

JOHNSON MUDZINGWA
versus
SIMON MACHIRI
and
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE 27 & 28 July 2023

Urgent Court Application

Mr *T D Mutsikadowa*, for the applicant
Mr *P B Saurombe*, for first respondent
No appearance for the second respondent

MUCHAWA J: This is an urgent court application for a declaratory order made in terms of Rule 59 (6) of the High Court Rules, 2021. The order sought is in the following terms:

“IT IS DECLARED

1. That the nomination of the first respondent on 21st June 2023 as a candidate to participate in the local authority election for Ward 35 Mazowe Rural District Council scheduled to be conducted on 23rd August 2023 is in contravention of section 119 (2) (h) (ii) of the Electoral Act, [*Chapter 2:13*].
2. That the nomination of the first respondent on 21st June 2023 as a candidate to participate in the local authority election scheduled to be conducted on 23rd August 2023 is declared null and void and is of no force and effect and is hereby set aside.
3. That first respondent is not a candidate for the local authority elections in Ward 35 of Mazowe Rural District Council scheduled to be conducted on 23rd August 2023.

ACCORDINGLY, IT IS ORDERED:

4. That the first respondent is disqualified from contesting as a candidate in the Mazowe Rural District Council Ward 35 elections by operation of section 119 (2) (h) of the Electoral Act [*Chapter 2:13*].
5. Second respondent shall not include the name of first respondent in the preparation of ballot papers to be used in the elections scheduled to be conducted on 23rd of August 2023.
6. The first respondent shall pay the costs of this suit.”

The brief background to this matter is that the applicant and first respondent were duly nominated as candidates to contest on 23 August 2023 for the seat of Ward 35 Mazowe Rural District Council. It is the applicant’s averment that the first respondent was not qualified to be nominated as, though he is an owner of land held under an agreement of lease being Plot No. 13, Danbury Park Farm in Mazowe Rural District Council, he owed Mazowe Rural District

Council in unpaid levies. The amount owed is said to be four hundred and twenty United States Dollars and this is contended to be a contravention of s 119 of the Electoral Act.

The application is opposed by the first respondent whilst the second respondent filed a notice indicating that it would be bound by the decision of the court in this matter. Six points *in limine* were raised by the first respondent in the notice of opposition. Both parties filed heads of argument. I heard the parties on the points *in limine* and reserved my ruling. The six points raised are:

1. That the matter is not urgent,
2. That this is a disguised application for review.
3. That the court lacks jurisdiction
4. That there are disputes of fact
5. That there is fatal non joinder
6. That this is an abuse of court process.

Though I heard the parties on all the points *in limine*, it is my considered opinion that this matter can be resolved on a consideration of whether the matter is urgent or not. I turn to consider that issue.

Is This Matter Urgent?

Mr *Saurombe* submitted that this matter is not urgent at all as the conduct complained of, which is the nomination of the first respondent as a candidate, happened on 21 June 2023 and this application was brought a month later as it was filed on 21 July 2023 and there has been no attempt to explain the delay. The application is alleged to be an afterthought which is meant to harass the first respondent in the less than thirty days remaining before the elections. Both the certificate of urgency and the founding affidavit are alleged to be deficient in accounting for the delay. It was contended that, even if one accepts the 3rd of July when the applicant claims to have received a letter from the Mazowe Rural District Council as the date when the facts needed to complete the cause of action, there is still no explanation for the delay from then to 21 July 2023.

The applicant's attempt to use the 23rd of August as the date of reckoning, which is the date set for the elections was said to be an improper test on urgency.

To further point to the urgency of this matter in the context of elections, Mr *Saurombe* pointed to the timelines set in the Electoral (Applications, Appeals and Petitions Rules), 1995

wherein a party is given four days in which to act against a decision of the nominating court. It was argued that the applicant should have acted by 25 June 2023.

Case law authorities which deal with urgency such as *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188, *Tripple C Pigs & Anor v Commissioner General ZIMRA* HH 7/07 and *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 140, were referred to.

It was prayed that the point in *limine* should be upheld, and the matter be dismissed with costs.

Mr *Mutsikadowa* denied that the matter is not urgent and said that the day of reckoning is 23 August 2023 when the election is going to be held and this application was filed well before that date. It is averred that the applicant did not explain any delay in his founding affidavit because there is none and equally the certificate of urgency does not address that as it is not necessary. It is then argued that there is obviously time needed for preparing an application before its filing and such time need not be accounted for.

It is only in the heads of argument that the applicant explains that his legal practitioners engaged the Mazowe Rural District Council on or about the 3rd of July 2023 to ascertain the correct position regarding the first respondent's indebtedness to the Council. This process is said to have taken a bit of time as the relevant persons were not readily available. It was further argued that the urgency of the matter arises from the fact that if the matter is heard on the ordinary roll, then it will be heard after 23 August 2023. The certificate of urgency was said to be properly before the court. Mr *Mutsikadowa* prayed for the dismissal of this point *in limine*. I start off by laying out the test to be used in resolving whether a matter is urgent as set out in *Tripple C Pigs supra* wherein it is observed that when a matter is heard urgently, a party is given the privilege of jumping the queue and having their matter heard ahead of a host of other litigants:

“When a court is considering whether or not a matter is urgent, each case is judged according to the circumstances surrounding the matter. The test for urgency, is however not subjective. See *Document Support Centre P/L v T. F. Mapuvire*¹. MAKARAU JP stated therein that the test for urgency is not subject but objective.”

In *Gulmit Investments (Pvt) Ltd v Ranchville Enterprises (Pvt) Ltd & 4 Ors* HH 94/04 the position was put as follows:

“This court has held that an application is urgent when if at the time the cause of action arises, determination of the matter cannot wait. (See *Kuvarega v Registrar-General & Another* 1998

¹ HH 117/2006

(1) ZLR 188 (HC)). In such a case, the filing of an application with the court immediately the cause of action arises acts to underscore the urgency of the matter and the vigilance of the applicant. A delay may however occur between the cause of action arising and the filing of the application with the court. Where the urgency of the matter is born out of that delay, then unless the delay is satisfactorily explained, the non- action on the part of the applicant until his or her legal position is altered by some other vigilant person cannot constitute urgency for the purposes of the rules of this court.”

In *casu*, the need to act arose on 21 June 2023 when the first respondent was nominated as a candidate and the latest date if the applicant is given the benefit of doubt, is 3rd of May. There has been no attempt to explain the delay from either date. What must be considered is the date when the need to act arose and not the date of reckoning of 23 August 2023. If the delay is not explained, then no good cause is shown to justify the privilege of jumping the queue.

In *Mzite v Damafalls Investments (Pvt) Ltd* HH 218/16 this was said:

“A party who brings a matter on an urgent basis is required to outline fully and truthfully the facts surrounding the application. He is required to file a fully comprehensive certificate of urgency. The purpose of a certificate of urgency is to guide the court on issues of urgency. It must outline the nature of the application and the grounds relied upon for the assertion of urgency. Where there has been a delay, this delay must be explained in the certificate of urgency. A practice has arisen where legal practitioners who are asked to do such certificates, to do so as a matter of course without paying particular attention to the requirements of the law. That practice is discouraged.”

In this matter there is absolutely no attempt in the founding affidavit, on which a matter stands or falls, to outline fully the date when the cause of action arose and the grounds relied upon for the assertion of urgency. The delay is also not explained. Even the certificate of urgency says nothing about the delay. It is my finding that no good cause has been shown to justify the urgent application.

The first respondent prayed for dismissal of this application on account of the matter not being urgent. When it was pointed out that when a matter is found not to be urgent, then it stands to be struck off the roll as the merits of the matter would not have been engaged on. Mr *Saurombe* distinguished this as being a court application as opposed to a chamber application in which there will be a provisional and final order and r 60 (18) explicitly provides for the striking off, of a matter found not to be urgent from the roll of urgent matters.

The distinction seems to be immaterial, in my opinion. The point is that the matter cannot be dismissed as the merits have not been considered.

It is my finding that the matter is not urgent, and I proceed to strike it off the roll with costs.

Mugomeza & Mazhindu, applicant's legal practitioners

Zimbabwe Lawyers for Human Rights, first respondent's legal practitioners

Nyika Kanengoni & Partners, second respondent's legal practitioners