SILAS GWESHE
versus
BIGGIE J. MATIZA
and
CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

WILSON MAKANYAIRE
versus
TEMBA MLISWA
and
CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

TRACY MUTINHIRI
versus
JEREMIAH CHIWETU
and
CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

JAMES I. H. KAY
versus
RAY KAUKONDE
and
CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

BEDNOCK NYAUDE
versus
TOENDEPI MATANGIRA
and
CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

ELECTORAL COURT OF ZIMBABWE
BHUNU J
HARARE, 13 November & 20th November 2013

Electoral Petitions

G.Mutisi & T.Maanda, for the petitioner
F.G Gijima, for the 1st Respondent.
T.M. Kanengoni, for the 2nd Respondent

BHUNU J: The 5 petitioners, Silas Gweshe, Wilson Makanyaire, Tracy Mutinhiri, James I. H. Kay, and Bednock Nyaude were all losing candidates in the recent harmonised elections held on 31 July 2013. They were contestants in the Murehwa South, Hurungwe West, Marondera East, Marondera central and Bindura South Constituencies respectively.

Aggrieved by the outcome of the electoral process they have now filed electoral petitions in terms of s167 of the Electoral Act [*Cap 2:13*] as read with the Electoral Rules and Regulations. They all seek more or less the same relief to the effect that the respondents in their respective constituencies were not duly elected. They then seek either a re-run or to be declared the winners in their respective constituencies.

All the petitions are opposed and the respondents have raised a number of pertinent preliminary issues. By and large the preliminary points are identical thereby prompting the parties to agree that the 5 cases be consolidated as one ,for the purpose of determining the preliminary issues. I now proceed to deal with and determine the preliminary issues.

1. Misjointer of 2nd Respondent The Chair Person of the Electoral Commission.

The first issue common to all the 5 cases is whether or not the petitioners have improperly cited the 2nd respondent as a party to the proceedings. The 2nd respondent is the Chairperson of the Zimbabwe Electoral commission, a constitutional body responsible for administering elections in terms of the constitution as read with the Act and Regulations.

In determining this issue it is critical to bear in mind that the Electoral Court is a creature of statute and to that extent it is strictly bound by the four corners of the Electoral Act as read with the Constitution and Electoral Regulations. Section 166 of the Act provides for who may be cited as respondents in an election petition Under the Act. It provides that:

> **"166 Interpretation in Part XXIII**
> In this Part—
> "respondent" means the President, a member of Parliament or councillor whose election or qualification for
> holding the office is complained of in an election petition.
> [Definition substituted by section 78 of Act 17 of 2007]"

The Latin maxim *expressio unis est. exclusio alteris* that is to say the express mention of one thing excludes that which is not mentioned, is a term well known to lawyers which accords with common sense and is almost of universal application. For instance, if a coach were to specifically mention eleven players making his team, it is not difficult for any reasonable person imbued with a measure of common sense to appreciate that anyone not on the list of players expressly mentioned by the coach is excluded from the team.

In this case s166 of the Act has expressly stated that the term 'respondent' for purposes of the Act means, *the President, a Member of Parliament or councillor whose election or qualification for holding the office is complained of in an election petition.* The use of the precise word '*means*' instead of the permissive words such as, *include or may,* is a clear indication that the law maker intended to define the term 'respondent' with finality and precision admitting of no additions or subtractions. Had the legislator intended that the meaning was subject to the inclusion of others not specifically mentioned in the section it would certainly have said so or at least have left room for such additions. It is therefore self evident that by not mentioning the *Chairperson of the Electoral Commission* the law maker deliberately excluded the incumbent from the list of respondents in terms of the Act.

It is not difficult to see the rationale behind leaving out the Chairperson from the list of respondents in terms of the Act. The Chairperson of the Electoral Commission is responsible for conducting elections in an impartial, fair and just manner without fear or favour in accordance with the general principles laid down in s 3 of the Act. That section provides as follows:

> **"3 General principles of democratic elections**
>
> Subject to the Constitution and this Act, every election shall be conducted in way that is consistent with the
> following principles□
> (*a*) the authority to govern derives from the will of the people demonstrated through elections that are conducted
> efficiently, freely, fairly, transparently and properly on the basis of universal and equal suffrage
> exercised through a secret ballot; and
> (*b*) every citizen has the right□
> (i) to participate in government directly or through freely chosen representatives, and is entitled,

without distinction on the ground of race, ethnicity, gender, language, political or religious belief,
education, physical appearance or disability or economic or social condition, to stand for office
and cast a vote freely;
(ii) to join or participate in the activities of and to recruit members of a political party of his or her
choice;
(iii) to participate in peaceful political activity intended to influence the composition and policies of
Government;
(iv) to participate, through civic organisations, in peaceful activities to influence and challenge the
policies of Government;
and
(*c*) every political party has the right—
(i) to operate freely within the law;
(ii) to put up or sponsor one or more candidates in every election;
(iii) to campaign freely within the law;
(iv) to have reasonable access to the media"

The dictates of the above section equates the Chairperson to a judge, umpire, match commissioner or referee who is not expected to participate in the conflict or to take sides. Even the common man in the street knows that the match commissioner in the event of conflict between the parties is routinely called upon to submit a report as evidence of what transpired at the match. The norm is that he is called to account as a witness and not as a party to the conflict. Citing the Chairperson of the Electoral Commission as a party to the controversy is misplaced as it can only convert her into a player in the game of politics, thereby prompting her to lose her impartiality as her sight is clouded by the dust of the conflict. It therefore, stands to reason that the Chairperson should be allowed to go about her duties without fear of being sued by any of the contesting parties.

While it is correct that judges may make law in the course of interpreting the law, their primary function is to interpret and implement the law as made by the legislator, doing otherwise would amount to usurping the functions of the law maker and to infringe on the doctrine of separation of powers. Judges' scope of making law is however, extremely limited and that right must not be abused. In the words of Lord Diplock in *Duport Steels Ltd* v *Sirs (Lord Fraser)* (1980) All ER at p541.

> "My Lords at a time when more and more cases involving the application of legislation which give effect to policies that are the subject of bitter public and Parliamentary controversy, it cannot too strongly be emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers; Parliament makes the laws' the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or lacuna in the law the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral... Under our Constitution it is Parliament's opinion on these matters that is paramount".

As I have already indicated elsewhere in this judgement, the words and language employed in s166 of the Act at hand is plain and simple conveying no ambiguity or uncertainty at all. In the absence of such ambiguity or uncertainty in the law, it would be an abuse of the judicial mantle to smuggle the Chairperson of the Electoral Commission as a respondent in circumstances where she is clearly excluded by the relevant statute.

It is surprising that the petitioners elected to persist with citing the Chairperson of the Electoral Commission as a party to the dispute in circumstances where this Court has already for good unassailable reasons held that it is incompetent to do so way back in 2008. See *Simbarashe* v *Zimbabwe Electoral Commission & Anor* 2008 (1) ZLR 342.

Upon realising the futility of his argument Mr *Mtisi* conjured up what appeared at first glance an ingenious argument dusted from the rubble of his hitherto unsustainable submissions. Though not part of his petition to this court he submitted out of the blue that s 166 of the Electoral Act was unconstitutional and as such it must be declared Unconstitutional and struck off the Statute books. It was clear that in making that submission Mr. *Mtisi* was confusing this Court as the Electoral Court with the High court. The frequency with which trained lawyers keep on approaching the wrong courts for relief in cases of this nature is indeed amazing.

That argument for a plethora of justifiable reasons found no favour with his team mate Mr. *Maanda* who strenuously disputed that the section was unconstitutional. His counter argument was that because of her failure to comply with statutory provisions set out

in s 177 of the Act concerning the proper handling of elections, the Chairperson breached the founding values and principles under s 3 (2) of the constitution.

Indeed, a house divided among itself cannot stand. Mr. *Maanda*'s argument does not take the petitioners' case any further. Whether or not the Chairperson's conduct in administering the elections was defective or irregular is a matter of fact. Her alleged errors of commission or omission cannot be decided on the basis of an exception. Back to basics, an exception is a legal objection to an opponent's pleading, for instance where the pleading does not show any proper cause of action or defence. It is a technical preliminary issue that does not seek to deal with the facts. For that reason Mr. *Maanda*'s argument is equally sterile and devoid of merit at this stage in so far as it is grounded on the resolution of disputed facts. Such disputes cannot be resolved on the papers without hearing evidence.

The allegation that the Chairperson of the Electoral Court's conduct of the elections was irregular to such an extent as to have adversely affected the outcome of the elections though premature is being brought in the face of a Constitutional Court ruling that the Presidential Election simultaneously conducted at the same time and places as part and parcel of the Harmonized Elections were free and fair untainted by any irregularity. It has now become public knowledge that on Tuesday 26 August 2013 in the case of *Morgan Tsvangirai* v *Robert Mugabe, Zimbabwe Electoral Commission, Rita Makarau and Chief Elections Officer* CCZ 71/13 the Constitutional Court made a determination in the following terms:

> "...the Constitutional Court, in terms of section 93 (3) and (4) of the Constitution of Zimbabwe, makes the following determination and *declarator*:
>
> 1. THAT the Zimbabwe Presidential elections held on 31 July 2013 was in accordance with the laws of Zimbabwe and in particular with the Constitution of Zimbabwe and the Electoral Act [Chapter 2:13];
>
> 2. THAT the said election was free, fair and credible. Consequently, the result of that election is a true reflection of the free will of the people of Zimbabwe who voted; and
>
> 3. THAT Robert Gabriel Mugabe was duly elected President of the Republic of Zimbabwe and is hereby declared the winner of the said election."

Considering that the Constitutional Court is the highest court of the land and having regard to the doctrine of binding precedent, I am constrained to observe in passing that its pronouncements on the outcome of the Presidential Election Petition which was part and

parcel of the Harmonized 2013 Elections are likely to have a bearing on other related petitions.

In saying that I am mindful of the petitioners' contention that the conduct of Parliamentary Elections may not have influenced the outcome of the Presidential elections, but that need not detain us at this stage.

In the final analysis I can only hold that the citing of the Chairperson of the Electoral Commission as a respondent under s 166 of the Electoral Act [*Cap: 2:13*] is unlawful and to that extent not permissible at law.

The respondents have asked for costs at the higher scale on the basis that the petitioners ought to have known the futility of their conduct in citing the second respondent as a party in light of decided cases and clear statutory provisions to the contrary. Though the petitioner's arguments were extremely weak, they were however, not so outrageous in their defiance of logic so as to attract punitive costs. The exception is accordingly sustained with costs at the ordinary scale.

Musendekwa Mtisi and Maunga Maanda and Partners, the petitioners' legal practitioners.
F.G. Gijima & Associates, 1st respondent's legal practitioners
Nyika Kanengoni and Partners, 2nd respondent's legal practitioners