

ONISIMO GORE
versus
GIFT CHIMANIKIRE
and
ZIMBABWE ELECTORAL COMMISSION

ELECTORAL COURT OF ZIMBABWE
OMERJEE J
HARARE: 30th June and 2nd July 2008

Electoral Petition

Mr *F.G. Gijima*, for the petitioner
Mr *J. Bamu*, for the first respondent
No appearance for the second respondent

OMERJEE J: On 29 March 2008, the harmonised presidential, parliamentary and council elections were held in Zimbabwe. The petitioner stood as the candidate on behalf of Zimbabwe African National Union (Patriotic Front) ‘ZANU PF’ for the House of Assembly seat in the constituency of Southerton. Gift ChimaniKire the first respondent representing the Movement for Democratic Change ‘MDC’ contested the seat. The elections were conducted and supervised by the second respondent. On 30 March, 2008 the first respondent was declared the winner of the seat. Dissatisfied with the prevailing environment at the time as well as with the manner the election was conducted the petitioner lodged the present petition with the Registrar on 14 April 2008. He seeks an order nullifying the result of the Southerton constituency and ancillary relief, together with an order as to costs. The relief sought is opposed by both the first and second respondents respectively. The first respondent contends in *limine* that this court ought to determine in the first instance the question of compliance with the electoral law in the following respects namely:-

- (1) Whether service of the petition outside the 10 day period stipulated in s 169 of the Electoral Act [*Chapter 2:13*] “the Act” is such non-compliance as to render the petition a nullity
- (2) Whether service of the petitioner at the headquarters of the first respondent’s political party is such non compliance with the said provision of the Act as to render the petition invalid.

Both issues arise from the wording of s 169 of the Act. The issues in simple terms

whether service outside the 10 day period, and secondly, at the political party headquarters of the first respondent constitutes compliance with s 169 of the Act. This court considers that is necessary and desirable to determine in the first instance whether or not there was compliance with the provisions of the Act. Such finding will in turn determine, whether or not the petitioner is non suited or not. I propose to adopt this approach in this matter. Section 169 of the Act reads as follows:

“Notice in writing of the presentation 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”.

Mr *Bamu* in his heads filed on behalf of the first respondent, submitted that the petitioner was in violation of the terms of the said provision requiring that service be done within ten days. The petition was filed on 14 April 2008. The 10 day period expired at the close of the business on 24 April, 2008. Service of the petition it is not in dispute was effected on 6 May 2008 some 12 days outside the 10 day limit prescribed in s 169 of the Act, The petitioner failed to adhere to the 10 day limit. The petitioner did not achieve equivalent or substantial compliance with the prescribed limit of 10 days. On the basis of *Pio v Smith* 1986(3) SA 145 (ZH) in the absence of either exact or equivalent compliance, the petition becomes a nullity.

In relation to the second issue, written notice of the petition was served at the first respondent’s political party headquarters. The electoral law sets out in specific and clear language the proper manner of serving election petitions. Service has to be personal or at the residence or place of business of the first respondent. In the view of this court, service of the petition at the party headquarters of the first respondent, does not constitute service at any of the places contemplated by s 169 of the Act. This court sitting as an Electoral Court has no powers to condone any breach of the requirements as to time frames or as to manner of service that are stipulated in the Act. See *Chitungo v Munyoro* 1990(1) ZLR 52 (H) at 58 (H) *Hove v Gumbo* S.C. 143/2004, *Patrick Chabvamuperu and Others* HH. 46/08 and *Tsitsi Muzenda v P. Kombayi and ZEC* HH 47/08.

In the result this court finds that service of the petition on 6 May 2008 was invalid for two reasons. Firstly, the petition was served outside the 10 day prescribed and, secondly at the wrong place in contravention of the provisions of s 169 of the Act. These issues were the subject of determination by this court recently in case No. HH 47/08 in *Tsitsi Muzenda v P.*

Kombayi and ZEC. I respectfully associate myself with the reasoning of Mr Justice KUDYA. It does not in my view serve any useful purpose to repeat the reasoning of the court in that matter. Mr *Gijima* advised the court that the petitioner did not wish to pursue the joinder of the second respondent. The petitioner formerly withdrew his action against the second respondent and tendered wasted costs.

The final determination of this matter is as follows:-

1. This petition is a nullity by reason of non compliance with s 169 of the Act.
2. ZEC was improperly sighted as a party to this petition and is hereby removed as a party to this petition.
3. The petitioner is to pay the respondents costs.

Gijima & Associates, petitioners' legal practitioners
Mbidzo, Muchadehama & Makoni, first respondent's legal practitioners