

CITIZENS COALITION FOR CHANGE  
and  
SENGEZO TSHABANGU  
versus  
PRINCE DUBEKO SIBANDA  
and  
BRIAN VANYA MOYO  
and  
VELISWE NKOMO  
and  
JASMINE TOFA  
and  
STABILE MLILO  
and  
PASHOR RAPHAEL SIBANDA  
and  
NICOLA JANE WATSON  
and  
ERECK GONO  
and  
EVIDENCE SUNUNGURAI ZANA  
and  
MORGAN NCUBE  
and  
OBERT MANDUNA  
and  
JANETH DUBE  
and  
DESMOND MAKAZA  
and  
FEBION MUNYARADZI KUF AHAKUTIZWI  
and  
GIDEON SHOKO  
and  
TENDAI SIBANDA  
and  
ANASTASIA MOYO  
and  
JOEL GABUZA GABUZA  
and  
DAVID ANTHONY CHIMHINI  
and  
SIPHIWE NCUBE  
and  
FELIX MAGAGELA SIBANDA  
and  
HELEN ZIVIRA

and  
MATIVENGA GODFREY MADZIKANDA  
and  
ZIMBABWE ELECTORAL COMMISSION  
and  
THE MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS  
and  
CITIZENS COALITION FOR CHANGE

HIGH COURT OF ZIMBABWE  
KATIYO J  
HARARE, 23 November & 06 December 2023 & 02 February 2024

### **Urgent Counter Application**

*L Uriri*, for the 1<sup>st</sup> and 2<sup>nd</sup> applicant  
*A Muchadehama* for the 1<sup>st</sup> to 22<sup>nd</sup> respondent  
*TM Kanengoni* for the 24<sup>th</sup> respondent  
*Gumbo* for the 25<sup>th</sup> respondent

**KATIYO J:** The applicants approached the court seeking a declaratory order in the following terms

- a) That the decision of the Nomination Court sitting at Harare, Bulawayo, Gwanda, Lupane and/or any other location around the country on 7 November 2023 to accept the nomination papers and candidature of 1<sup>st</sup> to 23<sup>rd</sup> respondents and any other recalled individuals whatsoever for election in the by-elections set to be conducted on 9 December 2023 is unlawful, of no force and effect and hereby set aside.
- b) That 1<sup>st</sup> to 23<sup>rd</sup> respondents and any other recalled individuals whatsoever are not candidates for election in the by- elections scheduled to be conducted on 9 December 2023.
- c) That 23<sup>rd</sup> and 24<sup>th</sup> respondents shall not include the names of 1<sup>st</sup> to 23<sup>rd</sup> respondents and any other recalled individuals whatsoever in the preparation of ballot papers to be used in the by-elections scheduled to be conducted on 9 December 2023.
- d) That the 1<sup>st</sup> to 23<sup>rd</sup> respondents are interdicted from representing or holding themselves out to the general public and electorate in the constituencies concerned or any other place in Zimbabwe, whether physically or through any form of media, as candidates for election in by-elections scheduled to be held on 9 December 2023.
- e) 1<sup>st</sup> to 23<sup>rd</sup> respondents shall jointly and severally pay the applicants' costs on the scale of legal practitioner and client.

### **Brief Background**

The applicants seek a Declaratory order that the decision of the Nomination Court to accept the first to twenty-third respondents as candidates of political party called Citizens

Coalition for Change (CCC) led by a man called Nelson Chamisa in the by-election be deemed unlawful and set aside.

It is common cause that the first to twenty-third respondent's confirmation of membership in the National Assembly and senatorial seats was published in the Government Gazette on 30 August 2023. The second applicant proceeded to address letters to the presiding officers of the Parliament on 3 October 2023 wherein he alleged that the first to twenty-third respondents had ceased to be members of the CCC political party.

The first to twenty-third respondents under HC 6684/23 filed an application for a declaratory order which sought resolution of the question on, whether the communication written by the second applicant *in casu* notifying the presiding officers about the cessation of the respondents' membership in the CCC party on whose ticket they had been voted into Parliament, and for them to act in terms of the law conformed to the requirements of s 129(1)(k). The matter appeared before the honourable MUTEVEDZI J who dismissed the application in its entirety. The application resulted in a failed attempt to successfully contest and subsequently reinstate the first to twenty-third respondents' membership to the CCC political party, which judgment was handed down on 3 November 2023.

The first to twenty-third respondents proceeded to the Nomination Court to submit their nomination papers to be admitted as candidates in the by-election as members of the Citizens Coalition for Change political party. The nomination papers were nonetheless accepted by the nomination court. The applicants, aggrieved by the acceptance of the nominations approached this Honourable Court seeking an order declaring that the decision of the nomination court is unlawful, should be set aside and requested that the matter be determined on an urgent basis.

The first to the twenty-third respondents argued that there is no material basis upon which the present application can be granted stating that the order sought is incompetent. The respondent further raised points *in limine* as the basis upon which the matter ought to be disposed. The court will dispose of both the merits and points *in limine* as follows.

### ***In Limine***

The respondent raised the point that the Court has no jurisdiction to entertain the matter stating that the matter ought to be handled by the Electoral Court and ought to have been brought by way of a review. An Application for a Declaratory Order such as that before this Honourable Court deals with rights and legality of matters, an application for review deals with procedural irregularities and procedural compliance of such. Where there is an illegality and a declarator is called for to do away with the illegality. *In casu*, the fact that the applicant had

recalled the respondents cannot then be accepted to have been validly nominated because their hands were dirty, they remain expelled or barred by the party unless there is a resolution showing that they were accepted back.

Reference is made to the case of *Kasukuwere v Mangwana & Ors SC 78/23* where the court wrote:

“The appellant went to great lengths arguing that what was before the court *a quo* was an electoral matter which should have been filed before the Electoral Court on the basis that it has exclusive jurisdiction to hear all electoral matters. The submissions by the appellant raise the issue whether the conferment of exclusive jurisdiction on the Electoral Court in terms of s 161 of the Electoral Act ousts the court *a quo*’s jurisdiction in electoral matters.”

The correctness and finality of decisions of the Supreme Court cannot be impugned as was enunciated in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe limited & Anor 2018 (2) ZRL 743 (CCZ) at 756*. The respondents argued that this court sitting as an electoral court does not have the jurisdiction to handle this matter, this court engaged the import of s161 of the Electoral Act in coming up with its decision. The fact that the Electoral Court is a division of the High Court does not detract from the fact that it is a creature of statute with limited jurisdiction. The High Court sitting as an Electoral Court does not have the jurisdiction to grant a declaratory order. There is no basis upon which the present matter can be definitively be defined as a disguised application for review hence this argument falls away as argued by the respondents this court is not sitting as an electoral court with inherent jurisdiction therefore, it assumes jurisdiction. Now that the court is dealing with a declaratory order it indeed has jurisdiction.

It has also been raised that the matter is now moot. The proclamation and nomination is done and ballot papers are already printed. The printing of ballot papers before the event does not make matter moot for it is the casting of the vote which will bring about that position. See *Kasukuwere v Mangwana & Ors SC78/23*, both the High Court and the Supreme Court had him removed from the nomination papers well after he was nominated and his name gazetted as a presidential candidate.

The applicant was using a Constitution which was operational, effective of 20 January 2022, whereas the twenty-sixth respondent now brings about a Constitution produced in November 2023, even though they purported to justify that it was operational as far back as February 2022 thereabout and nothing is substantiating that as the Constitution itself states that the effective date is the date of the signature yet the signature is not dated. The only assumption is that it became effective from the 20<sup>th</sup> of November 2023 when it was produced.

## Merits

The allegation that the applicant is a fraudster or a crook does not hold water. As per the judgment by MUTEVEDZI J, the submissions before the court brought out that Tshabangu actually signed some nomination papers for the harmonised elections of August 2024 under CCC and undeniably he was using the CCC Constitution hence produced in January 2022.

In the matter of *Sibanda and 13 Ors v Tshabangu & 8 Ors* HCH 6684/23 the court stated that:

“The first respondent produced his own letter which showed that like the rest of the officers therein he was also designated as an officer who could counter sign for the nomination of CCC candidates.”

In terms of actions commencing before the high Court there is only one CCC. The issue of two CCC parties emerged only in the application of joinder of the twenty-sixth respondent, which application was brought before JUSTICE ZHOU. During the proceedings *in casu*, the twenty-sixth respondent made submissions and admitted in open court that the second applicant was indeed a known entity as he raised an issue that second applicant signed some documents on behalf of the CCC political party. Mr Gumbo, the legal practitioner for the twenty-sixth respondent could not explain himself on the existence of the two CCC against the allegation that the applicant is an imposter, he had no choice but to concede that Mr Tshabangu a known in the CCC political party as he signed some nomination papers in the August harmonised elections. The issue of Tshabangu being an imposter falls away as per MUTEVEDZI J judgment.

Sections 39 and 46 of the Electoral Act [*Chapter 2:13*] deal with the nomination of candidates whether as competing candidate or as proportional representatives. The whole section deals with candidates therefore the whole argument falls away. Section 39(1) reads as follows

“A vacancy in the membership of Parliament which exists otherwise than by reason of a dissolution of Parliament shall, subject to this section, be notified to the President and the Commission in writing by the President of the Senate or the Speaker of the House of Assembly, as the case may be, as soon as possible after the President of the Senate or the Speaker of the House of Assembly becomes aware of the vacancy.”

Factually speaking ZEC (the twenty-fifth respondent) does not investigate anyone’s source other than to ensure that all papers are in order and it accepts.

It was an admitted fact that Tshabangu is a known figure in the CCC rather than a fraudster, a spook or an unknown entity only that some differences developed. This aspect was confirmed by MUTEVEDZI J in his dispossession. From the analysis of this case, it can be derived that from the evidence presented before the court it is a fallacy that Tshabangu was an imposter falls away. If Tshabangu recalled candidate in CCC under the January Constitution, on what basis would the parties go back to the nomination ballot without being nominated.

### **Declaratory Order**

As far as the declaratory order is concerned the court is guided by s 14 of the High Court Act [*Chapter 7:06*]

“High Court may determine future or contingent rights, The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination”

In the case of *RK Footware Manufactures Pvt Ltd v Boka Book Sales* 1986 (2) ZRL 209 SANDURA JP (as he was then) held and commented as follows:

“The court has to identify two considerations that the court has to look at when determining whether or not to issue a declaratory order. He stated that the court had to consider whether the applicant was an interested person in an existing future of contingent right of obligation and secondly whether the case was a proper one for the court to exercise its discretion.”

In the case of *Recay Investments (Pvt) Ltd v Tarcon* 2011(2) 2LR 65(H) the court held that;

“For a declaratory order to succeed there are certain conditions to be met. This means that if the applicant fails to meet one or both of the conditions the court has to use its discretion to either grant or dismiss this order.”

The applicant has met the conditions necessary for a declaratory order to be granted. It therefore goes without saying that the applicants’ application is not without merit and hence it ought to be granted.

### **Disposition**

In granting the final order for the matter, the fourteenth respondent as he appears in the, applicant’s court application, applicants’ heads of argument, answering affidavit and amended order, was erroneously omitted from the list of respondents appearing in the matter. It was clear that the applicants in their papers cited the applicant. Also, the respondent’s notice of opposition cites the fourteenth respondent therefore proving the point that the respondent was always a part of the proceedings. Therefore, in the absence of any objections to his inclusion in the papers it follows that he is still part and parcel of the respondents as they appear in the

matter. The omission can only be assumed to be an error therefore the order should be corrected as such to include the fourteenth respondent.

**In the result the order was granted and amended as follows;**

1. That the decision of the Nomination Court sitting at Harare, Bulawayo, Gwanda, Lupane and/or any other location around the country on 7 November 2023 to accept the nomination papers and candidature of 1<sup>st</sup> to 22<sup>nd</sup> respondents for election in the by-elections set to be conducted on 9 December 2023 is unlawful, of no force and effect and hereby set aside.
2. That 1<sup>st</sup> to 22<sup>nd</sup> respondents are not candidates for election in the by- elections scheduled to be conducted on 9 December 2023.
3. That 23<sup>rd</sup> and 24<sup>th</sup> respondents shall not include the names of 1<sup>st</sup> to 22<sup>nd</sup> respondents in the preparation of ballot papers to be used in the by- elections scheduled to be conducted on 9 December 2023.
4. That the 1<sup>st</sup> to 22<sup>nd</sup> respondents are interdicted from representing or holding themselves out to the general public and electorate in the constituencies concerned or any other place in Zimbabwe, whether physically or through any form of media, as candidates for election in by-elections scheduled to be held on 9 December 2023.
5. 1<sup>st</sup> to 22<sup>nd</sup>, and 25<sup>th</sup> respondents shall jointly and severally pay the applicants' cost on the ordinary scale.

*Ncube Attorneys*, first and second applicants' legal practitioners  
*Mbidzo, Muchadehama & Makoni*, first to twenty-third respondents' legal practitioners  
*Nyika, Kanengoni & Partners*, twenty-fourth respondent's legal practitioners  
*Corious, Kanengoni & Partners*, twenty-sixth respondent's legal practitioners