MERCY MAZADZA

COURAGE SUCHU

HAZEL SISASENKOSI MOYO

TSITSI DZETE

LIPONIA TSHUMA

DIANA SAKHILE NCUBE

SHEILA MAFU

EMILY HANDINA

NOMAZULU SIBANDA

INNOCENT GOTAMI

PATRICK SHERENI

NETSAI KAMOME

Versus

NICOLA JANE WATSON

SURRENDER KAPOIKILU

COLLINS DISCENT BAJILA

PRINCE DUBE

DESIRE MOYO

DESMOND MAKAZA

OBERT MANDUNA

MINENHLE NYANDOYENKOSI GUMEDE

SICHELESILE MAHLANGU

PASHOR RAPHAEL SIBANDA

GIFT SIZIBA

ERECK GONO

And

INNOCENT NCUBE N.O

ZIMBABWE ELECTORAL COMMISSION

CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

IN THE ELECTORAL COURT OF ZIMBABWE
KABASA J
BULAWAYO 26 AND 28 JULY 2023

Electoral Review

N. Ndlovu, for the applicants
W. Ncube with J Tshuma, for the 1st respondents in EC 17 - 19 and EC 21 - 28/23 and 2nd respondent in EC 20/23
T M Kanengoni, for the 2nd – 4th respondents

KABASA J: This application seeks a review of the second respondent's decision wherein he accepted nomination papers for the first respondents after the 1600 hours deadline on 21 June 2023.

It is important to state from the onset that these applications were filed on 16 July 2023 as a total of 21. The issues raised therein were similar and the relief sought similar. The only difference was the identity of the applicants and the respondents whose nomination papers the applicants allege were irregularly accepted.

The matters were therefore consolidated into one application. However in the matter filed under EC 20/23 the second respondent was Prince Dube whereas in the rest of the applications the Presiding Officer of the Nomination Court was the second respondent. With the consolidation Prince Dube joined the other first respondents, making the Presiding Officer of the Nomination Court the second respondent in the consolidated matter.

The applicants, who are members of a political party named Elected Early Democrats were each seeking to be nominated to stand as candidates for the filling of the soon to be vacant National Assembly seats in the upcoming general elections pencilled for 23 August 2023. They

however failed to meet the 1600 hours deadline for submission of their nomination papers on the day the Nomination Court sat, which was 21 June 2023. The first respondents successfully submitted their nomination papers and were duly nominated to stand as candidates in the various constituencies under Bulawayo province. The second respondent was the Presiding Officer of the Nomination Court.

The applicants have taken issue with the acceptance of the first respondents' nomination papers and approached this court seeking to vacate the first respondents' nominations.

The grounds thereof were set out as:-

1. Second respondent herein conducted himself in an unlawful manner in the execution of his duties in terms of the Electoral Act, [Chapter 2.13].

2. Second respondent acted in an irrational and unfair manner in the execution of his duties thereby prejudicing applicants through accepting nomination papers for first respondents after 1600 hours yet he had rejected applicants' papers.

3. Illegality in the proceeding and determination.

4. Acting *ultra vires* his enabling Act, which is the Electoral Act.

This application, as already stated, was filed on 16 July 2023 as an urgent chamber application. A certificate of urgency was duly filed in terms of rule 60 (6) of the High Court Rules, 2021. An HC number was allocated, making it an application filed in the general division of the High Court. The application itself was headed "In the Electoral Court of Zimbabwe." Notices of set down for the hearing of the urgent chamber application were sent out to the respondents on 19 July 2023. On 21 July 2023 the Registrar wrote to the parties in response to a letter written by the applicants' counsel, advising all the parties of the transfer of the urgent chamber applications to the Electoral Court and the change in the case numbers from HC to EC.

This background was necessary as will become clearer later on in this judgment. I propose now to give the background of the matter as appears in the applicants' papers. The factual background is disputed by the respondents.

According to the applicants, on 21 June 2023 they were at Tredgold Magistrates Court for purposes of filing their nomination papers to contest for the National Assembly seats in the 23 August general election. They arrived at 1500 hours but their party President was yet to communicate with them on the availability of funds for payment of nomination fees. Such communication only came through at around 1604 hours, minutes after the 1600 hours deadline, rendering all the applicants ineligible to file nomination papers. The applicants accepted this position as it was the correct legal position. However the first respondents, who are members of a political party known by the name Citizens Coalition for Change "CCC", who were in the same predicament pleaded to be allowed to file their nomination papers outside the legally stipulated time and they were all allowed to do so by the second respondent.

The applicants regard the second respondent's conduct as illegal, irrational and unfair and on these grounds seek that the proceedings and resultant decision be set aside.

The application is opposed by all the respondents. In opposing the application *Mr W Ncube,* assisted by Mr J Tshuma took points *in limine* and so did *Mr Kanengoni* for second – fourth respondents.

The points *in limine*, if successful are dispositive of the matter. It is for this reason that I invited the parties to address me on the points *in limine* only. This judgment is therefore concerned with these preliminary points. The following are the points *in limine* raised by counsel for the first and second – fourth respondents:-

1. The application is not urgent.
2. The application is in essence an application for a declaratur disguised as a review.
3. An application for review cannot be brought as an urgent chamber application.
4. A declaratur cannot be granted in review proceedings.
5. Applicants have no *locus standi in judicio*.
6. Applicants are without legal interest.
7. Fatal non-joinder
8. Applications are an abuse of court process.

9. Material dispute of facts.

10. No cause of action.

The second, third and fourth points raise more or less the same issue as does the 5th, 6th and 10th points *in limine*. These points *in limine* can be reduced to six as the point *in limine* relating to the application being an abuse of court process would entail consideration of the merits.

As MATHONSI J (as he then was) stated in *Telecel Zimbabwe (Pvt) Ltd* v *PORTRAZ & Ors* HH 446-15 points *in limine* must be raised on points of law and procedure but where such is meritable and likely to dispose of the matter.

I am of the considered view that the issue of urgency, *locus standi* and the validity of the application for review as regards the manner in which it was filed should of necessity detain this court as my findings as regards their merit is dispositive of the matter.

Urgency

Counsel for the respondents contended that the matter is not urgent in that the conduct being complained of occurred on 21 June 2023 yet the application was only filed on 16 July 2027, almost a month later. The delay was not explained and the certificate of urgency equally failed to address this issue. The urgency was therefore self-created so argued counsel for the first respondents. Counsel for the second to fourth respondents associated himself with this argument.

In response to a question posed by the court with regards the provision of rule 31 of the Electoral Court rules which makes cases brought to the Electoral Court inherently urgent, *Mr Kanengoni* contended that that rule does not excuse a party from the normal requirements of urgency. The presumption of urgency can be rebutted where no such urgency has been exhibited by a litigant. Counsel further argued that to allow the inherent urgency provided for in rule 31 to be regarded as irrebutable would allow a litigant to bring an electoral matter on the eve of an election and prejudice all other processes which follow any election, postal votes and printing of ballot boxes. The court therefore must be able to exercise its discretion on the issue of urgency.

The applicants' founding affidavits made no mention of urgency yet they ought to have pleaded urgency especially given the delay in the filing of the application. The certificate of

urgency does not speak to the founding affidavits which it ought to as it is therein that the urgency and the failure to act timeously is located.

Counsel further argued that the Electoral Act in sections 46 (9) and 45 E (14) speaks to the urgency with which matters must be brought to court in setting out time-lines for when appeals should be filed, responded to and heard. Whilst the provision relates to appeals the legislature was demonstrating the general need for urgency in dealing with electoral matters.

Mr Ndlovu for the applicants countered these submissions by contending that whilst the litigant must indeed approach the court with urgency, rule 31 of the Electoral Court rules is peremptory. Electoral matters must be heard on an urgent basis. Counsel conceded that the applications ought not to have been filed as urgent chamber applications complete with a certificate of urgency as by its very nature, an electoral court application is urgent.

I must commend *Mr Ndlovu's* candidness in accepting the wholly undesirable manner in which the applicants' matter was brought to court. The applicants ought not to have relied on the High Court rules, specifically rule 60 (6) placing the matter within the general division of the High Court when it was an Electoral matter which was to be filed with the Electoral Court.

The issue of urgency and what amounts to urgency has been stated and re-stated in a plethora of case law. (*Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188, *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 140, *Triple C Pigs and Anor* v *Commissioner General, ZRA* 2007 (1) 27, *Gwarada* v *Johnson & Ors* 2009(2) ZLR 159.

It is however important not to lose sight of why electoral matters are inherently urgent and the purpose of rule 31 of the Electoral Court rules. Elections are set for 23 August 2023 and the 12 respondents have been duly nominated for National Assembly seats as representatives of their political party.

In *Chabvamuperu & Ors* v *Jacobs & Ors* HH 46-08 MAKARAU JP (as she then was), whilst dealing with an election petition had this to say:-

> "…. Election petitions require urgent resolution as they have the effect of disrupting the composition and working of two of the three pillars of state, the Executive and the Legislature. That this is the intention of the legislature is not only to be read from the section under construction but from the entire part of the Act dealing with election petitions as it goes to provide the period within which petitions have to be determined both at the first instance and on appeal."

The point made by the then Judge President is true even in applications of the nature I am seized with. *Mr Kanengoni's* contention that these matters are urgent as they impact on other processes echoes the remarks by MAKARAU JP (as she then was).

It is therefore my considered view that notwithstanding the confused manner in which this application was filed, the point is it is an electoral matter and rule 31 makes it urgent, not based on any averments by a litigant but by the very nature of the matter.

I therefore hold that the matter is urgent and consequently dismiss the point *in limine* on urgency.

I turn now to the point *in limine* regarding lack of *locus standi* of the applicants. *Mr Ncube's* contention was that the applicants have no right to seek review of a decision made for another party. They have no legal interest in the case. The decision does not relate to them as they conceded that they were lawfully ruled out for nomination as they failed to meet the 1600 hours deadline. There was no misdirection on the part of the second respondent in rejecting their nomination papers. The second respondent acted lawfully and they therefore have no cause of action warranting a review of the decision taken with regards to the first respondents.

Mr Kanengoni associated himself with submissions by *Mr Ncube.* In response *Mr Ndlovu* for the applicants conceded that the decision to reject the applicants' nomination papers was proper and no cause of action could therefore arise from that action. Counsel thereafter asked that the paragraph seeking to compel the second respondent to accept the applicants' nomination papers be deleted from the draft order. Counsel however contended that an application for review is not only against the decision but against the proceedings. The applicants take issue with the proceedings which resulted in a violation of the Electoral law and therefore seek that the proceedings be set aside. They therefore have a cause of action and a right to bring the application.

In *Peebles* v *Dairibord Zimbabwe (Pvt) Ltd* 1999 (1) ZLR 41 (HC) a cause of action was defined as:-

> "Simply a factual situation the existence of which entitled one person to obtain from the court a remedy against another person."

The applicants are not seeking a remedy against another in a matter that they have an interest in. They are not candidates vying for election for the same National Assembly seats. They have accepted that they were lawfully barred from being nominated as candidates.

It cannot be argued that the participation of the first respondents in the upcoming election defeats the applicants' free expression or public participation. It also does not impact on their right to vote or the freedom to elect whomsoever they wish. There is therefore no issue of a violation of some fundamental right that gives them the right to protect and defend.

A person has *locus standi* if they have a direct and substantial interest in the outcome of legal proceedings. The applicants' motivation appears to be one of 'if we are not contesting you also must not contest'. They could only say so if they were challenging the rejection of their nomination. They have accepted the decision and not only accepted it but acknowledged it as lawful.

The applicants may be interested in the outcome of the elections, just as every other citizen is, but being interested and having a direct and substantial interest in the matter are two different things. (*Zimbabwe Teachers Association & Ors* v *Minister of Education and Culture 1*990 (2) ZLR 48 (HC), *Grandwell Holdings (Private) Limited* v *Minister of Mines and Mining Development & Ors* HH 193-16).

That said I come to the conclusion that the applicants have no *locus standi*. The point *in limine* was therefore properly taken and succeeds.

The last point *in limine* I will consider relates to the defective nature of the application.

Counsel for the first respondent contended that an application for review is brought in terms of rule 62 (2) of the High Court Rules, 2021. This is so because the Electoral Rules do not have the requisite provision.

In terms of rule 33 of the Electoral Court rules, the High Court rules shall apply in regard to any matter not provided for in the Electoral rules. An application for review is one such matter.

Rule 62 (2) of the High Court rules, 2021 provide that:-

> "The court application shall state shortly and clearly the ground upon which the applicant seeks to have the proceedings set aside or corrected and the exact relief prayed for all of which shall appear on the face of the court application."

The application *in casu* stated the grounds but not the exact relief sought.

Mr Ncube contended that this defect is fatal and renders the application a nullity.

Mr Kanengoni associated himself with *Mr Ncube's* submissions but went on to argue that it is to rule 95 that the court must look not rule 62. Counsel's reasoning was that because the review application is provided for by statute it is covered by rule 95 which provides for miscellaneous appeals and reviews. Rule 95 requires that such application be filed within 15 days (rule 15 (8)) and this application was filed after 24 days and so falls foul of rule 95. Which rule is applicable *in casu?* Will a resolution of this issue change the fact that the exact relief sought does not appear *ex facie* the application? It does not and counsel correctly stated as much.

What is clear therefore is that whether it is rule 62 or rule 95 which is applicable the requirement that the grounds and the exact relief must appear *ex facie* the application is a peremptory requirement.

Mr Ndlovu conceded that there was a failure to comply with the rules. Again I commend counsel for conceding this point and departing from the argument in the heads of argument filed by the applicants' erstwhile legal practitioner who appeared to hold that such infraction was neither here nor there and not prejudicial to the respondents.

Mr Ndlovu proceeded to seek to be condoned for the infraction arguing that there was no prejudice occasioned to the other parties.

The question is what is the jurisprudence in this jurisdiction regarding a failure to comply with rule 62 (2) which was rule 257 in the now repealed High Court Rules, 1971?

In *Katsimberi* v *Rwodzi N.O and Anor* HC 246-22 MANZUNZU J set out several decisions of this court. In that case counsel had argued that the absence of the relief *ex facie* the application was not a material non-compliance. In disagreeing with this contention MANZUNZU J had this to say:-

> "The first case relied upon by *Mr Biti* of *Minister of Labour & Ors* v *Pen Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) at 295 G – 296 D, the court send a strong warning to legal practitioners for failure to comply with rule 257 thus:-
>
> "The notice of motion itself was not in accordance with proper practice. It simply asked for the relief particularised in an annexed draft order, which was that the determination

> be set aside and the dismissal of the employee confirmed. I am bound to reiterate the stricture of GREENFIELD J in *Ulterton* v *Ulterton* 1969 (2) RLR 404 (GD) at 409 f – g; 1969 (4) SA 391 (R) that the requirement of rule 227 (1) of the High Court Rules 1971, that an applicant should append to his notice of motion a draft of the order he seeks, does not relieve him of the necessity to ensure that the nature of the relief appears *ex facie* the notice."

MUNZUNZU J went on to cite several cases which speak to the same issue. (*Rimayi* v *Minister of National Supplies & Anor* S 89-90, *Chataira* v *Zimbabwe Electricity Supply* Authority 2001 (1) ZLR 30 (H), *Gonye* v *Mtombeni N.O and Ors* HH 356-17).

What is inescapable in the long line of case authorities is that a failure to state the grounds and the exact relief sought is fatal to the application. A failure to comply with a peremptory rule therefore renders the application a nullity.

In *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Proprietary) Ltd & Anor* SC 43-13 GARWE JA (as he then was) had this to say:-

> "The position is now well established that a notice of appeal must comply with the mandatory provisions of the Rules and if it does not, it is a nullity and cannot be condoned or amended. See *Jensen* v *Acavalos* 1993 (1) ZLR 216 (S)"

Granted this was referring to a notice of appeal but the legal principle lies in that a failure to comply with the mandatory provisions of the Rules renders the notice a nullity, whether it is an appeal or application matters not.

This position has not changed. One may argue that it is putting emphasis on form rather than substance but until the jurisprudence of this jurisdiction changes, this is the legal position which was enunciated by the Supreme Court and the doctrine of *stare decisis* demands that that be the position until there is a shift propounding a different approach.

In a recent judgment of the Supreme Court KUDYA JA restated this position in *Nyathi v The Trustees for the Time Being of the Apostolic Faith Mission of Africa and 5 Ors* SC63-22 when he said:

"…..a chamber application or opposition thereto that does not comply with the mandatory rules of court is a nullity." The application before me does not escape this because the case by KUDYA JA was concerned with a failure to set the correct *dies induciae.* The issue rests on the failure to comply with the peremptory rules of court, whatever the nature of such failure.

A nullity cannot be condoned or amended. *Mr Ndlovu's* application for condonation does not therefore change the fact that the application is a nullity and there is nothing for the court to condone. Can a nullity be condoned?

The point *in limine* therefore has merit and succeeds.

With the success of the 2 points *in limine* I find it pointless to consider the rest of the points *in limine*. I consider doing so an unnecessary exercise.

The first respondents asked for an award of punitive costs. Costs are in the discretion of the court. The papers before me show that the applicants filed another application before this court based on the very same facts but seeking a different relief. The papers are a replica of the application filed seeking the same relief but under a different procedure. This is an abuse of the court process which must be censured. The applicants' conduct is therefore deserving of censure and a case for punitive costs has therefore been made.

That said I make the following order:-

1. The point *in limine* on urgency is dismissed.
2. The points *in limine* on *locus standi* and defective application succeed and are upheld.
3. The applicants' application is accordingly struck off the roll.
4. The applicants are to pay costs on the legal practitioner-client scale.

Cheda & Cheda, applicants' legal practitioners
Tanaka Law Chambers, 1st respondents' legal practitioners
Nyika Kanengoni & Partners, 2nd – 4th respondents' legal practitioners