DR DANIEL SHUMBA
versus
CHAIRMAN OF THE ZIMBABWE ELECTORAL COMMISSION
and
ROBERT GABRIEL MUGABE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE: 27 November 2008 and 10 December 2008

Mr *Van Huyssteen*, for the applicant
Mr *Chikumbirike*, for the first respondent
Mr *Gijima*, for the second respondent

MAKONI J: On 25 August 2008, the applicant presented, with the Registrar of this court, an Election Petition to set aside the Presidential Election and the subsequent Presidential Run off whose results were announced on 29 June 2008. He simultaneously filed the present application seeking condonation for the late presentation of the election petition. The basis for the application is found in paragraph 23 of the applicant's founding affidavit. It reads as follows:

> "I could not have brought my application within the 30 day period stipulated in s 111(1) of the Electoral Act [*Cap 2:13*] because I was disabled to do so, owing to the fact that the Supreme Court, sitting as a constitutional Court, reserved judgment. The judgment was only made known to me on 1 August 2008. It is from this judgment that I draw my authority to bring about the main application seeking for nullification or invalidation of the Presidential Elections … ."

The brief background to the matter is as follows:

The applicant was an aspirant for the Presidential candidacy. On 15 February 2008 he arrived at the nomination, court sitting at Harare, before nomination court had closed, to present his papers. The papers were rejected on the basis that they were late. He challenged the rejection of his papers in an urgent chamber application filed in the High Court of Zimbabwe. The application was dismissed on the basis that the court lacked jurisdiction, sitting as a High Court, to entertain an urgent chamber application which had anything to do with Electoral Act [*Cap 2:13*] ("the Act").

Dissatisfied with the above ruling the applicant noted an appeal to the Supreme Court in case No. SC 42/08. The applicant also noted an appeal, to a Judge in chambers in terms of s 46(19)(b) of the Act against the decision of the Constituency Elections Officer. The matter was heard by UCHENA J sitting as a Judge of the Electoral Court. The appeal was dismissed on the basis that it had prescribed. Dissatisfied with the dismissal, the applicant noted an appeal to the Supreme Court.

The applicant then proceeded to file another urgent chamber application in the High Court of Zimbabwe. The matter was dismissed, without hearing, on the basis that the matter was not urgent. He again noted an appeal to the Supreme Curt against that decision.

Against this background, the applicant finally approached the Supreme Court under case No. SC 11/08 and Constitutional application number. 77/08. He alleged that his right to freedom of association, granted by s 21(1) and 21(2) of the Constitution of Zimbabwe and his right to protection of the law, guaranteed by s 18(1) of the Constitution were violated by the Constituency Elections Officer.

The application was heard by the Constitutional Court on 22 May 2008 and judgment was reserved. Judgment was delivered on 1 August 2008. This was some sixty days after the Presidential run off, whose results were announced on 29 June 2008. The applicant then presented the election petition and the present application.

The application is contested by both respondents. They filed notices of opposition in which they both raise the point *in limine* whether this court has jurisdiction to entertain an application to condone non-compliance with the provisions of the Act. The second respondent also raised the issue of whether there was a petition before the court in view of the fact that the petition was not served in terms of the Act.

I might as well, at this stage, comment about the second respondent's second point *in limine*. In my view this issue, in these proceedings, is misplaced. It should be raised in the court which will deal with the election petition.

Mr *Chikumbirike* submitted that the Electoral Court is creature of statute and that its powers and functions should be found in the four corners of the statute. There is no provision in the Act for parties to make an application such as the one before the court. The court cannot therefore entertain an application for condonation.

He agreed that the High Court Rules apply in this court as there were no rules for this court. He however submitted that the rule referred to by the applicant does not apply as it

condones a departure from any provisions of the Rules. The thirty (30) day period in issue, is not provided for in the rules but in the Act.

He further submitted in the relevant provisions, s 111 (1) of the Act, no provision is made for extension of time. All that the section provides is that a petition "may be presented to the Electoral Court within thirty days". The thirty days period is peremptory. The use of the word "may" before the words "be presented" gives discretion to the losing candidate to challenge the petition or not. After he decides to challenge, he must present the petition within thirty days.

Mr *Gijima* submitted the same argument that this court has no power to condone non-compliance with the provisions of the Act. He cited the case of *Chitungo* v *Munyoro and Anor* 1990 ZLR (1) 52.

In his heads of argument, the applicant submitted that from the wording of s 111 (1) of the Act, the court is at large on whether or not to condone non-compliance. The provision makes use of the term "may" as opposed to the repealed Electoral Act No 14 of 1979 which uses the term "shall" in s 140 (2). The section is not peremptory. This distinction separates the present case from that of Chitungo (*supra*).

It was further argued that the applicant was temporarily handicapped, within the thirty day period from bringing about the petition and there is indeed a relationship between the Supreme Court Case No. SC 11/08 and the petition in that the Supreme Court application gave birth to applicant's rights which he now enforces in the present application.

In a surprise turn of events, Mr *Van Huyssteen* in his oral submissions, submitted that the fact of filing the application for condonation is not a concession that the petition was presented out of time. The application was filed out of an abundancy of caution as an extra pre-cautionary measure. The judgment of the Supreme Court was handed down on 1 August 2008. That is when the applicant reached the position where he could say he had a right in terms of s III (1) (a). He presented his petition on 25 August 2008 which is within the thirty days of 1st August. The declaration of the result on 29 June 2008 must be read together with any judicial pronouncements. He concluded by saying that condonation was not necessary.

He suggested that the application should be postponed until the petition is heard and then the court determines whether the application for condonation was necessary. He said the matters should have been set down at the same time.

The submissions by Mr Van Hysseen are at a tangent with the applicant's papers. If his oral submissions were correct, the proper procedure would have been to withdraw the application. There is no provision in law to file an application out of an abundance of caution. It is trite that an application is based on true and correct facts and not on assumptions. If the applicant's oral submissions are correct, that the application was filed on time, there would be no basis for filing the present application.

The application for condonation was not withdrawn by the applicant despite the submissions by Mr *Van Huyssteen*. I will therefore proceed to determine the matter.

The Electoral Court is a special court set up in terms of s 79 of the Constitution of Zimbabwe. It is constituted in terms of s 161 of the Act. Section 161 (1) provides as follows:

> "161 (1) There is hereby established a court, to be known as the Electoral Court, for the purpose of hearing and determining election petitions and other matters in terms of the Ac.t.." (my own underlining)

The words, I underlined above, outline the powers and functions of the Electoral Court. It can only hear election petitions and other matters in terms of this Act. The Electoral Court is therefore a creature of statute whose powers and functions are to be found in the four corners of the statute. It has no inherent powers such as is possessed by the High Court and can therefore not claim authority which cannot be found, within the four corners of its constituent Act, which is the Electoral Act.

This court can therefore not entertain an application for condonation as no provision is made for such an application in the Act. All that s 111 of the Act provides is that a petition "may" be presented to the Electoral Court within thirty days" and it ends there. See *Chitungo* (*supra*) at p 57. The provision is not qualified with clauses such as "or within such period as the court may deem reasonable". That would have given the court powers to consider an application to extent the time.

The applicant sought to argue that the current Act uses the term "may" unlike the repealed Act 14 of 1979 which used the term "shall". It was submitted that this distinction distinguishes the present case from that of Chitungo (*supra*). In Chitungo supra the court was interpreting s 140 of the old Act which is identical to s 111 except for the use of the word "shall" which is peremptory.

I agree with Mr *Chikumbirike*'s submissions that the use of the word "may" in s 111 gives an option to losing candidates whether to file a petition or not. Once the losing candidate decides to present a petition then it must be presented within thirty days. The thirty day period is peremptory because of the use of the word "within" before the stipulated period. In Blacks Law Dictionary, 5th Edition, the word "within" when used relative to time has been defined, variously, as meaning "time before, at or before, at the end of, not later than". It is clear from the above definitions that the period of thirty days cannot be exceeded.

The applicant also seeks to rely on the provisions of the High Court of Zimbabwe Court Rules 1979 on condonation by virtue of s 165 (4) of the Act which provides that if no rules of the Electoral Act are made in terms of that Act, the Rules of the High Court shall apply.

Order 1 Rule 4C deals with the issue of condonation. It provides:

> The court or judge may in relation to any particular case before it or him, as the case may be –
>
> (a) direct, authorise or condone a departure <u>from any provisions of these rules including an extension of any period specified</u> therein, where it or he, as the case maybe, is satisfied that the departure is required in the interests of justice. (my own underlining)

The key words in r 4C are those underlined above. The act to be condoned must be provided for in the Rules and not to any situations outside the provisions of the Rules. The applicant is asking me to condone an act provided for in an Act of Parliament. I have no such powers. It is trite that Rules of this court cannot interfere or derogate from a specific provision of the Act. Rules are subordinate to an enactment. To ask the court to condone a period provided for in an enactment, as urged by the applicant, would be to usurp the functions of the legislature, by purporting to amend a specific provision, which this or any other court cannot do. See *Registrar General of Elections* v *Combined Harare Residents Association & Anor* SC 7/02 at p 6 of the cyclostyled judgment.

The mandatory nature of the time limits within which process must be presented or completed runs through the Act. Section 46 (19) (c) provides for a mandatory period within which an appeal must be noted. Section 172 provides for a mandatory period of six months within which an appeal must be determined. Section 168 and 169 relates to mandatory periods

within which a petition must be presented and served on the respondent. There is also s 182 which provides:

> "Every election petition shall be determined within six months from the date of its presentation".

This provision did not exist in the old Act. It is a recent amendment of the Act by the Electoral Amendment Act number 17 of 2007. The amendment was in line with decided cases which stressed the point that it is in the public interest that elections petitions be speedily resolved. See *Pio* v *Smith* 1986 (3) SA 145 and *Nair* v *Teck* 1962 (2 ALL ER 34. It also proves beyond a shadow of doubt that there cannot be room for an extension of the prescribed periods for if there was room for such, the peremptory periods, such as the six months, would not be achievable. From the above analysis, it is clear that the court has no jurisdiction to entertain an application for condonation.

The applicant in his affidavit raises two points *in limine*. These are that the first respondent filed its notice of opposition outside time and that the affidavit of Emmerson Mnangagwa is not properly before the court as he was not authorised by the second respondent to depose to such affidavit. These issues relate to the application for condonation. Since I have made a finding that this court has no jurisdiction to entertain the application, it will not be necessary determine the points raised.

Both counsel for the respondents asked for costs *de bonis popriis* in their submissions. The basis for such an application was that Mr *Chinyama* appeared for the applicant in case number EP 12/08. The same point whether r 4, in that case r 4A, extends to the time limits prescribed in an Act of Parliament, was in issue. In that case, Mr *Chinyama* conceded that his argument was untenable He then proceeded to file the present application using the same argument. He is persisting with the untenable argument.

The above facts were known to the respondents when they filed their notices of opposition. They did not pray for costs *de bonis propriis* but for costs on a higher scale. If they had prayed for costs *de bonis propriis*, Mr *Chinyama* would have had notice of their prayer and would have responded appropriately. Granting such costs in the circumstances would be a clear breach of the *audi alteram parten*, rule an elementary rule based on natural justice and

fairness. See *Technique* (*Pvt*) *Ltd* v *Allan Cameroon Eng* (*Pvt*) *Ltd* 1794 (1) ZLR 246 (S) at 252 H.

No serious argument was advanced for costs *de bonis propriis* against Mr *Van Huyssteen*. Therefore the court will not grant the prayer.

However the court will grant costs in favour of the respondents on a higher scale. In my view the applicant's conduct is an abuse of court process and the respondents were unnecessarily brought before the court. The applicant persists with an argument on which this court has already made a pronouncement against him.

In the result I will make the following order:

(1) The application is dismissed.

(2) The applicant is to pay the respondents costs on a legal practitioner client scale.

Chinyama & Partners, applicant's legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners

F G Gijima & Associates, second respondent legal practitioners