MBAAKANYI v INDEPENDENT ELECTORAL COMMISSION AND ANOTHER 2010 2 BLR 157 HC

Citation: 2010 2 BLR 157 HC

Court: High Court, Lobatse

Case No: Misca 690 of 2009

Judge: Walia, Kirby and Tafa JJ

Judgement Date: January 15, 2010

Counsel: D V MakatiMpho for the petitioner.rnT Dambe for the first respondent.rnJ Nnoi for the second respondent.

Flynote

Elections - Election petitions -
Relief - Act authorising only three substantive orders - Petitioner seeking order directing High Court to carry out and oversee recount of ballots - Whether such order competent under Act - Electoral Act (Cap 02:09), s 121.

Elections - Election petitions -
Requirements for - Non-compliance - Security -Court not empowered to condone non-compliance with provisions of Act - Late filing of security fatal to petition - Electoral Act (Cap 02:09), s 117(d).

Headnote

An unsuccessful candidate for the Lobatse constituency in the 2009 parliamentary elections brought an election petition in which she sought orders declaring that the verification and counting of the ballots cast in the Lobatse constituency was improper; and an order directing that the High Court carry out and oversee a recount of the Lobatse constituency ballot papers and that the outcome of that recount be declared the official result of the election for the Lobatse constituency. The respondents objected in limine, inter alia, that the relief sought was incompetent as it was not authorised by s 121 of the Electoral Act (Cap 02:09).

Held:
(1) Section 121 of the Electoral Act authorised only three substantive orders by the High Court on electoral petition. The court had no inherent or common-law powers to make orders not authorised by the Electoral Act. Kono and Others v Lekgari and Others; In re Lekgari and Others v Independent Electoral Commission and Others [2001] 2 B.L.R. 325, CA at p 330 applied.

(2) None of the orders sought was authorised under the Electoral Act.

(3) It followed that the point in limine had to succeed and that, on that ground, the petition had to be dismissed.

(4) The petition fell to be dismissed on the further ground that security had not been given timeously and the court had no power to condone non-compliance with the provisions of the Electoral Act. Kono and Others v Lekgari and Others; In re Lekgari and Others v Independent Electoral Commission and Others [2001] 2 B.L.R. 325, CA at p 332 and Dipate v Mmusi and Another [1990] B.L.R. 153 applied.

Case Information

Cases
referred to:

Dipate v
Mmusi and Another [1990] B.L.R. 153

De
Villiers v Louw 1931 AD 241

Kgoadi v
Ramatsebe; Tlhokwane v Thuku [1996] B.L.R. 574

Kono and
Others v Lekgari and Others; In re Lekgari and Others v Independent Electoral Commission and Others [2001] 2 B.L.R. 325, CA

ELECTION
petition. The facts are sufficiently stated in the judgment.

D V
Makati-Mpho for the petitioner.

T Dambe
for the first respondent.

J Nnoi
for the second respondent.

Judgement

KIRBY J:

This is an
election petition in which the petitioner, Mrs Moggie Mbaakanyi, an unsuccessful candidate for the Lobatse constituency in the parliamentary elections held on 16 October 2009, seeks an order as follows:

(a) that
the verification process of the ballots cast in the elections in the Lobatse constituency was improper, irregular and resulted in the declaration and results that were not correct and the errors made could affect the outcome of the parliamentary elections for the Lobatse constituency;

KIRBY J

(b) that
the counting of ballots was improper, irregular and resulted in the declaration and results that were not correct and the errors made could
affect the outcome of the parliamentary elections for the Lobatse constituency;

(c) that
a recount of all the parliamentary ballot papers in respect of the Lobatse constituency be ordered carried out and overseen by the High
Court and only the outcome of the said count be declared the official result of the parliamentary elections in respect of Lobatse; and

(d) costs
of suit.

In her
special power of attorney authorising the petition, the petitioner seeks only the relief of a recount of the ballot papers.

The petition

was lodged on 16 November 2009, on which date it was stamped by the High Court Registry.

Security was
given on 24 November 2008 at 9.48 am, as evidenced by a similar stamp. Notice
of presentation of petition was given the same day.

At a roll
call on 3 December 2009, deadlines were set for the filing of affidavits and it
was ordered that all preliminary points were to be argued on 18 December 2009.

A full set
of affidavits was duly exchanged and notice of intention to raise points in
limine was given by both the Independent Electoral Commission (IEC), which is
the first respondent, and the Honourable Nehemiah Modubule, who is the second
respondent, and the Member of Parliament for Lobatse, whose election is
challenged in the present proceedings.

The
points in limine

The first
respondent avers that the relief sought is incompetent, since it is not
authorised by s 121 of the Electoral Act (Cap 02:09) as amended (the Act), and
prays for the dismissal of the petition.

The second
respondent raises the same preliminary point, but adds two further objections,
namely that:

(a) the
verifying affidavit was not properly commissioned and falls to be disregarded,
and

(b) the
petitioner has failed to accord Kealeboga Modise, one of the unsuccessful
candidates in the election, an opportunity to be joined as a co-petitioner,
which is compulsory in terms of the proviso to s 116 of the Act.

The
approach of the courts to election petitions

Because of
the potentially disruptive effect of successful election petitions on the affairs
of State, the Court of Appeal has found that election petitions should not be
embarked upon lightly. In the leading case of Kono and Others v Lekgari and
Others; In re Lekgari and Others v Independent Electoral Commission and Others [2001] 2
B.L.R. 325, CA Tebbutt AJP (as he then was), with Zietsman and Blofield JJA
concurring, held at p 330 that:

'The power of the courts to consider the regularity of
elections is not derived from any inherent jurisdiction nor does it arise from
the common law but it is to be found within the corners of the electoral
statute, i.e. in

KIRBY J

Botswana in the Electoral Act. In applying that Act the
courts must be astute not to disturb an election which on the
face of it appears fair and regular. Persons who allege that it was not, have,
of course, a democratic right to challenge it but such challenge must not be
frivolous, mischievous or ill-founded but be based on substantive grounds. In bringing
an election petition, too, a petitioner must ensure that he complies
meticulously with the relevant provisions of the Electoral Act.'

This passage
sets out the general approach of the courts in determining election petitions.

It follows
that the court itself has the duty, as well, to ensure that all the peremptory
provisions of the Act relating to election petitions have been complied with.
This is so because, if there is non-compliance with a mandatory requirement, the petition is a
nullity and the court has no power to condone irregularities of this sort or to
grant extensions of the strict time limits set by the Act. (See Kono's
case at p 332.)

Argument was
accordingly also invited as to whether the provision of security on 24 November
2008 complied with s 117(d) of the Act, which requires security to be
given at the time of presentation of the petition or within seven days afterwards.

The jurat

As to the
commissioning of the verifying affidavit, the second respondent alleges that
this is defective because the jurat does not state the rank of the purported
commissioner of oaths. In fact, it does do so. The signature of the commissioner is
accompanied by the official stamp of the Central Police Station of the Botswana
Police Service. Next to the signature is the abbreviation 'Sgt.' written in the
hand of the signatory, and below it are hand-printed the words 'Sgt. Rungwe K'.
This is sufficient, in my judgment, to clearly indicate that the signatory is a
sergeant in the Botswana Police Service. In terms of s 3 of the Commissioners of Oaths Act (Cap
05:03), as read with Part II of the schedule thereto, officers of the Botswana
Police Force of rank of and above sergeant are ex officio commissioners of
oaths. It follows that the verifying affidavit was properly commissioned in
this respect.

The second
respondent also argues in his heads that, while the petitioner is described in
the body of the affidavit as 'an adult female of full legal capacity resident in Lobatse',
on the final page the deponent acknowledged that 'he knows and
understands the contents of this affidavit, has no objection to swearing to the
prescribed oath, and that same is binding on his conscience' (my
emphasis). The argument continues that 'it is quite possible that the second
page of the "verifying affidavit" was mistakenly stapled on to page 1
as there is nothing
on either of the pages to show what the nexus between the two pages is'. This
argument was raised only in the second respondent's heads, and not in his
affidavit or in his original notice, so the petitioner has not had the
opportunity of responding thereto. This is a possibility (however remote) which
the second respondent could have substantiated by the simple expedient of
seeking an explanatory affidavit from Sgt Rungwe, but he

KIRBY J

chose not to
do so. In my view the male pronouns used in the jurat are an obvious typographical or drafting
error, and the point made is both farfetched and de minimis. To the extent that
that may be necessary, I exercise my discretion to receive the verifying
affidavit in terms of rule 13 of Order 13 of the High Court Rules.

The attack
on the verifying affidavit is thus unsuccessful, and that point in limine
cannot be sustained.

The
opportunity to be joined as a co-petitioner

Turning to
the next point: in her petition, as amplified in her replying affidavit, the
petitioner avers that she personally afforded Kealeboga Modise the opportunity
to be joined as a co-petitioner. He declined to do so, stating that he pulled
out of the race

and did not consider himself to have been a candidate, notwithstanding that he received 40 votes. Mr Modise declined to sign a confirmatory affidavit, saying that he had not been authorised to do so by his party. The second respondent does not deny those averments but argues that, without such an affidavit, compliance with s 116 of the Act has not been proven. This argument is without merit. There is no requirement in s 116 of the Act that the opportunity to be joined as a co-petitioner must be given in writing, nor is guidance given as to the manner in which this is to be proved. It is sufficient that the petitioner attests to doing so on oath, and this has been done. It is open to a respondent, if he so desires, to refute the allegation by tendering evidence to the contrary. No such affidavit from Kealeboga Modise or other evidence has been placed before the court and the petitioner's evidence of compliance is uncontradicted. That point too must fail.

Competence of the relief sought

The point in limine common to both respondents is that the relief sought is incompetent and that therefore the petition must be dismissed. In terms of s 116 of the Act an election petition may be brought by a candidate who complains of an undue return or an undue election of a member for any constituency by reason of want of qualification or by reason of disqualification, corrupt or illegal practice, irregularity, or by reason of any other cause whatsoever. And in terms of s 121(2) of the Act -

'(2) The following provisions shall apply with respect to the trial of election petitions -

...

(f) at the conclusion of the trial of any election petition, the High Court shall determine whether the respondent was duly elected or whether any, and if so what, person other than the respondent was or is entitled to be declared duly elected;

(g) if the High Court determines that the respondent was duly elected, such election shall be and remain as valid as if no petition had been presented against it;

(h) if the High Court determines that the respondent was not duly elected, but some other person was or is entitled to be declared elected the respondent shall forthwith be deemed to have vacated

his seat, and the High Court shall forthwith certify its determination to the Secretary and the Secretary shall thereupon by notice in the Gazette declare such other person duly elected;

(i) if the High Court determines that the respondent was not duly elected and that no other person was or is entitled to be declared duly elected, the seat of the respondent shall be deemed to be vacant and the High Court shall certify its determination to the President that a vacancy has occurred, the cause of such vacancy and the constituency in which such vacancy has occurred.'

In each of these subsections the imperative word 'shall' is used. Three substantive orders, and no others, are authorised:

(1) that the respondent was duly elected; or

(2) that the respondent was not duly elected and ABC was or is entitled to be declared

elected; or

(3) that
the respondent was not duly elected, and no other person was or is entitled to
be declared elected.

The
petitioner argues that the court is enjoined to determine these issues but that such
determination is not necessarily an order as such and other orders are not
precluded, including the granting of a prayer for a recount to be conducted by
the court. I do not think that argument can be sustained. 'Determination' is
defined in Black's Law Dictionary (7th ed) as 'a final decision by a
court' and to determine is thus to finally decide. So, at the conclusion of the
hearing of an election
petition, the court is to finally decide in one of the three ways authorised by
the Act. Its order must reflect its final decision and only three orders are
thus authorised in an election petition.

As laid down
in Kono's case (supra) the court, in determining an election petition,
must comply strictly with the provisions of the Electoral Act. It has no
inherent or common law powers to make other orders which are not authorised by
the Act. The Act is specific as to what court access is permitted, and as to the powers of the
court. Appeals and objections during the registration process are to be heard
by a magistrate, whose decision is final (Part IV). The nomination process may
only be challenged in an election petition (s 37(3)). Election petitions must
be made to the High Court and only three outcomes are allowed (Part X). Other applications
to the High Court are specifically authorised in two cases only: by s 88 in
relation to errors in returns of election expenses, and by s 107 as an
alternative to an election petition, to regularise an apparent illegality
committed by inadvertence or error. Objections to security may also be heard by
the High Court (s 119(2)).

Procedures
for the hearing of election petitions are laid down in the Act itself. It is only on the form of
the petition and the matters to be stated therein that Rules of Court are
authorised to be made by s 123 of the Act. To date no such Rules have been
made.

Election
petitions must be tried in open court, when oral evidence is received by the
court (Kono's case p 329). This notwithstanding, preliminary arguments
may be heard as to whether the election petition as

KIRBY J

filed is
competent, without the hearing of oral evidence, as was done in Kono's case, and also, for
example, in Dipate v Mmusi and Another [1990] B.L.R. 153 and Kgoadi v
Ramatsebe [1996] B.L.R. 574.

By s 79 of
the Act, all documents relating to the conduct of an election shall be
delivered by the returning officer to the Registrar of the High Court, who
shall keep them in safe custody for six months unless otherwise ordered by the
court, or unless
legal proceedings are pending in respect of such election, whereafter they
shall be destroyed. These documents would include a wide variety of
instruments, including results of election, nomination papers, returns,
ballots, envelope accounts, acceptances of support, and no doubt many others.
They are retained for the purposes of being produced as exhibits or explained
by competent witnesses at the trial of election petitions so as to prove or
disprove alleged
irregularities and not, in my judgment, for any other purpose. Certainly, they
are not retained so that the court can conduct a recount.

The petitioner seeks as her principle prayer an order that the High Court carry out and oversee a recount of the Lobatse constituency ballot papers, and that the outcome of that recount be declared the official result of the election for the Lobatse constituency. To justify such an order, two antecedent orders are sought:

(a) that the verification process was improper and irregular to the extent that errors made could affect the outcome of the election; and

(b) that the counting of ballots was improper and irregular to the extent that the errors made could affect the outcome of the election.

No complaint is raised about the registration process, the nomination process, or the poll itself.

None of the orders sought is among those authorised by s 121 of the Act, nor is any combination of these so authorised.

In my judgment, the limitation of the orders permissible on an election petition is deliberate. Parliament has set the bar high so that it will not be easy to upset the result of an election which has been generally free and fair but in which some mistakes may have been made, as will almost invariably be the case. This is made clear by s 140 of the Act, which provides as follows:

'No election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of Part VI [Elections] and Part VII [Polling], if it appears to the Court that the election was conducted in accordance with the principles laid down in Part VI or Part VII and that such mistake or non-compliance did not affect the result of the election.'

The reason for this is set out in Kono's case at p 330, where Tebbutt AJP quoted with approval the words of Wessels JA in relation to a similar section, in De Villiers v Louw 1931 AD 241 at p 268:

'[I]f an election is set aside the whole electorate is affected, business is dislocated, expenses are incurred by electors going to the poll, the business

of hotels and public houses is interfered with, and generally speaking a number of persons are greatly inconvenienced.'

And at p 264:

'We may therefore conclude that the Legislature did not desire an election to be set aside lightly; it regarded it as a matter in which the court should act with particular caution and circumspection; no matter how grave the mistake or non-compliance may be the court may not declare an election void except in the event mentioned in the section.'

It is also the practice in Botswana that, immediately following a general election, Parliament is convened, the members are sworn in, and the business of the house commences. A successful election petition may thus cause considerable disruption.

The reason
the petitioner did not seek any of the orders authorised by s 121 is not
difficult to fathom: even assuming that all her suspicions and complaints went
unanswered, she was unable to say either that the second respondent would not
have been elected or that she would have been elected or that no person was
elected and the election should therefore be declared void; and she was defeated by a fairly solid
margin of 115 votes in a poll of 9 968 voters.

Counsel for
the second respondent argued further that the petitioner had failed to make out
even a prima facie case in her petition for any of the reliefs available under
the Act. It may or may not be that the point has merit. However, it was neither formally
raised nor fully argued, and it is unnecessary to deal with it here.

All of the
petitioner's complaints have been comprehensively denied by the IEC, which has
filed a detailed account of the election and the verification and counting
processes. It has set out in full the complex arrangements made, and has listed
the IEC staff and candidates' representatives who were on hand on election day and
during the counting process to ensure transparency and the free and fair
conduct of the elections. These checks and balances make impressive reading and
are not in the main denied by the petitioner.

They
demonstrate graphically why the High Court is not authorised to perform and
supervise its own recounts, as prayed for by the petitioner. The IEC has put in place for the
elections a highly trained team of registration officers, presiding officers,
polling officers, returning officers, assistant returning officers, and other
staff. Each candidate has his or her own polling agents and counting agents
present to check and verify each ballot cast or counted, and during the
counting each ballot is individually held up for scrutiny by all present. The
police are in attendance, as are observers from the Southern African
Development Community
(SADC) and the African Union (AU), among others.

Neither the
judges nor the High Court staff have had the benefit of the specialised
training given to IEC officials. To allow an ad hoc count by the untrained
court staff to gainsay the count and the decisions on spoilt papers of the IEC
professionals, in the absence of election agents and neutral

KIRBY J

observers,
would be to make a mockery of the carefully crafted verification and counting process. That
is why, in my judgment, the court is not permitted under the Act to perform or
order its own recount of ballots.

It is
noteworthy also that in those countries where judicially supervised recounts
are authorised by legislation (such as in New Zealand and Canada) these are
still conducted by trained electoral staff, with the court having only a
supervisory role.
In Botswana judicial recounts are not authorised at all.

The point in
limine that the order sought is incompetent therefore succeeds.

Late
filing of security

While it is
not, in the circumstances, strictly necessary to do so, I will deal briefly as well with the
question of whether security was timeously given in terms of the Act, since in
my view the petition must fail on this ground too.

The High
Court stamp shows security to have been given on 24 November 2009, whereas the petition was filed on 16 November 2009. By s 117(d) of the Act, security is to be given at the time of presentation of the petition (here, on 16 November 2009) or 'within seven days afterwards'. The seven days afterwards commenced on 17 November 2009 and ended on Monday 23 November 2009. Security was therefore given beyond the time during which it could lawfully be given.

Failure to
strictly comply with any of the time limits set by the Act in relation to election petitions nullifies the petition. (See Kono's case at p 332, and Dipate v Mmusi and Another (supra). Those cases are also authority for the rule that the court
has no power to condone such irregularities or to extend the time limits.

No explanation
is given for this late filing in the papers. However, although it is not in evidence, the petitioner's counsel has made reference to a memorandum from the Registrar noting that a legal messenger was turned away by the civil registry staff on the afternoon of 23 November 2009, which was still in time, when he sought to lodge the security. It was thus lodged the following morning, 24 November 2009.

Unfortunately,
this cannot avail the petitioner because the court has no power, however sad or blame-free the circumstances, to condone late filing or to grant extensions of time. Practitioners are all aware that by the Chief Justice's Practice Note No 1/2008 filing of court process is only permitted on weekday mornings between 7.30 am and 12.45 pm, save in the case of urgent applications, or where authorised by the registrar. A case could certainly have been made out for afternoon filing on 23 November in an election petition where time was running out, but the attorneys failed to do so, and chose to file late. In all of the four petitions before this court, including the present one, attorneys have been able to file at least one pleading during the afternoon. The petitioner's attorney should surely have done likewise. All electoral deadlines are to be strictly complied with, and this is no exception. Petitioners must ensure that they allow proper time for service before the deadline, as they should be aware that excuses or explanations for late filing cannot avail them.

Mrs
Makati-Mpho for the petitioner argues that the Chief Justice's practice note has no force of law, since it has not been gazetted as a rule

KIRBY J

of court. In
this she is incorrect. Rule 5 of Order 3 provides that the Registrar shall have authority to limit the hours during which process may be filed, provided that in doing so he shall ensure that process may be filed for at least five hours on any court day. This he did when, on the instructions of the Chief Justice, he circulated Practice Note No 1/2008. The lawfulness of the practice note is in any event irrelevant since the court has no power to extend the statutory time limit for the filing of security.

Counsel has
also submitted that security was given when the guarantors signed their bonds on 14 and 20 November 2009 respectively and that timeous delivery of the security is not required by the Act. This argument cannot succeed. The security must be both approved by and given to the Registrar and it must be given timeously. In casu, it was not.

For this
reason too, the petition is a nullity and falls to be dismissed.

In result:

(1) The

petition is struck off.

(2) The petitioner is to pay the costs of the first and second respondents.

Walia and Tafa JJ concurred.

Petition dismissed.