HH 137-2003
HC 3175/2003
HC 3616/2002
HC 469/2003
HC 470/2003
HC 471/2003
HC 1788/2003
HC 2022/2003

MORGAN TSVANGIRAI
vs
ROBERT GABRIEL MUGABE
and
THE REGISTRAR-GENERAL OF ELECTIONS
and
THE MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS
and
THE ELECTORAL SUPERVISORY COMMISSION

HIGH COURT OF ZIMBABWE
MAVANGIRA J,
HARARE, 28 March and 14 April, 2003

Mr *B Elliott* on 28 March, 2003 and
Adv *A P de Bourbon SC* on 14 April, 2003 for the applicant
Mr *T Hussein* for the lst respondent
Mrs *Y Dondo* for the 2nd and 3rd respondents
Mr *G Chikumbirike* for the 4th respondents on 28 March, 2003 only

MAVANGIRA J: On 28 March, 2003 I called the parties in chambers and gave directives as to how I intended to deal with the matter, with particular reference to the filing of papers and heads of argument. During the proceedings the 4th respondent's legal practitioner objected to his client's joinder in the proceedings on the basis that his client is not a party to the proceedings and that no relief is sought against it in any event. He bitterly complained about having been called to attend court on this matter as it was a complete waste of time and resources for the 4th respondent.

In response Mr *Elliott* submitted that the application before the Court affected all the four parties directly and for that reason all the respondents, including the 4th respondent, had been cited. He also submitted that as the 4th respondent was a party at the Pre-trial Conference on 16 September before GARWE JP, it consequently was a party to the present application. Furthermore, the 4th respondent had not complied with orders issued against it

by the Judge President. He also submitted that although the 4th respondent's legal practitioner insisted that his client is not a party to these proceedings, he has made no effort whatsoever since April 2002 to have his client struck out as a party. It would thus be extremely anomalous therefore not to serve the notice of set down on the 4th respondent. He submitted that an order had also been issued by GUVAVA J against the 4th respondent compelling it to discover documents that it had refused to discover.

In response Mr *Chikumbirike* submitted that it was not in dispute that the 4th respondent is a party to these proceedings but proceeded to state that it is a misjoinder which will be a preliminary issue at the hearing of the main matter, the Election Petition in Case No HC 3616/2002. The 4th respondent has no interest in the present application. The order by GUVAVA J, it was submitted, is not before this Court and will be dealt with appropriately. It might be appealed against. He submitted that the applicant should bear the 4th applicant's costs for the day.

Although the court asked Mr *Chikumbirike* to formally indicate in writing the 4th respondent's stance, to date he has not done so.

Mr *Chikumbirike* asked to be excused before I had given my directives in full as to the filing of papers and the hearing of the application which was to be on 14 April, 2003. Since then there has been no further participation by the 4th respondent which did not file any papers nor attend the hearing on 14 April, 2003.

This is an application in which the applicant prays that the court exercises its discretion in terms of Rule 165(2) of the High Court Rules and issues an order in the following terms:

"IT IS DECLARED:

1. That the Second Respondent has failed to comply with the Orders of this Honourable Court dated 12 October 2002 in Case Nos. HC 469/2003 and 470/2003, being Orders made in terms of Rule 165(1) of the High Court Rules 1971.
2. That the Third Respondent has failed to comply with the Order of this Honourable Court dated 12 October 2002 in Case No. HC 471/2003, being an Order made in terms of Rule 165(1) of the High Court Rules 1971.

ACCORDINGLY IT IS ORDERED:

1. That in terms of Rule 165(2) of the High Court Rules 1971 the Second Respondent's application to the applicant's application in Case No. HC 3616/2002 be and is hereby struck out and judgment be and is hereby given in default with costs in Case No. HC 3616/2002 against the Second Respondent and in favour of the Applicant.
2. That in terms of Rule 165(2) of the High Court Rules 1971 the Third Respondent's Opposition to the Application in Case No. HC 3616/2002 be and is hereby struck out and judgment be and is hereby given in default with costs in Case No. HC 3616/2002 against the Third Respondent and in favour of the Applicant.
3. That the Second and Third Respondents shall pay the Applicant's costs of suit in relation to this application jointly and severally, the one paying the other to be absolved".

The applicant is the President of the political party called the Movement for Democratic Change (MDC). He stood as a Presidential candidate on behalf of the MDC at the Presidential Election held on 9 to 11 March, 2002. The second respondent declared the first respondent who is also the President of the political party Zimbabwe African National Union (Patriotic Front) (ZANU(PF)), the winner of the Presidential Election.

On 12 April, 2002 and in Case No HC 3616/2002 the applicant instituted an Election Petition in terms of section 102 of the Electoral Act, Chapter 2:01, against all the respondents cited in this application, challenging the outcome of the Presidential Election held on 9 to ll March, 2002. The applicant submits that in his affidavit in Case No HC 3616/2002 he made numerous serious allegations against the second and third respondents in relation to the manner in which they conducted the said Presidential Elections. The said

respondents filed notices of opposition and opposing affidavits after which the applicant filed answering affidavits.

On 16 September, 2002, and in Case No HC 3616/2002 GARWE JP granted an order in the following terms:

> "IT IS ORDERED THAT:
> 1. The applicant shall file and serve his discovery affidavit and list of the witnesses he intends to call together with a summary of their evidence by Friday 4 October, 2002.
> 2. The respondents shall file and serve their discovery affidavits and list of witnesses they intend to call together with a summary of their evidence by 31st October, 2002.
> 3. Thereafter a Pre-Trial Conference shall be convened for purposes of discovering all issues related to the holding of the Trial.
> 4. Costs are to be in the cause".

In his discovery affidavit filed on 30 October, 2002, the second respondent disclosed two documents. On 6 January, 2003 the applicant filed a notice to produce documents for inspection. The applicant submits that there was no response to the said notice leading to the applicant instituting proceedings in Case No HC 469/2003 seeking an order that the second respondent makes available the discovered documents in terms of Order 24 of the High Court Rules, 1971. Such an order was granted on 12 February, 2003 and it was served on the second respondent on 21 February, 2003. The order is in the following terms:

> "IT IS ORDERED:
> 1. That the Respondent shall make available for inspection by the Applicant's Legal Practitioners in terms of Order 24 of the High Court Rules the Voters' Roll for the 2002 Presidential Election within five (5) days of the date of service of this Order on the Respondent".

The second paragraph of the order relates to the issue of costs.

The second respondent filed an Urgent Chamber Application in Case No HC 1788/2003 seeking directions on how to comply with the order in Case No HC 4691/2003.

The application was summarily dismissed with costs on 4 March, 2003. The second respondent then filed a Notice to Inspect Documents on 6 March, 2003, which notice the applicant submits, was not filed in accordance with the Court Order in Case No HC 469/2003.

On 10 March, 2003 the second respondent filed another Urgent Chamber Application in Case No HC 2022/03 seeking a postponement of the inspection programme set out in his notice filed earlier on 6 March, 2003. The application was dismissed with costs on ll March, 2003.

The Notice to Inspect Documents filed in Case No. HC 469/2003 on 6 March, 2003 reads:

> "Take Notice, that you may inspect the voters' roll for the 2002 Presidential Election on the dates and at the places mentioned in the schedule annexed hereto between the hours of 9 a.m. - 12.30 p.m. and 2.00 p.m. - 4 p.m."

The "Visiting Dates" in the schedule to the notice span a period from l March, 2003 to 21 October, 2003, that is slightly longer than 32 weeks, covering 120 constituencies and with the inspection to be carried out at 53 stated places and/or offices,

The applicant submits that the Notice to Inspect Documents, which was filed on 6 March, 2003 fails to comply with the Order in Case No HC 469/2002 for two main reasons. Firstly, because Rule 164(2)(a) of Order 24 sets out the place for inspection as:

> "The place for such inspection shall be -
> (a) If the person called upon is represented by a Legal Practitioner, the office of that Legal Practitioner…".

The applicant submits that despite this the second respondent summarily and unilaterally appointed various places situated throughout Zimbabwe for inspection of the documents, thus breaching the Court Order.

The second reason, in the applicant's submissions, is that the said Order orders inspection to take place within five days. The second respondent however summarily and unilaterally has only allowed inspection to take place from l0 March 2003 to 21 October, 2003, thus breaching the Court Order. The applicant also made reference to cases in which the second respondent has in the past been criticised for his conduct by this Court. reference was made to *Dongo* v *Mwashita*, 1995(2) ZLR 228(H); *P C Chihota* v *Registrar-General of Elections and Another* HH 11/2002 and *Morgan Tsvangirai* v *Registrar-General and Others*, HH 29/2002 especially from the foot of pages 24 to 25 and from pages 50 to 51. Reference was also made to *Supiya* v *Mutare District Council & Ors*, 1985(2) ZLR 53 (HC), the main case in Zimbabwe dealing with Rule 165, as authority for the granting of the relief sought by the applicant in this application.

The applicant submits that the second respondent has persistently disregarded Orders and directions of this Court. Even as at April, 2003, over 5 months after discovery was made, proper inspection had still not been allowed. The Court should also consider that this is not an isolated incident as the second respondent has persistently flouted orders and directions issued by this Court. The applicant also submits that the second respondent is thus guilty of gross contumacy and this, it was held in the *Supiya* case, *supra*, is a good reason to strike out a defence. It is thus now time for this Court to stamp its authority on the second respondent by striking out his defence.

The applicant also submits, in the second instance, in relation to the second respondent, that the discovery that he made in the Election Petition, Case No HC 3616/2002 was grossly inadequate, contrary to the requirements of the law as highlighted in various cases including the following: *Wallis and Wallis* v *Corporation of London Assurance*, 1917 WLD 116; *Durbach* v *Fairway Hotel Limited*, 1949 RLR 115; *Supiya* v

Mutare District Council and Ors, *supra* and *Morgan Tsvangirai* v *Registrar General (Elections)* HH 32/2003 at pages 9 to 15.

The applicant submits that the Electoral Act gives the second respondent considerable functions and it is obvious that in order to fulfil those various functions he must compile a considerable amount of documentation. He also submits that it is apparent from the paucity of the documents discovered by the second respondent that he has a considerable amount of documents which he has failed to discover.

The applicant makes reference to the Court Order in Case No HC 470/2003 issued on 12 October 2002 and served on the second respondent on 21 February, 2003. The order reads:

> "IT IS ORDERED:
> 1. That the respondent shall effect further discovery in terms of Order 24 of the High Court Rules of the documents set out in the schedule annexed hereto within five (5) days of the date of service of this Order on the respondent".

The second paragraph relates to costs.

The schedule annexed to the order lists more than ten categories of documents to be discovered by the second respondent. The applicant contends that the order has not been complied with. He submits that the second respondent failed to specifically answer various paragraphs in the schedule to the Court Order and that this failure means that there is no way of knowing whether the second respondent has made full discovery. He submits that in the circumstances the second respondent has still not made full discovery.

The applicant also submits that paragraph 2 of the schedule to the Court Order relating to the registration of voters after 10 January, 2002 is not dealt with at all by the second respondent in his further discovery affidavit. He submits that this is a deliberate

omission by the second respondent because this registration was done secretly with the deliberate aim of assisting the re-election of first respondent.

In relation to the other documents or categories of documents listed in the schedule, the applicant submits that because of the way in which the second respondent's schedule to the further discovery affidavit is framed, the extent of compliance, if any, is unknown. He also submits that the second respondent has chosen to ignore the strictures in the judgment HH 32/2003 which sets outs in considerable detail what is required of the second respondent in relation to discovery. He contends that this failure by the second respondent, to make full discovery, even when ordered to do so, emphasizes his contumacy and further adds to the argument that the only and in fact proper option for this Court to adopt is to strike out his defence in the main action, that is, Case No HC 3616/2002.

In relation to the third respondent the applicant submits that the discovery affidavit that he filed on 22 November, 2002 was grossly inadequate resulting in the applicant filing and serving on the third respondent, a Notice to Make Further Discovery. No response was received to that notice.

On 12 February 2003 in Case No HC 471/2003 this Court issued an order against the third respondent to make further discovery. It was filed and served on the third respondent on 21 February, 2003. The third respondent then filed a further discovery affidavit on 6 March, 2003. The applicant submits that, as with the second respondent the third respondent has not complied with the Court's order as proper and full discovery ha still not been made.

The order in Case NO HC 471/2003 reads -

"IT IS ORDERED:

1. That the respondent shall effect further discovery in terms of Order 24 of the High Court Rules of the documents set out in the schedule annexed hereto within five (5) days of the date of service of this order on the respondent".

The second paragraph relates to costs.

The schedule annexed to the order lists 14 categories of documents to be discovered. The applicant submits that various documents are listed by the third respondent in Part 2 of the First Schedule of the discovery affidavit. However, privilege is claimed for those documents but no reason for so claiming is given, contrary to requirement for the grounds to such claim being clearly stated. See in this regard "**The Civil Practice of the Supreme Court of South Africa"** by Herbstein and Van Winsen at page 594 and the cases cited therein. See also *Morgan Tsvangirai* v *Registrar-General (Elections)* HH 32/2003 at pages 14 to 15. The applicant submits that even when ordered to do so, the third respondent has still failed to give any reasons why he is claiming privilege. Furthermore, that, in those circumstances and also bearing in mind the complete inadequacy of the documents listed in Part l of the Schedule, that the third respondent is guilty of gross contumacy and that, as with the second respondent, his defence in the main application in Case No HC 3616/2002 should be struck out.

It is the applicant's contention that if the orders he prays for are granted, then the trial in Case No HC 3616/2002 will proceed but will only be concerned with the defences raised by the first and fourth respondents.

The second and third respondents on the other hand contend that they have not willfully refused to comply with the said Court orders but that they have in fact complied with all the orders that have been put in issue by the applicant.

The second respondent's response is to the following effect. He was ordered to file a discovery affidavit by 31 October, 2002 which he did. The fact that he failed to disclose

more documents does not mean non-compliance. It is therefore incorrect for the applicant to contend that he did not comply with the order issued by the Judge President.

Although the applicant contends that the second respondent failed to comply with the order to produce the voters roll for inspection within five days, he however also acknowledges that the second respondent made an urgent application for directions within the five day period. The notice to inspect was then filed within two days of the dismissal of the application for directions.

In response to the contention that the notice to inspect does not comply with the order as it requires the inspection to be conducted at various places and outside the five day period, the second respondent submits that in terms of Rule 164(2), it is clear that even where a person is legally represented, the place of inspection does not necessarily have to be the office of the legal practitioner. Exceptions are provided in Rule 164(2)(b) and (c) in terms of which inspection may be conducted at the usual place of custody of a banker's books or other books of account or books in constant use for the purpose of any trade, business or undertaking or at some convenient place mentioned in the notice.

The second respondent submits that because the voters' roll is not being kept in one place but at various centres in the country he had sought directions on how to give effect to the order. As the application was dismissed, the second respondent gave effect to the order in the best way he could. Furthermore, it is completely impractical for the inspection to take place at the Civil Division of Attorney-General's Office, (the Civil Division) due to lack of space as these are bulky documents. It is also because the voters roll is not being kept in one place that the notice to inspect documents covers the period l0 March 2003 to 21 October, 2003. It was impractical to have the inspection take place within 5 days. Furthermore, the voter's roll comprises bulky documents and the inspection could not have

been concluded within the five day period. In the circumstances the second respondent did not fail to comply with the Court order to make documents available for inspection.

The second respondent filed a further discovery affidavit in compliance with the order in Case No HC 470/2003. By letter dated 6 March, 2003 the applicant advised the second respondent's legal practitioners in the Civil Division that the form was incorrect as there were no paragraph by paragraph responses and further argued that the further discovery affidavit was inadequate. The Civil Division replied and promised to rectify the form. But, before this could be done, the applicant brought the present application.

The second respondent contends that he has made full discovery and that there is no basis for the allegation that there is a deliberate omission to cover up some unlawful conduct on his part. He submits that whilst in the *Supiya* case, *supra*, the respondent failed to comply with a court order, in this case he has strived to comply with Court orders and has never ignored same. He thus cannot be held to be guilty of contumacy. The second respondent also submits that he has discovered most of the documents requested by the applicant and that those documents not disclosed do not exist. In the circumstances his defence should not be struck off.

The third respondent's response is to the following effect. He has made full discovery, contrary to the applicant's contention that he has failed to comply with a court order dated 12 February, 2003 for further discovery, in that the schedule to the order has not been complied with. He also submits that he filed his further discovery affidavit before he had seen the judgment HH 32/2003 hence his failure to give reasons for claiming privilege. In any event, the applicant is not precluded from challenging the third respondent's claim for privilege. He has thus not willfully refused to comply with any

order and the allegation of gross contumacy is unwarranted. His defence should therefore not be struck out as there is no basis for doing so.

Both the second and the third respondents submit that this is a mater of such national importance that it should not be dismissed on a mere technicality. Furthermore, should the court find that there has been insufficient compliance it is within the Court's discretion to condone it and put the respondents on terms. They have not failed to comply with any of the Court orders and there has been substantial compliance therewith. This application should thus be dismissed with costs.

The first respondent's response is to the following effect. The effective relief sought by the applicant, that is, the striking out of the second and third respondents' defences and default judgment against them in Case No HC 3616/2002 cannot be granted as a default judgment entered against the two would result in the election being set aside.

The petition is instituted against the first respondent as the winning candidate on the grounds of violence and various other corrupt practices. The applicant seeks a declaration that the first respondent was not duly elected on this basis. The applicant also seeks the setting aside of the election on the basis that the second and third respondents did not comply with the principles of the Act, that is improper and illegal conduct of the elections themselves.

The first respondent submits that the causes of action against the first, second and third respondents are divisible and may on their own result in the setting aside of the election. He also submits that as the causes of action against the second and third respondents emanate from section 102 of the Electoral Act, the issues may only be determined at a trial as required by section 136(1) of the said Act. Furthermore, section 102(4) of the said Act is inapplicable to Presidential elections. In the circumstances it is

not within the powers of this Court to grant paragraphs l and 2 of the applicant's draft order. The first respondent thus prays for the dismissal, with costs, of this application.

It is important to call back to mind the relief sought by the applicant in this application. It is for both respondents' opposition to the application in Case NO HC 3616/2002 to be struck out and for judgment in default, with costs, to be entered in Case No HC 3616/2002 against the respondents and in favour of the applicant.

It thus becomes important to ascertain the relief or order sought in Case No HC 3616/2002. The draft order in Case No HC 3616/2002 is in the following terms:

> "IT IS ORDERED:
>
> 1. That the first respondent was not duly elected as the President of Zimbabwe as a result of the Presidential Elections held on 9-11 March, 2002.
> 2. That General Notice 116E of 2002 by the third respondent in a Government Gazette Extraordinary dated l9 March, 2020 and General Notice 118B of 2002 published by the Acting Secretary for Justice, Legal and Parliamentary Affairs in a Government Gazette Extraordinary dated 28 March, 2002 be and are hereby set aside.
>
> ACCORDINGLY IT IS ORDERED:
>
> 1. That in accordance with section 102(2)(b) of the Electoral Act (Chapter 2:01) the Registrar of this Honourable Court shall forthwith give notice of the Declaration set out in paragraphs l and 2 above to the second respondent who shall forthwith publish a notice in the Government Gazette stating the effect of the order of this Honourable Court.
> 2. That the costs of this application shall be paid by the respondents, jointly and severally, the one paying, the other s to be absolved".

It should be noted that the citation of the parties in Case No HC 3616/2002 is exactly as it is in the present application.

As highlighted by the first respondent, the applicant instituted the Election Petition in terms of section 102 of the Electoral Act which provides that an election petition complaining of an undue election of a person to the office of President by reason of irregularity or any other cause whatsoever, may be presented to the High Court within

thirty days of the declaration of the result of the election in respect of which the petition is presented, by any person claiming to have had a right to be elected at that election or alleging himself to have been a candidate at such election.

The applicant also seeks the setting aside of the election on the basis that the second and third respondents did not comply with the principles of the Act, that is, improper and illegal conduct of the elections themselves. In this regard section 149 of the Electoral Act is relevant. It provides:

> "An election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if, and only if, it appears to the High Court that -
> (a) the election was not conducted in accordance with the principles laid down in this Act; and
> (b) such mistake or non-compliance did effect the result of the election".

Section 136(1) of the Electoral Act provides that an election petition shall be tried by the High Court in open court.

It appears to be clear that it is only after a trial that the High Court may determine the issues raised by the applicant to enable it to make an order in terms of section 102(2) which provides -

> "(2) If, on the trial of an election petition, presented in terms of subsection (1), the High Court makes an order declaring -
> (a) that the President was duly elected, such election shall be and remain valid as if no election petition had been presented against his election; or
> (b) that the President was not duly elected, the Registrar of the High Court shall forthwith give notice of that fact to the Registrar-General who shall publish a notice in the Gazette stating the effect of the order of the High Court".

This Court is being requested to make an order in terms of section 102(2)(b) without holding a trial as required by the Electoral Act. This Court is being requested to exercise its discretion in terms of Rule 165(2) of the Rules of the High Court. The order sought in this application by the applicant, in my view, has the effect, if granted, of setting

aside the election petition. Thus, if the second and third respondents' defence are struck out and judgment in default in Case No HC 3616/2002 is entered, this Court would in the event be effectively granting the order sought in the main matter, Case No HC 3616/2002. It appears to me therefore that this is not a proper case for the exercise of the Court's discretion in the manner prayed for by the applicant.

I also find apposite the following excerpt from DEVITTIE J's judgment in *Mandava* v *Chigudu and Ors*, 2000 (1) ZLR 679 (H) at 687E to 690F:

> "…In *Makamure* v *Mutongwizo supra*, I traced the history of the Act, in particular, those provisions relating to election petitions. It is abundantly clear that these provisions were enacted to put in place a system where in all election petitions the trial procedure was adopted. Notwithstanding the express provisions of our Act relating to the holding of election trials upon a petition being presented, an unfortunate practice has developed in this country where electoral disputes are brought as opposed matters. That is the procedure adopted on this case. This procedure is contrary to the express provisions of the Act. In more ways than one, it undermines the objectives which the Act seeks to achieve. One of the main purposes of the Act is to ensure that election results reflect the uninhibited democratic expression of the electorate. It seeks to achieve this purpose in three ways.
>
> Firstly, it provides for criminal sanctions and civil disabilities to be imposed upon any person for violation of the electoral code of conduct. In terms of s 109 of the Act, persons who are found guilty of illegal or corrupt practices are liable to criminal sanction, and, in addition, are liable to prohibition from registering as a voter and from holding public office for a period of five years. A person who holds public office at the time of his conviction shall vacate such office upon conviction. Corrupt practices include treating, violence and intimidation, bribery, and the transportation of voters to vote unlawfully in another constituency. Illegal practices include the obstruction of voters and the commission of prohibited acts within one hundred metres from a polling station.
>
> Secondly, as regards the election candidate and his agents, s 124 of the Act prescribes, in addition to criminal sanctions, the direst of penalties for breaches of the code of morality - nullification of the election result. If it is proved at an election trial that any corrupt or illegal practice has been committed:
>
> > 'by or with the knowledge and consent or approval of the candidate returned at that election, or by or with the knowledge and consent or approval of any of his agents, the election of that candidate shall be void, and a fresh election shall thereupon be held.'
>
> In addition, the candidate or his agent may be disqualified from voting for or filling public office for five years. The significance of this latter provision is that candidates are disqualified from holding public office in local or parliamentary

election (including a fresh election ordered by the court) for a period of five years from the date of the finding.

Thirdly, in an election petition the trial court is required, in the public interest to assume an inquisitorial function for the purpose of determining the extent to which corrupt and illegal practices have prevailed at the election which is the subject of the petition. I glean this function from the following provisions of the Act:

> 'Section 136(4) and (5)
>
> (4) Where a charge is made in an election petition of a corrupt practice or illegal practice having been committed at the election to which the petition refers, the High Court shall, in addition to the certificate in terms of subsection (3), at the same time report in writing to the Speaker whether any corrupt practice or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of a candidate at that election or by or with the knowledge and consent of any of his agents, and the nature of such corrupt practice or illegal practice; and
>
> (a) the names of all persons who have been proved at the trial to have been guilty of any corrupt practice or illegal practice; and
>
> (b) whether corrupt practices or illegal practices have, or whether there is reason to believe corrupt practices or illegal practices have, extensively prevailed at the said election.
>
> (5) The High Court may, in addition to the certificate required in terms of subsection (3), at the same time make a special report to the Speaker as to any matter arising in the course of the trial, including the commission or possible commission of any corrupt practice or illegal practice, where the High Court considers that an account of such matter ought to be submitted to Parliament'.

The significance of the above provisions is twofold. Firstly, it means at that the trial of the election petition a public inquiry is, in effect, conducted on corrupt and illegal practices that have prevailed during the election. Secondly, the trial of the election petition triggers off the prosecution, in separate criminal proceedings and after the election trial is complete, of all persons in respect of whom the evidence at the election petition disclose the commission of a criminal offence. Thus, s 137 of the Act is to the following effect:

> '**Procedures where High Court reports cases of corrupt practices or illegal practices**
>
> If the High Court states in the report on the trial of an election petition that any person has or may have been guilty of a corrupt practice or illegal practice or that there is reason to believe that corrupt practices or illegal practices have extensively prevailed at the election to which the petition refers -
>
> (a) that statement, with the evidence taken at the trial, shall be transmitted by the registrar of the High Court to the Attorney-General with a view to the institution of any prosecution proper to be instituted in the circumstances; and
>
> (b) the report shall, so far as it concerns any such person, be transmitted by the registrar of the High Court to the Registrar-General.'

It seems to follow, therefore, that even where there is no factual dispute and the respondent does not oppose the nullification of the result, the court is nonetheless obliged to conduct a trial for the purposes of carrying out the statutory inquiry envisaged in the above sections. The statutory inquiry in turn paves the way for the prosecution of offenders in subsequent criminal trials. It seems desirable, therefore, that, the Director of Public Prosecutions be present during the trial of an election petition. A similar view is expressed in Halsbury's *Laws of England* vol 15 para 901 4 ed:

> '**Duty of parties and court**. There is no obligation on the petitioner's counsel to pursue charges, even though there may be good foundation for them, if by the establishment, or admission of other charges he has already attained the avoidance of the election.
>
> When the issue between the parties has been decided, there is no duty cast on either of them to continue the inquiry in the public interest for the purposes of ascertaining to what, if any, extent corrupt or illegal practices have prevailed. The object of the petition being gained, there is an end of the inquiry so far as the parties are concerned. Nevertheless there is a duty on the election court to investigate any allegation of corrupt or illegal practices brought to its notice. If there are any indications of improper conduct in the election, it is impossible to shorten the case by concessions between the parties. The court must sit as long as there is anything which can be brought before it by the parties or the Director of Public Prosecutions relating to these allegations. When, however, the whole case has been heard and when an admission is made which shows that the judgment must be that the election is void, it is no longer necessary for the court to go into all the other grounds on which the election might have been avoided. The court will only require such further evidence to be called as is necessary to enable it to report whether corrupt or illegal practices have extensively prevailed or not and also to see whether, in respect of offences with which particular individuals have been charged, it ought to report those individuals'.

It is self-evident that the above provisions, which are central to the purposes of the Act, cannot be invoked if an election trial is not held. From an evidential point of view, the above provisions envisage four separate evidential inquiries to be carried out; firstly, whether intimidation, bribery or other corrupt or illegal practice has taken place at the election which is the subject of the petition. This requires evidence to be heard from the accusers and from persons named in the petition as being guilty of such practices. Upon a finding that a corrupt practice has been proved the court is then required in the second stage of the inquiry, and based upon the evidence, to make a finding as to whether such acts were done 'with the knowledge and consent or approval of the candidate or any of his agents'. In terms of s 125, no penalty is attracted if the candidate and his election agents took all reasonable precautions for preventing the commission of corrupt practices and illegal practices at that election;

If the court finds against the candidate or his agent, then the election is void by operation of law, unless - and this involves the third stage of the inquiry - it is proved:

(a) in terms of s 126(1)(a), that:

'in the case of an illegal practice only, that it was done in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature'; (my emphasis) or

(b) in terms of s 126(1)(b), that:
'by reason of the circumstances it would be just that the candidate or his election agent or other agent or person, or any of them, should not be subject to any of the consequences under this Act of the said act or omission'.

Fourthly, the court is required, for the purposes of compliance with ss 136(4) and (5) and s 137 of the Act, to inquire, in the public interest, whether corrupt and illegal practices have prevailed extensively at the election which is the subject of the petition. It must now be apparent that there is merit in the view that the failure to hold a trial where allegations of corrupt, and illegal practices are made undermines the objects of the Act".

Although the learned judge was not dealing in that case with Presidential election petition, in my view the principles enunciated therein, are generally applicable in matters such as the present petition.

From the whole tenor of the applicable and relevant provisions of the Electoral Act, it is in my view clear that the intention of the Legislative was for a hearing or trial to be held before the Court may make any order in respect of an election. In any event, this is indeed a matter of such national importance that the order sought by the applicant should not be granted in the circumstances. Furthermore, if in fact the second and third respondents have not fully and properly discovered all documents that they should have discovered, it should, in my view, still be open to the applicant to urge the trial court to invoke Rule 167 which provides:

"The court may, during the course of any action or proceeding, order the production by any party thereto under oath of such documents in his power or control relating to any matter in question in such action or proceedings as the court may think just, and the court may deal with such documents, when produced, as it thinks just".

It appears very clear to me also, even if it was competent for the court to grant the order sought, of which I am not convinced, that if granted, the order would affect the first respondent in a final and conclusive manner without affording the first respondent an

opportunity to be heard. In my view, this could never have been the intention of the Legislature.

For the above reasons, this court is unable to exercise its discretion in the manner requested by the applicant and has to dismiss the application.

In the result it is ordered as follows -

IT IS ORDERED:

That the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners.
Hussein Ranchod & Co, first respondent's legal practitioners.
Civil Division of the Attorney-General's Office, second and third respondents' legal practitioners.
Chikumbirike & Associates, fourth respondent's legal practitioners.