THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

CIVIL REVISION NO. 0009 OF 2001

AND

IN THE MATTER OF MBR-00-CV-MA--OO34 OF THE CHIEF MAGISTRATE'S COURT OF MBARARA HOLDEN AT MBARARA

BYANYIMA WINNIE::APPLICANT

VS

NGOMA NGIME::RESPONDENT

BEFORE: THE HON. JUSTICE V. F. MUSOKE-KIBUUKA

REVISIONAL ORDER

Parliamentary elections were held throughout Uganda on Tuesday, 26th June, 2001. For the Constituency of Mbarara Municipality, there were only two candidates. There were only two candidates the applicant and the respondent to this application.

It is not in dispute that the Returning Officer, Mbarara District, did declare the applicant as the winner of the seat for Mbarara Municipality. The declaration was made on 26th June, 2001. According to the return, she poled 9,980 votes while the respondent poled 9816 votes. The two were separated by a difference of only 164 votes.

It appears that after declaring the winning candidates, for Mbarara Municipality, under Section 59(1) of the Act, the Returning Officer transmitted a return of the results to the Electoral Commission as section 59(2) of the Act requires of him.

In turn, the Electoral Commission, after ascertaining the numerical correctness of the results, contained in the return, went ahead, under section 60(1) of the Act and, in writing under the Commission's Seal, declared the applicant as the winner of the Parliamentary Seat for Mbarara Municipality. The Commission published in the Uganda Gazette, Vol. XCIV No. 41. Dated 29th June, 2001, the name of the applicant as the winner of Mbarara Municipality Seat in Parliament. The names of a good number of the other winning candidates were also published in the same publication of the Uganda Gazette.

Subsequently, the applicant was sworn in as a Member of Parliament and duly took her seat in the House, on Tuesday, 3d July, 2001.

However, on Monday, July, 2001, the respondent, through his advocates, Messrs. Kiryowa Kiwanuka & Co. Advocates, filed, in the Chief Magistrate's Court at Mbarara, Miscellaneous Application No, 0034 of 2001. The respondent sought, by that motion, an order of the Chief Magistrate's Court ordering a recount of the votes cast during the Parliamentary elections, in Mbarara Municipality under section 56 of the Parliamentary Elections Act 2001.

The learned Chief Magistrate heard the motion on Tuesday, 3rd July, 2001, and granted the application. She ordered that the recount commences on Thursday 5t1 July, 2001. The recount commenced as ordered.

However, on the same day, 5th July, 2001, the applicant filed this motion in the High Court seeking a revisional order setting aside the Chief Magistrate's order for the recount. Two main grounds were relied upon by the applicant, both in the motion and in the affidavit in support and the supplementary affidavit:

a) that in ordering a recount, the Chief Magistrate's Court exercised jurisdiction not vested in it as far as the court ordered a recount after the applicant's name had been Gazetted by the Electoral Commission and the applicant had taken up her seat in Parliament; and

b) that the Chief Magistrate's Court had exercised the jurisdiction, vested in it under section 56 of the Act, with material irregularity when it purported to conduct a recount of the votes for Mbarara Municipality when about 21 of the 66 ballot boxes had been found to be without seals which was contrary to the law.

On Friday, 6th July, 2001, this court made an interim order staying the recount until this motion was heard and determined. That order was made ex parte as the recounting exercise was in its second day and could be completed any time. The same order required the applicant to serve all interested parties and the hearing date for the motion was fixed for Tuesday 10th July, 2001, at 9.00 a.m.

On Tuesday,10th July, 2001, the applicant and her advocates were in court.
So was the respondent together with his two advocates, Mr. Kiryowa Kiwanuka and Mr. Akampumuza. Both advocates for the respondent informed this court that instructions to represent the applicant during the hearing of this motion had been withdrawn from them by the respondent. The respondent stated that he would argue the application personally. Both the advocates of the respondent and the respondent himself insisted that this court hears Miscellaneous No. 0057, which they had filed in court that same morning seeking leave of this court to appeal to the Court of Appeal against the interim order which had previously been issued by this court.

Indeed, there was no procedure under which Miscellaneous Application No. 0057 which had not been cause-listed for the day and which had been filed that very morning, could be heard. I ordered that the hearing of this application proceeds. The respondent personally made a statement at the beginning of the hearing of the application. He raised, in that statement, an objection relating to the impartiality of the court in this matter. But when his objection was overruled, the respondent walked out of court stating that he did not submit to the jurisdiction of this court. During all the years that I have been a judge on the bench of this honourable court I had never witnessed so much disrespect to it. That conduct by the respondent was highly contemptious of this honourable court. Surprisingly, however, the two advocates for the respondent who had informed court that they had no instructions to appear in the matter remained sitting in court at the bar throughout the hearing and were busy all the time taking notes.

So much for the background and circumstances of this application. I will now analyze the first substantive ground of this application. That is the question whether or not the learned Chief Magistrate had competent jurisdiction to order a recount when one of the candidates had been declared winner by the Electoral Commission, had her name Gazetted and after she had taken up her seat in parliament.

The same question was raised on behalf of the applicant before the Chief Magistrate's Court. The Court dismissed it after applying the old **"Golden Rule"** of Statutory interpretation. The court cited the English decision in *Warbuton v. Love-lord 5 E. R. 499* to the effect that "**where the language of an Act is clear and explicit, we must give effect to it."** It also cited the decision in *Commissioner of Income Tax vs. Perusel (1891) AC 531*, specifically, *at page 549*, where it was stated

" I **do not think it competent for** any **court to proceed upon the assumption that the legislature has made a mistake. Whatever the real fact may be, I think a court of law is bound to proceed** on **the assumption that time legislature is an ideal person that does not make a mistake."**

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Lastly, the court relied upon the decision in *R. v. Judge of the City of London Court (1892) IQD 273, at page 290*, where Lord Asher wrote:

"If the words of the Act are clear, you must follow them even though they lead to a manifest absurdity. Time court has nothing to do with the question whether the legislature has committed an absurdity."

The court thereafter concluded in the following words, **"The words of Act 8/2001 are very clear in so far as they give this court its jurisdiction to order a recount"**

Apart from the unappealing absolute judicial conservation which the **"Golden Rule"** of statutory interpretation clearly appears to advocates, and the quiet consolation it appears to offer under the cover of the notorious dictum that the duty of a judge is to administer the law and not to make it, I do not think that the **"Golden Rule"** was the proper interpretation aid that should have been employed in the instant case. For the question at issue, in the instant case was not whether or not the words of section 56(1) were very clear in so far as they

vested the Chief Magistrate's Court with jurisdiction to order a recount of votes. The issue in question was whether or not section 56(1) vested jurisdiction in the Chief Magistrate's Court to order a recount of votes where one of the candidates had already been gazetted as the winner and had taken his or her seat in parliament. The **Golden Rule** could not be of any meaningful help in solving that question because obviously the words of section 56(1) are very far from being expressly clear about that. The words were only clear in as far as they vested jurisdiction in the Chief Magistrates' Courts. The words were not clear as to under what circumstances that jurisdiction had to be exercised.

I, therefore, agree with Mr. Walubiri, learned counsel for the applicant that the best approach to interpret the provisions of section 56(1) of the Act with regard to the question of under what circumstances a Chief Magistrate's Court may exercise that jurisdiction, is to look for and ascertain what intention Parliament had in enacting that provision of the electoral law and the objective of the provision in question. I also agree that both intention and objective are ordinarily controlled by the context and often the statute as a whole. Thus words of a statute, although they are to be construed in their ordinary meaning, they should be construed in light of their context. A statute must be construed as a whole. See ***Halsbury Laws of England, 3rd Edition, paragraphs 593 and 594.*** **Also see** ***John Carter Calguhoun vs. Henry Brooks, House of Lords Vol. XIV 493.***

It appears to me that the provision of section 56 of the Parliamentary Election's Act, 2001 are relatively new provisions. Those provisions were not incorporated either in the *National Assembly Elections Act, Cap 131* (now repealed) or in the Constituent Assembly Election Rules, 1994. The provisions first appeared on the statute book of Uganda in section *85* of the Parliamentary Elections (Interim Provisions) Act, 1996. The same provisions now appear as section *56* of the present Parliamentary Elections Act. Their full import and limitations have, therefore, not been fully explored or understood through application and interpretation.

From the context in which section 56 exists, it is clear that the Parliamentary Elections process is a progressive one. The Act contains clearly marked and self-contained segments of the electoral process. The context also reveals that the electoral process does not move along a dual track. Nor does it go forward and backwards. It is clear that it moves in a single direction and along a single track: Once one segment is completed, the process moves on to another segment. Those segments or sets of election activities, e.g. nomination of candidates, campaigning, voting, counting of votes and announcing of the results and election petitions,

are all well demarcated by the law. Indeed each segment is contained in a well numbered and different part of the Act. It is clear that none of them flows into other. The law does not provide for any overlapping. There will, for instance, be no official campaigning until the nomination of candidates is over. There will be no counting of votes until the voting period is over. There will be no declaration or the gazetting of the name of the winning candidate by the Election Commission until the vote counting process is over in the particular constituency of the particular Member of Parliament. That, I think, is a singular characteristic of the electoral law of Uganda.

Section 56 of the Parliamentary Elections Act is clearly part of the segment of the counting of votes and announcing of results. It falls under part IX of the Act. It is, therefore clear that the provisions of section 56(1) and the jurisdiction they vest in the Chief Magistrate' Act are intended to be and, indeed, are part of the segment of the counting of votes and announcement of the results. A recount of the votes under section 56 of the Act is merely a legal function performed under the neutrality of the courts and intended to untangle any numerical questions of the results as part of the vote counting process. It is intended to assist the Electoral Commission to announce the correct winner in the constituency. The segment of counting of votes and declaring the winning candidate closes with the publishing of the name of the winner in the Uganda gazette. That is the very last act of the Electoral Commission in respect of the election of a Member of Parliament. Once the person who is gazetted takes up his or her seat in Parliament the Electoral Commission can no longer reach him or her.

There cannot be any valid recount of the votes in the constituency after that last activity. For the Electoral Commission cannot announce a different winning candidate in the same constituency after that.

In the case of Mwesigye Enock vs. Electoral Commission, High Court Miscellaneous Cause No. 62 of 1998, in which the Electoral Commission had attempted to remove a sitting Councilor and declare a different person as elected instead, this court had occasion to state the following on this particular issue:

"The role of the Electoral Commission to act administratively in relation to any candidate closes the very moment the candidate takes his or **her seat as a Councillor or as a Member of Parliament. The Electoral Commission's powers can only be exercised** in **relation to "candidates" and not to Councilors or Members of Parliament. A person who has been declared the winner of an election or even the one who has lost one is no**

longer a Candidate. He or she is beyond the administrative reach of the Commission. The Commission can only reach him through a court order. To attempt to extend those powers to Councilors and Members of Parliament is to act in excess of jurisdiction and any decision or action is **ultra vires the Electoral Commission's Act."**

It, therefore, follows that the same law which so clearly demarcates those separate segments of the electoral activities, would, at the same time provide that after a candidate has been declared the winner and has taken up his or her seat in Parliament, after the counting of the votes and the announcement of the results segment has long been completed, the Electoral Commission would still be deciding the numerical questions of the results. If that were to be the case, then the law would be driving the electoral process along a backward track. I have said that is an alien feature of the Parliamentary Elections Act, 2001.

There is another equally strong reason why the jurisdiction of the Chief Magistrate's Court under section 56(1) of the Act cannot be exercised after one of the candidates has taken up his or her seat in Parliament.

By Looking at the Act as a whole, it becomes crystal clear that once a candidate takes up his or her seat in Parliament, the only valid question which arises at that point, in relation to his or her election, and which may require determination is, "was this member of Parliament validly elected?" The question, at that stage of the process, is no longer "who is the winning candidate? The latter is the question a recount, under section 56(1) of the Act, is intended to assist to answer.

The question whether a Member of Parliament has been validly elected or not can only be determined by the High Court. The relevant jurisdiction is vested in the High Court by section 8 of the Act. The question can only be determined upon a petition presented in the High Court and heard and determined in accordance with the provisions of sections 61 to 68 of the Act. It follows that the same question cannot be determined by a Chief Magistrate's Court through a recount under section 56 of the Act. The only recount that would be relevant at that point is one which the High Court may order under the provisions of subsection (5) of section 64 of the Act.

By purporting to exercise the jurisdiction under section 56 after the results have been gazetted by the Electoral Commission and after the winning candidate has taken his or her seat in Parliament, a Chief Magistrate's Court would be assuming the role of answering the question whether such Member of Parliament was validly elected or not. That court, in effect, would be assuming jurisdiction not vested in the Magistrate's Court but in the High Court. For the jurisdiction which is vested in the Chief Magistrate's Court by section 56 is clearly exhausted the very moment the counting segment of the electoral process is completed. That is when the winning candidate is gazetted and subsequently takes up his or her seat in Parliament.

It appears to me that Parliament, in its infinite wisdom clearly foresaw the kind of problems that would face the Chief magistrates' Courts in exercising the jurisdiction under section 56 of the Act. The counting of the votes segment of the electoral process is a very short period of time. The spirit of the Act is that the Returning Officer should transmit the results of the elections to the Electoral Commission immediately and without delay, as sub-sections (1) and (2) of section 59 clearly indicates. Parliament, in view of that spirit and requirement, did not only restrict the exercise of the jurisdiction under section 56 to about 11 days after the announcement of the results by the Returning Officer, but most importantly, it created, in subsection (3) of section 59 of the Act, an arresting mechanism whereby the results declared by the Returning Officer, after the counting process, are arrested and delayed by the Returning Officer from transmission to the Electoral Commission. That arresting mechanism is intended to protect the jurisdiction of the Chief Magistrates' Courts from being exhausted by the fast flowing election process as I have explained above. The Electoral process flows like a river. You have to build a dam across it to halt its rapid movement. It moves like a speeding bus. You have to stop it well in time. Short of that you will, certainly, be left behind.

Under section 51(1) of the Act, the tallying of the results by the Returning Officer is supposed to be carried out in the presence of the candidates or their agents. The law appears to me to require any candidate unsatisfied with the results tallied, to notify the Returning Officer at that point or soon after before the Returning officer transmits the results to the Electoral Commission that he or she intends to apply to the Chief Magistrate's Court for a recount. The Returning officer will then delay the transmission of the results for 7 days. If no such application is made, he or she will transmit the results to the Electoral Commission. If an application is made and granted by the Chief Magistrate, the Returning Officer will delay

the transmission of the results until after the recount; after receiving a certificate of the recount from the Chief Magistrate.

In the instant case, no notice was ever given to the Returning Officer by the respondent after the Returning officer had tallied the results. The Returning Officer, indeed, a very efficient Returning Officer, did his work almost in a record time. He appears to have transmitted the results soon after tallying them during the night of the 26th June, 2001. The Electoral Commission was equally efficient. It ascertained and declared the results and, as required by section 60(1) of the Act, gazetted the wining candidate within three days, on 29th June, 2001. All along, the respondent was sleeping upon his rights. No wonder, the flowing electoral process left him behind while he continued to enjoy his deep slumber. He appears to have woken up on the 6th day when he filed Miscellaneous Application No. 0034 in the Chief magistrate's Court. But even then, he gave no notice of such application to the Returning Officer. The electoral process proceeded and the winning candidate was sworn into office the following day, 3ft1 July, 2001. When the Chief magistrate's Court ordered a recount on 4th July, 2001, she had no jurisdiction left in the matter it had been entirely exhausted.

The position of the law appears to be very clear. An order made without competent jurisdiction is itself not competent. It is a nullity, see *Martin Judagi vs. West Nile District (1963) E. A. 906*, *Mwatsahu v. Maw (1967) E. A. 42*, *Nakabago Co-operative Society vs. Livingstone Kyonga (1992) III KALR l37and Mubiru And Others vs. Kayiwa (19889O, HCB* .

Such an order is subject to revision by invoking the supervisory jurisdiction of the High Court under section 84 of the Civil Procedure Act.

I am aware that I have spent a good amount of time analyzing the first ground of this motion. I am also aware that there are several ancillary matters to this ground which were argued before me by learned counsel Mr. Ngaruye and Julius Musoke, relating to alleged illegality and injustice, with which the learned Chief magistrate is alleged to have exercised her jurisdiction during the hearing of Miscellaneous Application No. 0034 of' 200 1. I have examined all those submissions. I propose to make no specific decisions on them in view of the conclusion which I have already made on the fundamental issue of lack of competent jurisdiction by the Chief Magistrate's Court in this matter.

I will now move to the other major aspect of this motion. That is the ground argued before me by learned counsel, Mr.Alaka. It is to the effect that the Chief magistrate's Court exercised the jurisdiction under section 56(1) of the Act with material irregularity when it purported to recount the votes after discovering that some of the ballot boxes which were presented for the recount had not been secured in accordance with the law.

The supplementary affidavit as well as the record of the proceedings in the Chief Magistrate's Court show that out of 66 ballot boxes, 21 were found to be unsealed upon their presentation for the recount. There is no dispute about that fact. This means that 21 ballot boxes were not secured in accordance with sections 5 1(2) and 53, of the Act. The question is, would a valid recount be conducted after such a discovery?
Under Article 61(a) of the Constitution, the Electoral Commission is mandated to ensure that **regular, free** and **fair** elections are conducted or held. As I understand it, an election must be fair to three parties to it. The first is the nation. Every aspect of a national election is fair to the nation if it is conducted in strict accordance with that nation's laws. The second party, to which an election must be fair, are the candidates who take part in it. Here the notion of transparency is vital. An election cannot be fair to the candidates if the results of that election are merely second guessed.

The third party to which an election must be fair are the voters. There is need for both transparency and exercise of free will in respect of choice of a candidate to vote for and the security of the vote after it has been cast. Where the votes given to each candidate by the voters have not been secured in accordance with the law, it will be unfair to the voters to attribute the outcome of an obviously sham recount to them.

A recount under section 56 of the Act is intended to serve as a filtering mechanism. It is intended to be more secure and reliable than the first count carried out by Presiding Officers at the various polling stations in the field at the end of polling time, on polling day. A recount is a legal function, performed under the neutrality of the court in order to untangle the numerical questions of the results. It is intended to be carried out at a higher level of scrutiny and to produce uncontestable figures of the results of each candidate.

It is, therefore, difficult to reconcile a recounting of any votes from ballot boxes, which have not been secured in accordance with the law, with those values and aspirations or even with the goals and purposes of section 56 of the Act.

It appears to me that it should take much less than ordinary common sense to know that where any of the ballot boxes presented for a recount are found to be open or unsealed, the purposes of a recount are not achievable. Prima facie, the evidence would have been tampered with and rendered useless. In those circumstances the number of votes obtained by each candidate would not be verifiable by way of a recount.

To pretend to conduct a recount where some of the ballot boxes have been found open is mere false pretence. It is an abuse of court's process. It amounts to second-guessing the results. Section 56 was never intended to create an illegitimate mechanism of second-guessing the results in a Parliamentary election. A recount cannot be mechanically and purposelessly carried out. Exercising jurisdiction under those circumstances, would be exercising it with material irregularity. I duly agree with Mr. Alaka in that regard. Such material irregularity is so fundamental that it viciates the entire process of conducting a valid recount.

I noted above, that section 56 of the Act is a relatively new provision of our law. It has, therefore, not received significant judicial interpretation. But there is the case of *Sulaiman Ssembajja vs. Returning Officer And Kigimu Kiwanuka Maurice Ben.* It was election Petition No. MMA 1of 1994. It related to elections of the delegates to the Constituent Assembly. Under the Constituent Assembly Election Rules, 1993, the jurisdiction to hear and determine election petitions were vested in the Chief Magistrate's Courts. In this case, the petitioner and second respondent had stood in the Constituency of Bukomansimbi in Masaka District. Kagimu Kiwanuka had worn the elections beating Sulaiman Ssembajja by 71 votes. For various reasons Sulaiman Ssembajja filed a petition during the hearing of which he sought an order for a recount of the votes. The court made the order and called for the relevant ballot boxes to be presented before it. But when the 93 ballot boxes which had been used during the election were brought before the court, 77 out 93 were found not to bear seals supplied by the Electoral Commission. They were completely unsealed. The court ruled, and rightly so, that a recount was not possible since the ballot boxes had not been secured in accordance with the provisions of the law.

The decision in Sulaiman Ssembajja's case is one of a lower court. It has no binding effect to this court. I have only referred to it for lack of a relevant decision of any of the courts of judicature. However, that decision assists to show that the application of the principle which I am now stating is, indeed, well known and has been in practice in the courts of this country. In the instant case, some 21 ballot boxes were found not to have been secured in accordance with the provisions of the law, for the court to have ordered and proceeded with, a recount under those circumstances, was to exercise its jurisdiction with material irregularity. That too forms a basis for a revisional order under S.84 of the Civil Procedure Act.

On the basis of the analysis which I have set out in this revisional order, and in order to provide some kind of a check-list for the courts below, I set out below conditions under which a Chief Magistrate's Court may competently exercise the jurisdiction under section 56 of the Parliamentary Elections Act, 2001. It appears to me that a Chief Magistrate's Court will competently and regularly exercise the jurisdiction under section 56 of the Parliamentary Elections Act, 2001, where, inter alia, the following conditions, generally, obtain:

(i) Notwithstanding the fact that section 56(1) of the Parliamentary Election's Act, 2001, provides for a period of 7 days, following the day on which the Returning Officer declares the results of the election, within which a candidate may apply for a recount of the votes, the decision to apply for a recount must be made promptly and without inordinate delay after the Returning Officer has declared the winning candidate. That decision must not be made as an afterthought.

(ii) the candidate intending to apply for a recount under section 56(1) of the Act, should immediately inform the Returning Officer of his or her intention to apply for or of the application, as indicated under sub-section (3) of section *59* of the Act. The notice serves to arrest or delay the rapid flow of the electoral process to enable the recount fit within its proper location within that process;

(iii) upon the receipt of the notice of the intention to apply for a recount or of the application, the Returning Officer should delay the transmission of the results of the Constituency affected, to the Electoral Commission, until after the recount. Where the Returning Officer receives the notice of the intention to apply or of the application, after he or she has already transmitted the results to the Electoral Commission, inform the Electoral Commission of the

recount so that, in turn, the electoral Commission delays declaring the winning candidate and gazetting his or her name under sub-section (1) of section 60, of the Act;

(iv) At the time an order for a recount is made by the Chief Magistrate's Court, the winning candidate, declared by the Returning Officer, must not have been declared or gazetted by the Electoral Commission under section 60(1) of the Act, or assumed his or her seat in Parliament;

(v) the order for a recount, under section 56(1) of the Act, must be made judicially. Good cause for a recount must be shown by the applicant to the satisfaction of the court, (on a balance of probabilities). For during an election, everything is presumed to have been rightly done unless there is reasonable ground shown for doubting it; and

vi) before commencing upon the recount, the court must, prima facie, be satisfied that the purpose of the recount is achievable. All the ballot boxes presented by the Returning officer, for the purposes of the recount, must have been and should still be sealed as required by sections 51(2) and 53 of the Act. Where any of those ballot boxes have been unsealed before their presentation before the Chief Magistrate, then, prima facie, the purpose of the recount is not achievable and no legitimate recount can take place under those circumstances since the evidence of the numerical numbers of the votes polled by each candidate, which the recount seeks to verify, would not have been secured in accordance with the law and should be regarded as tampered with and rendered unreliable, valueless and completely useless.

In the final result, I make the following orders:
a) the order made by the Chief Magistrate's Court Mbarara, on 4th July, 2001, requiring a recount of the votes to be conducted in respect of Mbarara Municipality Constituency following the Parliamentary elections, 2001, is hereby set aside;

b) any recount which was conducted in pursuance of that order is declared null and void and for that reasons, it is also set aside;

c) all elections materials which were ferried to the Chief Magistrate's Court for the purpose of the recount be returned to the Returning Officer;

d) the applicant is to recover her costs in this application and in the court below, from the respondent. Two certificates for two counsel for the applicant are authorized.

V. F.Musoke Kibuuka

Judge

17/07/2001

Mr. Ngaruye-Ruhindi for applicant

Applicant in court

Respondent not in court.

Mr. Kiryowa-Kiwanuka for respondent.

Court: Case for ruling.

Ruling read and signed.

V. F. Musoke-Kibuuka

Judge

Mr. Kiryowa-Kiwanuka:

I have instructions from the respondent to seek leave of this court to appeal to the Court of appeal.

Mr. Ngaruye:

I refer to Order 40 rule 1(4) which requires that leave be by notice of motion. The respondent was not a party to this application.

Court: Leave granted to the respondent if he so wishes to appeal to the Court of Appeal.

V. F.Musoke -Kibuuka

Judge

17/07/2001