

BLESSING CHEBUNDO
versus
MASANGO MATAMBANADZO

HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 5 AND 25 SEPTEMBER 2018 AND 22 NOVEMBER 2018

Election Petition

T Chitere for the petitioner
L Mashanyare with *T C Masawi* for the respondent

MABHIKWA J: The petitioner was a candidate for the Movement for Democratic Change (MDC) Alliance in the general elections held on 30 July 2018. The respondent also participated in the same election contest representing the National Patriotic Front (NPF) party. The two, together with other candidates were vying for the Kwekwe Central Constituency National assembly seat.

On 3 July 2018, the respondent was declared the winner of the polls and dully announced the elected Member of Parliament for the Kwekwe Central National assembly with 7 578 votes. The petitioner polled 7 127 votes. On 16 August 2018, the petitioner filed the above petition seeking the following relief that—

1. The election of Masango Matambanadzo as member of the National Assembly for Kwekwe Central Constituency in the Harmonised Elections held on 30 July 2018 be set aside.
2. The parliamentary seat for the Kwekwe Central Constituency be declared vacant.
3. A declaration that a by-election be held within ninety (90) days of the court order to elect a member of the National Assembly for Kwekwe Central Constituency in terms of provisions of the Electoral Act.

4. The Registrar of the Electoral Act be directed to serve a copy of the court order on the Zimbabwe Electoral Commission and speaker of the Parliament of Zimbabwe.
5. The respondent bears the costs of suit of the petition.

Brief background facts

In his founding affidavit, the petitioner stated that the grounds upon which his petition is based include vote buying in that the respondent engaged in massive vote buying in the Kwekwe Central Constituency and that this unduly influenced voters with the effect of swaying the votes in favour of the respondent. He alleged that respondent enticed the electorate by giving them money and food handouts which consisted of rice and cooking oil among others to ensure that they voted for him. He further alleged this malpractice was rampant in Wards 6, 7, 8 and 9.

It must be stated at this stage that the petitioner was actually and clearly alleging corrupt practices against the respondent and it is trite that once one alleges corrupt practices against another in an election petition, then the petitioner must prove those allegations beyond reasonable doubt and the standard of proof is the same as in criminal cases.

Secondly, the petitioner complained that the respondent exploited state's resources to further his campaign programmes by using an ambulance bought using Constituency Development Funds (CDF) during his tenure as a ZANU (PF) member of the National Assembly.

Thirdly, the petitioner complained that the respondent fraudulently misrepresented himself to the Kwekwe central constituency electorate by constantly purporting to be working with the MDC Alliance presidential candidate Nelson Chamisa. He alleged that respondent gave out Chamisa's cards and insinuated that National Patriotic Front was one of the seven parties that formed the alliance. Respondent allegedly misled the electorate by alleging that he was the National assembly candidate for the MDC Alliance in Kwekwe Central whilst the Petitioner was the senatorial candidate.

The petition was opposed by the respondent who filed points *in-limine* as follows:

- 1) That there was none-compliance with section 168 (3) of the Electoral Act in that the petitioner had failed to show or provide proof of payment of security for costs.

- 2) That the petitioner did not state his right to present the petition in terms of rule 21 subrule (A) of the Electoral (applications, appeals and petition) Rules SI 74 of 1995.
- 3) That in the petition, the petitioner calls upon the respondent to file the opposing papers in the Harare court yet he issued his petition out of the Bulawayo court-Respondent stated that this rendered the petition fatal for non-compliance with the rules and that the petition is therefore non suited before the court.

For the purposes of time, expediency and the nature of the petition, it was agreed between the parties with the court's indulgence that they argue the issue in the points *in limine* as well as the merits at once so that the court will also deal with the two issues at once in the judgment.

The court will now deal with the points *in limine* first.

On the day of hearing, the respondent withdrew his second point *in limine*, that of non-compliance with rule 21 (A) of the Electoral (Applications, Appeals and Petition) rules SI 74 of 1995.

Section 168 (3) of the Electoral Act [Chapter 2:13] provides as follows:

“Not later than seven days after the presentation of the election petition, security of an amount fixed by the Registrar of the Electoral Act, 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.”

At the hearing of the petition, it was argued by Mr *Masawi* for the respondent that the import of section 169 of the Electoral Act is that the petitioner has to serve on the respondent proof of payment of security for costs together with the petition. Failure to serve proof of security for costs and to provide securities and their addresses as contemplated by section 169 is fatal to the petition.

On the other hand, it was submitted by Mr *Chitere* for the petitioner that once the amount of security is paid as fixed by the CHIEF JUSTICE, then there is no need to serve the names and addresses for the proposed surities, as there is no need for such surities. It was further argued that the issue of security for costs was settled by KUDYA J in *Muzenda v Komabyi and another* HH 47/08 where the Honourable Judge had this to say:

“My view is that once the petitioner pays the amount fixed, it is not necessary to furnish the names and addresses of surities. ---. He only does so where he enters into a recognizance.”

I find reason in the above finding and in the argument by Mr *Chitere*. Section 169 as read with sections 168 and 170 of the Electoral Act, contemplates a situation where a petitioner has not paid the whole amount of security, such that he/she has had to enter into recognizance with the Registrar whereupon he has to furnish the names of securities and their addresses. The proof of the amount paid, together with the full names and addresses of the surities would have to be served on the respondent and on any subpoenaed witnesses who in terms of section 170 have the right to object to the amount paid.

In *casu*, it appears that though proof payment of security for costs was belatedly served on the respondent, the petitioner had paid the whole amount as fixed by the Chief Justice so the argument does not arise.

In any case, in their point *–in-limine*, respondent had pleaded non-compliance with section 168(3) only. The shift to section 169 only came in argument on the date of hearing. Whilst it is trite that any preliminary point may be raised at any time or stage of the proceedings it appears to me that on that aspect, respondent was on a fishing expedition.

I accordingly dismiss the first point *in limine*.

On the second point, the court notes that at the outer page of the petition page, at the top corner the petitioner clearly showed that the petition would be heard by the Electoral Court Division, held at Bulawayo. At the bottom left corner of the same “application/petition” page, applicant’s legal practitioners provided not their Kwekwe address nor a Harare address but their Bulawayo correspondents’ address for service.

Most importantly the petition was received by the Registrar of the High Court, Bulawayo as shown by the date stamp of 16 August 2016. It (petition) was also allocated a Bulawayo Electoral Court No. 6 of 2018.

On the next page containing the index, respondent again shows that the petition will be heard at the Bulawayo Electoral Court. Again, that page is stamped by the Registrar at Bulawayo. Practically, the petitioner, through his legal practitioners, provides a Bulawayo

address for service and the process is addressed, served and issued by the Registrar of Electoral court in Bulawayo.

The Notice referred to by counsel for the respondent is headed at page 1

“Election Petition in terms of section 167 of the Electoral Act [Chapter 2:13]. Just as in the previous pages, it is clear that the petition is being issued out of the Bulawayo court. It is only on page 4, the last sentence that the notice reads

‘If you do not file an opposing affidavit within the period specified above, this application will be set down for hearing in the Electoral court at Harare without further notice to you ---.’”

Surely anyone reading the petition together with the offending notice would tell, with no difficulty at all that the phrase “court at Harare” was a typographical error which needs no debate or argument at all. It is clear from the rest of the processes that the matter is to be heard at Bulawayo. That is I believe the reason why respondent filed his notice of opposition in Bulawayo not in Harare. It cannot be argued at all as Mr *Masawi* does that there was non-compliance with the Electoral Act. The intention on and the compliance is clear. I thus dismiss that point *in limine* as well.

Merits

Coming to the merits of the case, it has been already stated above that in his first ground, the petitioner is in effect alleging corrupt practices against the respondent. In *Hove v Gumbo* (Mberengwa West Election appeal) S 143-04 2005 (2) ZLR 85. The petitioner was a candidate in the election sponsored by the Movement for Democratic Change (MDC) whilst the respondent was representing the Zimbabwe African National Union (ZANU (PF) in the same election. On 17 July 2000, the petitioner presented an election petition in terms of section 132 of the electoral Act, complaining of “irregularities, illegal and corrupt practices in the election of the respondent. The relief sought was an order nullifying the election of the respondent, the setting aside of the election result and barring the respondent from standing as a Parliamentary candidate for a period of 5 years.

MALABA JA (as he then was) stated at page 90 quoting the Supreme Court of India in *Kinju v Unni* [1984] 3 SCR 162 that:

“There is total consensus of judicial opinion that a charge of corrupt practices under the act must be proved beyond reasonable doubt and the standard of proof is the same as in a criminal case.”

It was further stated that a charge of corrupt practices under the Representation of the People Act must be established by clear and cogent evidence. The court in *Hove v Gumbo (supra)* found that undue influence had not proved against the respondent. The court further held that it was very difficult to prove a charge of corrupt practices merely on the basis of oral evidence because in election cases it is very easy to get the help of interested witnesses but very difficult to prove charges of corrupt practices (the underlining is mine).

Also in the Gokwe South Election Petition MAKARAU J (as she then was) pointed out that the Electoral Act imposes high standards of election morality, particularly in an election petition where corrupt and illegal practices are alleged.

In *casu*, the petitioner alleged numerous and widespread corrupt practices against the respondent leading to the polling day. He chronicled them as follows in his founding affidavit.

1. That on 3 May 2018, the respondent gave Rita Madututu rice and money in the sum of \$10-00 in exchange for voting for him in 2018 elections.
2. That on 12 July 2018 Evelyn Rubvuta and Shylet Kandarira among others were invited to respondent's garage at Amaveni where respondent allegedly gave them extensive “political education before offering them 5kgs of rice to ensure that they vote for him. The respondent allegedly also averred that he was a member of the Patriotic Front candidate Nelson Chamisa.
3. On 20 July 2018, allegedly held a small rally at Ivanhoe Mine where he guttered over 60 people who included John Paradza. He allegedly gave those present \$10 each and even promised to host a party for them if he won the parliamentary seat.
4. Again on 20 July 2018, respondent allegedly approached Collen Mabhena, with workmates Elvis Sibanda, Fayson Banda, Petros Moyo and Amadu Chitange and gave them \$10 each. He also allegedly promised to secure jobs for those who aided him in his campaign strategies.

The petitioner then went on to refer to corrupt practices as defined in section 4 of the Electoral Act and that they include personation, bribery etc.

I deliberately underlined the dates on which the alleged massive vote buying took place. It shall be noted that they all allegedly took place well before the elections on 30 July 2018. For that reason I asked the petitioner and his counsel why they did not apply to the court for an interdict or even disqualification of the respondent right at the time the need to act arose rather than wait until voting was over and until they had lost the election, only to file a petition two (2) weeks after such announcement of results.

Further, one would question, as I did during the hearing, the reliability of such alleged voters who change allegiance to their candidate by merely being given \$10 or a packet of rice. In fact one wonders whether such voters are worth voting in the first place. I was not surprised to find out that in the *Gokwe Election Petition (supra)* MAKARAU J (as she then was) also questioned reliance on seemingly “directionless youths whose political loyalty can be briefly bought.”

As already stated above, allegations of corrupt practices should be proved beyond reasonable doubt on the same high standard of proof as in Criminal cases. In any case, in terms of 171 of Electoral Act, once disputes of fact arise in an election petition as was the case in the current one, the electoral court may be turned into a trial court. In the Gokwe Election petition, the witnesses testified verbally and the court believed some and disbelieved others.

In *casu*, the petitioner relied on the affidavits of the said “supporters” completely untested by cross examination. As MALABA JA pointed out in *Hove v Gumbo (supra)*, it is very easy to find assistance of interested witnesses in an election petition, I would add that it is even much easier to get interested witnesses or supporters who would depose to anything in an affidavit to be used in an election petition knowing that they would not be tested in cross-examination as to the truthfulness of their averments.

As argued by Mr *Mashanyare* for the respondent, the deponents to the affidavits relied on by the petitioner do not state whether after being “bought” or mislead, they still went on to vote or not, and if they did, they do not say they then voted for the respondent instead of the petitioner. Further, *Mashanyare* argues that basically, the grounds upon which the petition is

based are complaints containing vague and general complaints which do not state in precise terms the precise prejudice and material effect in which the alleged acts of or malpractices affected the election.

The court finds that the alleged corrupt practices cannot be said to have been proved beyond reasonable doubt.

On the second ground, the petitioner alleged misrepresentation or impersonation so to speak where in respondent allegedly falsely aligned and portrayed himself to the Kwekwe Central electorate as working closely with Nelson Chamisa. He also allegedly misrepresented to the electorate that the petitioner was in fact the MDC senatorial candidate whilst he (respondent) was the National Assembly candidate for the MDC.

This argument means that the petitioner begs this Honourable Court to waste its time pondering on his alleged supporters who are unduly timid and gullible to the extent that they probably do not even know him and can listen to anyone telling them any “parable” about “their candidate.”

The petitioner went on to cite the Gokwe election petition in respect of this ground. But the Gokwe Electoral petition is very distinguishable from the current one. In the petition, the MDC candidate for Gokwe South was attacked and severely assaulted by the rival ZANU (PF) supporters for almost – 45 minutes. As a result of the attack the medical report sworn to by the doctor and describing the injuries, also showed that he “sustained four (4) scalp lacerations, a laceration on the forehead, chest contusion, rib fractures, multiple bruises and plural haematoma.” He was in hospital until after the elections, only managing to go out briefly to vote after pleading with the hospital authorities. Meanwhile the rival candidate and his supporters circulated a rumor that the petitioner had died and was therefore no longer a contesting candidate which rumour many people reasonably believed because they were not seeing him.

In *casu*, the petitioner literally wants the electoral court to act retrospectively to protect his “supporters” from all sorts of imagined wrongs by rival candidates.

On the final complaint of abuse of public facilities, reference being made to the ambulance allegedly bought using the ZDF funds, the respondent has denied completely that he drove around the ambulance and that neither his agent, employee or relative paraded the said

ambulance. The petitioner has not provide evidence of who exactly drove the vehicle and committed the act complained of save for the bald averment that it was the respondent. In any case it has been argued, which argument I find merit in, that even if the ambulance was driven around in the manner complained of, there was nothing wrong with that conduct in the circumstances. I find merit in that argument because the petitioner does not appear to draw the line between a malpractice and a legitimate campaign strategy.

In *casu*, the respondent was apparently an aspiring returning member of parliament. If in the previous parliament he lobbied for, and assisted the community to secure an ambulance, it is a public facility yes. However, what is wrong with him telling the electorate that “if you vote for me, I will do good things for you as I did in the last parliament such as this ambulance that you can all see. What is wrong with an aspiring returning candidate whose efforts in the last parliament saw the constituency receiving a clinic built for them by the Government. Why cannot that candidate point the electorate to the clinic and say “you remember last time you voted me and I secured a clinic which you all see. If you vote me again, I will do more things for you.”

In my view it is pure campaign and no malpractice there. The candidate is simply assuring the electorate that he is a man with accountability, who keeps his promises to deliver and uses state funds responsibly.

Finally, it is pertinent to note the proviso to section 168 of the Electoral Act. It reads—

“Provided that, if the return of an election is questioned upon 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----- in furtherance of the illegal practice alleged in the petition, at anytime within 30 days after the day of such payment or other act.”

I would agree also with counsel for the respondent that almost all the acts complained of by the petitioner are criminal acts, yet there was never any report filed with the police.

In the recent case of *Nelson Chamisa v Emmerson Dambudzo Mnangagwa and 24 others* MALABA CJ pointed out that:

“It is an internationally accepted principle of election disputes that an election is not set aside easily, merely on the basis that an irregularity occurred. There is a presumption of validity of an election. It is not for the court to decide elections, it is the people who do

so. It is the duty of the courts to strive, in the public interest to sustain that which the people have expressed their will in.”

From the foregoing, it is clear that the whole essence of an election petition is to find out to what extent the malpractice or actions complained of, materially affected the outcome of the election. In *casu*, the petition does not meet that requirement of the law.

Consequently the election petition is dismissed with costs of suit.

Chitere, Chidawanyika and Partners, petitioner’s legal practitioners
Mavhiringidze and Mashanyare, respondent’s legal practitioners