The exact relief sought by the petitioner.

Commenting on the meaning and import of Rule 21 (e), the Supreme Court stated in *Moyo v Nkomo*, SC 67/14 as follows:

“In our view, rule 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.”

The petitioner, it is needless to mention, flouted section 168 (2) of the Act. He filed his election petition out of time. The petition, therefore, suffers an incurably fatal defect. The second preliminary point of the respondent is therefore upheld.

The respondent premises his last *in limine* matter on Rule 24 (1) of the Electoral Court Rules. The rule relates to list of votes to which an objection is taken. It reads:

“(1) Either together with his election petition or not later than seven days after the petition is at issue, the petitioner shall file with the Registrar-

- (a) a list of any votes he intends to object to; and
- (b) a statement of his grounds of objection to each such vote.”

The respondent’s statement is that the petitioner failed to comply with the above-stated rule its peremptoriness notwithstanding. He alleges that the petitioner challenges votes but fails to file a list of the votes which he intends to object to. The petitioner, according to him, makes a blanket statement of the objection. He avers that the petitioner’s failure to provide a list of votes he objects to renders the petition a nullity.

The petitioner’s reply to the respondent’s third *in limine* matter is that the rule which is the subject of consideration at this point of the case is only applicable when a petitioner is challenging specific votes. He insists that he challenges the entire voting process which took place in the constituency. He submits, through counsel, that, if the respondent insists on the petitioner’s compliance with the rule, the latter challenged specific votes when he submitted V 23 forms which show that in the wards concerned the respondent seemed to get a favourable voting pattern because of the alleged illegal practice.

It is my considered view that Rule 24(1) of the court’s rules was crafted with a specific objective in mind. The rules of court never envisaged a situation where a petitioner would challenge the results of an election in an entire constituency but would, in all probability, challenge the voting process which his agents and him were able to observe as having occurred, contrary to the law of elections, at some polling stations within a constituency. For a petitioner to challenge the whole voting process which took place in a whole constituency, he would have to allege that his agent (s) and him were at every polling station observing the manner of voting by the voting public as well as the conduct of other interested persons who were at those stations. Short of that, the petition runs the risk of inviting the court to upset votes which were taken at polling stations which the petitioner’s agent(s) and him did not visit and/or observe on the day of voting.

The petitioner's statement is that the election which took place in the constituency occurred in eleven (11) wards. Judicial notice is taken of the fact that each ward had/has a number of polling stations. Whilst the number of polling stations which were set up in the constituency have not been mentioned, it is, in my view, improbable that the petitioner and his four agents were able to observe the conduct of an election which took place in the whole of Gwanda South constituency. The petitioner appears to have exaggerated this aspect of his case with a view to upsetting the result of the election which, to all intents and purposes, might have been conducted in a fair, clear and transparent manner. His narration of events on this aspect of the case appears to be more improbable than it is possible, let alone probable.

The petitioner, it is observed, couches his petition on this aspect of the case in vague terms. He alleges, on the one hand, that voting in the constituency was marred by illegal practice of such a serious magnitude as to upset the entire election process which took place in the constituency on 23 August, 2023. He, in the alternative, insists that he complied with the rule when he submitted V23 Forms which show the list of votes he intends to object to.

The long and short of his stated conduct is to invite me to go on a fishing expedition with him, so to speak. The clear message which comes out of the observed position is that the petitioner is certain of what he wants to achieve but is not sure of how he should go about to achieve it. He cannot be allowed to approbate and reprobate on one and the same matter as he is doing: *Mare v Deas*, 1912 AD 242 at 259. He should take a clearly defined course of action and proceed with it to its final conclusion. He cannot be allowed to suggest that, if the court is not with him in his first line of prosecuting his petition, then it should buy his alternative. Such conduct is consistent with that of a person who is prepared to have it all at all costs regardless of whether his petition has merit or has no merit. That conduct should be frowned upon in the extreme sense of the word.

The petitioner submitted only two V 23 Forms which accompanied his petition and, with only those, he seeks to persuade me to nullify the election which took place in the whole constituency on the strength of the two forms. He is encouraged to be candid with the court when he files such a petition as he filed. If his intention was to object to the votes which appear in the two forms which he makes reference to, he was at liberty to state as such. What he cannot do is to refer me to the two forms and move me to quash the whole election which took place in the constituency which, according to him, boasts of eleven (11) wards.

Because of the conduct of the petitioner in respect of this preliminary point-as outline above- it cannot be said that the respondent failed to discharge the *onus* which rests upon him. He proved that the petitioner violated Rule 24 (1) of this court's rules. The third *in limine* matter is, accordingly, upheld.

When all has been said and done, therefore, the respondent proved the merits of each preliminary matter which he raised on a preponderance of probabilities. The petitioner, I am satisfied, failed to comply with mandatory provisions of the Electoral Act and the Electoral Court Rules in a dismal way. The petition is, accordingly, dismissed with costs.

Mathonsi Ncube Law Chambers, petitioner's legal practitioners
Cheda and Cheda, respondent's legal practitioners