REPORTABLE (46)

JONATHAN NATHANIEL MOYO
v
ROSELINE NKOMO

IN THE SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GARWE JA & GUVAVA JA
BULAWAYO, JULY 26, 2014 & JULY 30, 2014

T Hussein, for the Appellant

T Biti, for the Respondent

GWAUNZA JA: This is an appeal against the entire judgment of the Electoral Court, Bulawayo, handed down on 31 January 2014.

The brief facts of the matter are as follows:

The appellant was a candidate for the National Assembly seat for Tsholotsho North Constituency in Matabeleland North Province in the harmonised elections held on 31 July 2013. He was a nominee of the ZANU (PF) political party. The respondent was also a candidate for the same seat representing the MDC-T political party. The respondent was declared the winner of the National Assembly election in respect of the said constituency. The appellant was not satisfied with this outcome and filed a petition in terms of s 167 of the Electoral Act [*Cap 2:13*] ("the Act")

Among other relief, the appellant sought an order in the following terms:

1. That the respondent was not duly elected as the representative of Tsholotsho North Constituency as declared on 1 August 2013 by the Zimbabwe Electoral Commission, and
2. That the said election be set aside and a by-election held within 90 days of the order.

At the hearing of the petition the court *a quo* upheld the points *in limine* raised by the respondent and issued an order in the following terms:

"1.The Electoral Petition filed by the petitioner in this case is fatally defective and is of no force and effect for want of compliance with Rule 21 (e) and (g) of the Electoral (Application, Appeals and Petitions) Rules, 1995.

3. The Applicant's Petition is hereby dismissed with costs.

4. The Respondent Roseline Nkomo be and is hereby declared duly elected member of the National Assembly for the Tsholotsho North Constituency.

5. The Registrar is hereby directed to proceed in terms of s 171 (3) (a) (ii) of the Electoral Act [*Cap 2:13*]."

Dissatisfied with the judgment of the court *a quo*, the appellant noted an appeal to this Court and raised a number of grounds of appeal which may be summarised as follows;

1. The dismissal of the Petition without a trial was in contravention of s 171 of the Electoral Act, which makes a trial mandatory;
2. That the court *a quo* erred at law in finding that the form of the petition adopted by the Appellant was not in compliance with the Electoral Act and Rules.

The appellant accordingly seeks an order that:

(i) The appeal be allowed.

(ii) The order of the court *a quo* be set aside and substituted with an order to the effect that the points *in limine* raised by the respondent be dismissed with costs and the matter referred to trial before a different judge of the Electoral Court.

Before the hearing in the court *a quo* the parties agreed on the issues to be determined by the court and these were set out in a joint pre-trial conference minute dated 13 December 2013. Among such issues were two preliminary matters one being whether the petition conformed to the provisions of the Act and relevant Rules. As already indicated the court *a quo* found that the petition did not comply with r 21 (e) and (g) of the Electoral (Applications, Appeals and Petitions) Rules S.I. 74A of 1995 ("the Rules").

The appellant challenges this finding on the two grounds mentioned above. He contends, firstly, that it is contrary to s 171 (1) & (3) of the Act which requires that such a determination be made only at the end of a trial. Secondly he submits that in any case, the petition that he filed complied substantially with the requisite requirements of the Act and Rules. The section reads as follows:

"1. An Election Petition shall be **tried** by the electoral court in open court

2. …

3. **At the conclusion of the trial** of an election petition, the electoral court shall determine whether the respondent was duly elected or whether any, and if so, what person other than the respondent was entitled to be duly elected …." (emphasis supplied)

The appellant argues on the basis of these provisions that in the court *a quo* a trial neither commenced nor was it concluded, as the matter had been determined on

preliminary points. It is the appellant's further argument that the order of the court *a quo* was therefore not competently made.

We find merit in the submissions made by Mr *Biti* for the respondent that a trial is a process that consists of pleadings (which are adjectival and procedural) and substance (which is the oral hearing where *viva voce* evidence is led). Further that, as part of any trial, a court is enjoined to hear arguments on points *in limine*, if any, and may dispose of the matter purely on those points. As is evident from the joint pre-trial conference minute, both parties appreciated this possibility. Indeed at the commencement of the hearing before the court *a quo* the parties made submissions on the preliminary issues raised. The court was, after that, required to make a determination on these issues and properly proceeded to do so.

In contending that the petition that he filed in the court *a quo* substantially complied with the relevant provisions of the Act and the Rules, the appellant specifically cites r 21 which in part states that:

> "An election petition shall be generally in the form of a court application…."

The appellant further argues that since "court application" is not defined in the Rules, resort must be had to Rule 33 of the High Court Rules, 1971 which defines a court application. On the basis of this definition, the appellant submits that a petition can properly take the form of a court application as set out in form 29 of the High Court Rules. This is despite the fact that Form 29 does not have a provision that requires that the petitioner's cause of action or relief be set out within the said document.

While this may be true of ordinary court applications, we find that sight must not be lost of the rest of r 21 which provides, *inter alia*, that an election petition shall state:

> "(a) ….
> (b) ….
> (c) …..
> (d) ……..
> (e) the grounds relied on to sustain the petition
> (f) …….
> (g) the exact relief sought."

In our view r 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**.** There is accordingly, in our view, no merit in the contention made on behalf of the appellant that there is no specific provision relating to petitions nor that r 33 of the High Court Rules should be adopted as the default rules in this respect.

It is not in dispute that the form and content of the appellant's petition did not conform to the format set out in r 21 (e) and (g). The petition set out in very brief terms, three grounds on the basis of which he sought the relief outlined in his draft order. Its petition ended with the following;

> "TAKE FURTHER NOTICE THAT the accompanying affidavit and supporting documents are tendered in support of this application and should be read as specifically forming part of this notice"

This latter part of the petition suggests that the appellant, erroneously in our view, took the view that a petition can also properly be called a "Notice."

The court *a quo* considered, but was not persuaded by, Mr *Hussein's* submission that, taken together with the other supporting documents attached to it, the petition that was filed substantially satisfied the requirements of r 21. The court found, as stated on page 4 of its cyclostyled judgment, as follows:

> "I am of the view that if the framers of the law intended to provide that the petition shall be accompanied by an affidavit and supporting documents, this would have been stated in clear and unambiguous terms….
>
> The express provisions of the law allow a petitioner to lodge a petition in terms of the laid down procedure …. Whilst it may be convenient for the applicant to present a petition with brief grounds set out in what he refers to as the "notice" accompanied by an affidavit and other supporting documents, this does not become in my view the form prescribed by statute …."

The reasoning of the court *a quo* in our view cannot be faulted. It reinforces the position at law, 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 reasoning also finds support in a plethora of cases in the Electoral Court and this Court, some of which were cited in the respondent's heads of argument. The remarks made in the case of *Hove* v *Gumbo* (Mberengwa West Election Petition Appeal) 2005 (2) ZLR 85 are particularly pertinent in this respect. At page 92A the court stated as follows:

> "A petition is not a common law cause of action. It is a special procedure created by statute. The law governing the manner and grounds on which an election may be set aside must be found in the statute and nowhere else"

The court also cited with approval remarks in the Indian case of *Sahu* v *Singh & Anor* (1985) LRC 31 at page 39 that:

> "The rights arising out of elections, including the right to contest or challenge an election are not common law rights. They are creatures of statutes which create, confer or limit those rights. Therefore, for deciding the assertion whether an election can be set aside on any alleged ground, the courts have to consult the provisions of the law governing the particular election. They have to function within the framework of that law and cannot travel beyond it"

In the result we are satisfied that a trial was properly held in accordance with s 171 (1) and (3) of the Act. It follows that the determination by the court *a quo* was proper. This appeal therefore lacks merit and must fail.

It is accordingly ordered as follows:

"The appeal be and is hereby dismissed with costs"

GARWE JA: I agree

GUVAVA JA: I agree

Messrs Hussein Ranchod & Co, Appellant's Legal Practitioners

Messrs Phulu & Ncube, Respondent's Legal Practitioners