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TRACY MUTINHIRI Petitioner
versus
JEREMIAH CHIWETU Respondent

WILSON MAKANYAIRE Petitioner
versus
TEMBA MLISWA Respondent

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 12 November 2013 and 25 November 2013

REGISTRAR OF THE HIGH COURT
OF ZIMBABWE
CRIMINAL DIVISION
27 MAR 2014
P.O. BOX CY 175, CAUSEWAY
ZIMBABWE

Electoral petition

G. Mtisi, for the petitioners
F. Gijima and *T. Z. Mazhindu*, for the respondent

CORRIGENDUM

BHUNU J: Please take note that this judgement delivered on 25 November 2013 order no. 4 which was sighted as in terms of s 171 (3) (b) (ii) of the Electoral Act [*Cap 2:13*] should read as in terms of s 171 (3) (a) (ii) of the Electoral Act [*Cap 2:13*]

Musendekwa Mtisi Legal Practitioners, the legal practitioners for the applicant
F. Gijima and Associates, the respondent's legal practitioners
Mugomeza & Mazhindu, the 2nd respondent's legal practitioners

TRACY MUTINHIRI
versus
JEREMIYA CHIWETU

WILSON MAKANYAIRE
versus
TEMBA MLISWA

ELECTORAL COURT OF ZIMBABWE
BHUNU J
HARARE, 12 November and 25 November 2013

REGISTRAR OF THE HIGH COURT
OF ZIMBABWE
CIVIL DIVISION
27 MAR 2014
P.O. BOX CY 275, CAUSEWAY
ZIMBABWE

Electoral Petitions

G.Mtisi, for the petitioners
F.G. Gijima and *T. Z.Mazhindu,* for the respondents

BHUNU J: Both petitioners Tracy Mutinhiri and Wilson Makanyaire were losing candidates in the recent Harmonised Elections held on 31 July 2013. They lost to both respondents Jeremiah Chiwetu and Temba Mliswa respectively. The petitioners have since filed petitions seeking the setting aside of the electoral results on account of irregularity.

The respondents have raised identical preliminary objections. All the parties concerned have agreed that it is convenient to deal with both objections collectively as one.

The respondents' exception has to do with the format of the petitions. They both allege that the petitions are defective and irregular for want of compliance with the provisions of section 167 of the Electoral Act [*Cap 2:13*] as read with r 21 of the Electoral Rules.

While preparing judgment in this case I however entertained some doubt as to whether or not the Electoral (Applications, Appeals and Petitions) Rules 1995 Statutory Instrument 74A of 1995 were still valid. I then invited all the legal practitioners concerned to address me on the issue of the validity of the rules in light of the provisions of s 165 of the Electoral Act which tends to suggest that until new rules have been made in terms of that section High Court Rules shall apply with suitable changes deemed necessary by the Electoral Court.

I am grateful to Mr. *Gijima*'s well researched and persuasive submissions. The Electoral Rules were made in 1995 under the Electoral Act [*Cap. 2:01*]. That Act was subsequently repealed and replaced by the current Act [*Cap 2:13*] which saved the rules under s193 (3) (d) as read with sec(s) (1) and (2). The relevant portion of that section reads:

"193 Repeal of Cap. 2:01 and savings

(1) In this section—

"Repealed Act" means the Electoral Act [*Chapter 2:01*].

(2) **The Electoral Act [*Chapter 2:01*] is repealed.**

(3) Despite subsection (2)—

(a) the person who, immediately before the fixed date, held office as the Registrar-General of Elections in terms of the repealed Act shall be deemed to have been appointed Registrar-General of Voters in terms of section *eighteen*;

(b) every person who, immediately before the fixed date, held office as constituency registrar, deputy constituency registrar or assistant constituency registrar for any constituency shall be deemed to have been appointed constituency registrar, deputy constituency registrar or assistant constituency registrar, as the case may be, for the constituency concerned in terms of section *nineteen*;

(c) every roll kept by a constituency registrar in terms of section 17 of the repealed Act immediately before the fixed date shall be deemed to be the voters roll kept for the constituency concerned in terms of section *twenty* and every person who, immediately before the fixed date, was enrolled on such a roll, shall be deemed to have been registered on the voters roll for that constituency in terms of this Act;

***(d)* every claim, application or objection made, notice issued, proclamation, rule, regulation or other statutory instrument published or other matter or thing whatsoever made, done or commenced in terms of the repealed Act which, immediately before the fixed date, had or was capable of acquiring legal effect shall continue to have or to be capable of acquiring legal effect in terms of this Act in all respects as if it had been made, issued, published, done or commenced, as the case may be, in terms of the appropriate provision of this Act.**

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It is apparent and self evident that upon repealing the Electoral Act [*Cap 2:01*] the law maker intended to preserve and perpetuate the existence of the rules made there under through the savings clause s193 (3) (d) of the current Electoral Act [*Cap 2:13*]. Having clearly articulated that intention the law maker appears to contradict itself by enacting s165 that provides as follows:

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"165 Rules of Electoral Court

(1) The Chief Justice and the Judge President of the High Court, after consultation with a committee appointed by the Chief Justice, may make rules as to the practice and procedure to be observed in respect of any jurisdiction which under this Act is exercisable or to be exercised by the Electoral Court.
(2) The rules in terms of subsection (1) may make provision for—
(*a*) the practice and procedure to be observed in the hearing of election petitions;
(*b*) service of an election petition on the respondent;
(*c*) priority of set down for the hearing of an election petition.
(3) Rules of court made in terms of subsection (1) shall be submitted to the Minister responsible for the administration of the High Court Act [*Chapter 7:06*] for his or her approval and, if so approved, shall be published in the *Gazette*.
[Subsection amended by section 87 of Act 17 of 2007]
(4) Until rules of court for the Electoral Court are made in terms of this section, the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction."

Despite the1995 Electoral Rules having been saved under s193 (3) (d) of the current Act, s165 (4) of the same Act tends to suggest that those Rules were repealed together with [Cap 2:01], hence the need to apply the High Court rules with suitable modification until new Rules have been made under that Act.

The two sections given their natural and grammatical meanings are clearly in conflict and repugnant to each other. It is undesirable that sections in the same Act should contradict each other as that brings uncertainty to the application of the law and may lead to a result unintended by Parliament. From the outset one needs to appreciate that sections in an Act do not operate in a vacuum. They must be viewed as part and parcel of the whole *corpus juris*or related body of laws.

It is however, not strange or unusual through inadvertence or lack of attention to detail, for Parliament or its draughtsman to enact two contradictory sections in the same enactment as appears to have happened here. When that happens, it is left to the Court to resolve the contradiction through time honoured legal interpretation techniques meant to suppress the mischief and advance the remedy for which the law was intended.

Sir Rupert Cross, in his book, *Statutory Interpretation* 1976 offers a practical effective way of surmounting such legal hurdles when he says at p 101:

> "To begin with, two sections may be repugnant to each other. If the repugnance is total and wholly inescapable, a rule of thumb has to be applied under which the later

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> prevails *"legis posterior priore contrarias abrigant';* but this is very much a last resort and there are various techniques of construction which may be employed in order to avoid a repugnancy. One of these, the technique of finding a secondary meaning for one or more of the words or phrases in question has already been discussed."

There is no point for me in exhausting all the other alternative methods of resolving the legal conflict at hand as the above example will suffice. It is plain to me that the dominant intention in both sections was to bring order and suppress disorderliness and chaos in the adjudication of electoral disputes through the employment of Court Rules. The norm in Zimbabwe is that each Court has its own Rules regulating the conduct of its own proceedings. Common sense dictates that each Court's own Rules are crafted to suit the exigencies and peculiarities of that Court. Each Court's own Rules are therefore best suited to carter for the needs of that Court. For that reason resort to other Courts' Rules is the exception rather than the norm. This accords well with the doctrine of exhausting domestic remedies before looking elsewhere for solutions.

Given their plain, literal grammatical meaning the words in s165 have the undesirable effect of rendering the Electoral Court Rules redundant and ineffectual contrary to Parliament's intention in saving the Rules under s193 of the Act. It would be absurd for Parliament to have saved the Electoral Rules under s193 had it intended that High Court Rules should apply in the electoral Court to the exclusion of the Electoral Court Rules.

The purpose for saving the Electoral Court Rules and incorporating them into the current Electoral Act was to preserve and render them useful in the orderly dispensation of electoral Court Justice. It appears to me that Parliament intended s165 (4) of the current Act to provide a back up where there was a void or *lacuna* in the electoral Rules. To give effect to that intention the section must be given a restricted meaning to the effect that where there is a void or *lacuna* in the Electoral Rules the High Court Rules shall apply.

That interpretation is consistent with Rule 33 which provides for the application of High Court Rules. It reads, "The High Court Rules shall apply, *mutatis mutandis*, in regard to any matter not provided in these rules". The rule makes it clear that High Court Rules are only applicable to electoral proceedings in matters not covered by the Electoral Rules 1995.

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Looked at from a different angle, I revert to the technique of last resort suggested by Cross above. In their chronological order s165 comes first before s193. It therefore follows that when Parliament saved the Electoral Rules it was aware of the existence of s 165, it must therefore have intended the provisions of s 193 to prevail over s165.

For the foregoing reasons I come to the conclusion that the Electoral Court Rules under Statutory Instrument 74A of 1995 are valid. Having come to that conclusion I cannot but take heed of *Bennion*'s instructive words of wisdom in his book *Interpretation of Statutes, 1984* at p 125 where the learned author says:

> "A **rule** binds but a principle guides. Thus if an Act incorporates a **rule**, it makes that **rule** binding in relation to the purpose of the Act. But if it attracts a principle it leaves scope for flexible application."

By logical deduction the Electoral Court Act [*Cap 2:13*] incorporates the Electoral Court Rules 1995. For that reason alone a petitioner is obliged to render strict compliance with the Rules failure of which the Court has no option but to invalidate the petition. The Electoral Court being a creature of statute is strictly bound by the four corners of the enabling Act.

I now turn to consider whether there has been a failure by the petitioners to comply with s 167 of the Electoral Act as read with r 21 of the Electoral Rules.

Section 167 of the Act provides as follows:

> **"167 Who may present election petition**
>
> A petition complaining of an undue return or an undue election of a Member of Parliament by reason of want of qualification, disqualification, electoral malpractice, irregularity or any other cause whatsoever may be presented to the Electoral Court by any candidate at such election.
> [Section amended by section 87 of Act 17 of 2007]"

Rule 21 then provides for the form an election petition must take as follows:

> "Form of election petition
> 21. An electoral petition shall generally be in the form of a court application and shall state-
> (a) The petitioner's right to present the petition in terms of section 125 of the Act; and
> (b) The date on which polling took place in the election concerned; and
> (c) The date on which the result of the election was announced in terms of section 66 of the Act; and

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(d) Where the petition relates to-
  (i) An election of chiefs, the electoral college by which the election was held;
  (ii) An election of any other member of Parliament, the constituency in which the election was held: and
(e) The grounds relied on to sustain the petition; and
(f) Where the petitioner relies on a corrupt or illegal practice, the full name and address, if known of every person whom the petitioner alleges was guilty of such a practice;
(g) The exact relief sought by the petitioner."

Thereafter Rule 24 goes on to provide for the listing of votes to which objection is taken as follows:

"List of votes to which objection is taken.
24. (1) Either together with his election petition or not later than seven days after the petition is at issue, the petitioner shall file with the Registrar –

  (a) a list of any votes he intends to object to; and
  (b) a statement of his grounds of objection to each such vote.

(2) As soon as possible after filing a list in terms of subrule (1), the petitioner shall serve a copy of it on the respondent.

(3) Except with the leave of the court, no evidence shall be given at the trial of an election petition against the validity of any vote that is not specified in a list filed under subrule (1) or upon a ground of objection that is not so specified.

(4) The Registrar shall-
  (a) Allow any person during office hours, to inspect a list filed in terms of subrule (1); and
  (b) At the request of any person whose name appears on the list, provide a copy of the list, free of charge."

It is apparent from a perusal of the two petitions that they do not conform to the format laid down in the Electoral Court Rules. For instance, there was failure to comply with r 21 (f) in both petitions. As can be seen, the rule requires that once a petitioner names a person as having engaged in corrupt or illegal practices he or she is obliged to give the full name and address of the person guilty of such conduct and serve a copy on that person so that he could respond.

The petitioner Tracy Mutinhiri accused Mashayamombe and Katsiru of engaging in such electoral malpractices by threatening to throw her supporters into the Wenimbe Dam.

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Petitioner Makanyaire accused Ngolanga and Murambiwa of rigging the elections and Ephraim Musauki of electoral violence in which his supporter was stabbed.

Both petitioners accused various unidentified chiefs, headmen and generally most of the traditional leaders in their respective constituencies of engaging in corrupt illegal practices without providing them with a chance to be heard. It is inconceivable that such prominent members of society could have been unknown to the petitioners.

In both petitions no full names and addresses of the alleged culprits were given as required by law. None of the petitioners proffered the valid defence that the alleged perpetrators of such electoral malpractices were unknown to them. On the contrary petitioner Makanyaire stated that Ephraim Musauki was well known to him and yet he failed to provide his full names and address.

It is needless to say that the *audi alteram patem* rule, that is to say, the need to be heard before anyone can be condemned is paramount and the bedrock upon which our justice system is founded. Thus, in enacting r 21 (f) Parliament intended that such people like Katsiru, Mashayamombe and Musauki would not be condemned of threatening to throw people into Wenimbe dam and of stabbing others without being given a chance to be heard. It would therefore be anomalous and unjust for the petitioners to assert their right to be heard while actively denying others the same right by omission.

Infact, there is no need to provide evidence of failure to comply with the electoral Court rules because it is common cause that there was a deliberate failure to comply with the Electoral Rules with the petitioners' lawyers confusing High Court Rules for Electoral Court rules. Misinterpreting the law is however no excuse for not complying with the law, for ignorance of the law is no excuse.

Having said that, it is not difficult for any reasonable and fair minded person to see that any court will be severely handicapped and unable to dispense real and substantial justice without hearing what Katsiru and others will have to say in respect of the serious criminal allegations levelled against them. And yet, they cannot be heard because of the petitioners' failure to comply with the law. That being the case the Court finds that both petitions are fatally defective and as such a nullity and of no force or effect for want of compliance with rules of Court.

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This really should be the end of the matter, but the petitioners in the course of argument sought to bar the respondents arguing that they were out of court in that they filed their responses out of time. There is however, absolutely no merit in that argument for the simple but good reason that there is no need to respondent to a petition that has been held to be a nullity *ab initio* and of no force or effect. That finding makes it wholly unnecessary to make a finding on whether or not the respondents' papers are in order because in our law when something is a nullity it is an event that never happened in the eyes of the law. What this means is that the petitioners in the eyes of the Court and the law never filed any petitions for the respondents to respond to. For that reason alone the need to respond did not arise.

In the final analysis it is accordingly ordered:

1. That both electoral petitions filed by the petitioners are a nullity, void and of no force or effect for want of compliance with s 167 of the Electoral Act [*Cap 2:13]* as read with r 21 of the Electoral Court Rules 1995.
2. That both petitions in case numbers EC 32/13 and EC 31/13 be and are hereby dismissed with costs.
3. That TEMBA MLISWA be and is hereby declared to be the duly elected Member of Parliament for Hurungwe West Constituency in the National Assembly Elections held on 31 July 2013.
4. That JEREMIAH CHIWETU be and is hereby declared to be duly elected Member of Parliament for the Marondera East Constituency in the National Assembly Elections held on 31 July 2013..
5. That the Registrar be and is hereby directed to proceed in terms of s 171 (3) (a) (ii) of the Electoral Act [*Cap 2:13*]

Musendekwa Mtisi Legal Practitioners, the petitioner's legal practitioners.
F. G Gijima and Associates, the respondent's legal practitioners.
Mugomeza&Mazhindu, the 2nd respondent's legal practitioners.