CITIZENS COALITION FOR CHANGE
and
WELSHMAN NCUBE
and
LYNETTE KARENYI
and
SESEL ZWIDZAI
and
EDWIN MUSHORIWA
versus
SENGEZO TSHABANGU
and
SPEAKER OF THE NATIONAL ASSEMBLY
and
NONHLANHLA MLOTSHWA

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 8 January 2025

Urgent Court Application

M Ndlovu, for the applicants
L Uriri with K I Phulu, for the 1st and 3rd respondents
S Hoko, for the 2nd respondent

WAMAMBO J: This matter came by way of an urgent court application.

The relief sought is formulated as follows:-

> "1. The application be and is hereby granted.
>
> 2. The removal of third and fifth applicants from their membership of the SROC in their *ex officio* and Opposition Chief Whip in the National Assembly by the first and second respondent be and is hereby declared unlawful and ultra vires the Constitution of Zimbabwe.
>
> 3. The appointment of Nonhlanhla Mlotshwa as first applicants overall Chief Whip, a position which does not exist under s 151(2) of the Constitution of Zimbabwe be and is hereby declared unlawful.
>
> 4. The reshuffle and deployment by first respondent of various elected members of Parliament of the first applicant in the different portfolio committees that they were duly deployed to by the party is null and void.

5. Consequently, the applicants seek that the second respondent be barred from announcing such changes to the house on Tuesday the 10th December 2024.

6. The first respondent shall bear the costs of this application on an attorney client scale."

The background and basis of the application can be gleaned from the founding affidavit deposed to by second applicant. He avers as summarized below:

First applicant is a political party and a unversitas which at law can sue or be sued.

Second applicant is the Acting president of first applicant having been appointed by first applicant to lead it when a vacancy arose.

Third applicant is the Vice President of first applicant and leader of the opposition in the National Assembly.

Fourth applicant is the National Chairman of first applicant and a Senator representing Midlands Province. He was unlawfully removed as a member of the Standing Rules and Order Committee.

Fifth applicant is first applicant's secretary for Presidential affairs and also the first applicant's Chief Whip in the National Assembly.

First respondent is referred to as a male adult with a given address for service.

Second respondent is the Speaker of the National Assembly while third respondent is referred to as a female adult with a given address of service.

Paragraphs 11 to 14 of the founding affidavit speaks to the nature of the application, the legal basis thereof and the relief sought.

The founding affidavit traverses the historical background beginning from 2017 when seven political parties signed an electoral coalition pact under the banner of MDC Alliance intent on contesting the 2018 general elections. The background reaches a climax when around 24 October 2024 first respondent orchestrated recalls. Thereafter the Standing Committee, National Executive, National Council of the Party agreed to save the party and its members of Parliament resulting in the appointment of second applicant as the Acting President.

Some of first applicant's members were appointed to chair committees. First respondent recalled elected members of parliament of first applicant resulting in a number of constituencies being declared vacant by second respondent.

Under HH 652/23 CHITAPI J rendered an order stopping the recalls pending the determination of case number HC 6872/23.

When the second session of the 10th Parliament started the party tasked second applicant to engage Parliament so as to structure its Parliamentary caucus leadership.

Second applicant wrote a letter to the second respondent Annexure CC5. Annexure CC6 is also attached which speaks to first respondent advising second respondent that communication from the party to parliament would emanate from second applicant.

On 4 December 2024 second applicant was informed of a meeting of the SROC on 6 December 2024 and the agenda contained a discussion of the Parliamentary leadership changes. Fifth applicant was barred from entering the venue by the Clerk of Parliament who advised her that she had been removed from the Chief Whip position of first applicant by first respondent with the concurrence of second respondent.

Second applicant avers that neither first nor second respondent has authority to remove fifth applicant from the opposition Chief Whip position without a resolution of first applicant. Fifth respondent was appointed to the position following a formal resolution which was accepted and implemented by first applicant.

Section 151(4) of the Constitution renders the removal of fifth respondent as unconstitutional and unlawful.

When third applicant arrived at the SROC meeting the sentry at the door of the meeting was no longer in place. Third applicant was denied the right to speak and was informed same was no longer a member of the SROC. The founding affidavit erroneously makes reference to third and fifth respondents instead of third and fifth applicants.

First applicant's resolution is that the most senior MP in the National Assembly, who is the Vice President is the leader of the Opposition. Such resolution has not been revoked and first respondent has no authority to change formal resolutions of first applicant.

On 6 December 2024, fifth applicant was replaced with Honourable M Kademaunga as the leader of the opposition in the National Assembly. Honourable C Moyo replaced fourth applicant as the Chief Whip in the National Assembly. The full deployments made are encapsulated in Annexure CC9.

The Committee on Standing Rules and Orders have accepted the redeployments.

Fourth applicant was appointed as a member of the SROC. He never resigned but was unlawfully removed contrary to s 151(4) of the Constitution.

The respondents are opposed to the application. I must relate to a case management meeting held before the hearing. At that meeting Mr Gumbo appeared and sought that a party called Citizens Coalition for Change be joined as the fourth respondent. The application for joinder was granted by consent of the other parties. Mr Gumbo however, neither filed any opposing papers nor made an appearance at the hearing. I take it there is no fourth respondent.

At the hearing the respondents took a number of points. First and third respondents raised the following points *in limine*.

The founding affidavit of the second applicant is defective as it does not bear the date of his signature and the date when the Commissioner of oaths administered the oath.

The second and third points *in limine* raised are that second applicant has no authority nor *locus standi* for filing this application.

Fourthly it is averred that the application for a declaratur is improperly before the court.

Fifthly it is averred that the application lacks urgency.

The certificate of urgency is attacked as not setting out the basis of the urgency.

The second respondent in turn raised a number of preliminary points.

He avers that the High Court has no jurisdiction to hear a matter involving failure to fulfil a constitutional obligation by parliament.

Lack of urgency is also raised.

Thirdly it is averred that this application is a constitutional application and was supposed to proceed via Rule 107 of the High Court Rules.

Various other questions are raised by the second respondents under the following headings.

Whether the conduct of the Speaker of the National Assembly and the CBRO was unlawful?

Whether the doctrine of estopped must apply in this case? and

The Speaker of the National Assembly has no authority to enquire into the authority of a member of a political party.

The sheer member of preliminary points raises eyebrows. Indeed, the wise words of MATHONSI J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd* versus *Postal and Telecommunications Regulatory Authority of Zimbabwe and Ors* HH 446/15 ring true in the instant case. At p 7 the Learned Judge said:-

> "Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter. The time has come to discourage such waste of court time by the making of endless points *in limine* by litigants afraid of the merits of the matter or legal paractitioners who have no confidence in their client's defence viz a viz. the substance of the dispute in the hope that by chance the court may find in their favour. If an opposition has no merit it should not be made at all. As points *in limine* are usually raised on points of law and procedure they are the product of the ingenuity of legal practitioners."

I will however proceed to deal with the points *in limine* in no particular order.

The point *in limine* impugning the dating of the founding affidavit of second applicant is clearly without merit. The affidavit is dated 7 December 2024 and is signed by the deponent and the Commissioner of Oaths, Hazel Nyoni.

There is no requirement at law that there must be two dates affixed to an affidavit I dismiss this point *in limine*.

A point *in limine* is raised that speaks to second applicant not being authorized to file the application. Second applicant avers in the founding affidavit that he is authorized by a resolution of the first applicant. The resolution is impugned as being unsigned. The resolution appears at p 38 of the record and is an extract of the minutes of the National Executive Meeting of the Citizens Coalition for Change on 19 June 2024.

The National Chairman's name who is the third applicant appears under "Signed by."

The same National Chairman who is the third applicant deposes to a supporting affidavit wherein, he avers as follows:-

> "I have read the founding affidavit of Welshman Ncube and wish to incorporate the contents there to as if the same have been specifically traversed hereto."

Were it that reference to the resolution was untrue the third respondent would not have confirmed the contents of the founding affidavit for the resolution clearly reflects the third applicant's name and capacity. I find therefore that the resolution is confirmed by third applicant and thus legitimized. I dismiss the point *in limine*.

Second applicant is alleged not to have *locus standi* to file this application. It being alleged that he has not demonstrated a real and substantial interest in the declaratur in his personal capacity.

I agree with applicants' counsels submissions more forcefully made in para (2.12 to 2.16 of their heads of argument. The long and short of it is that the second applicant avers that he is the acting president of the first applicant. Reference is then made to first applicant's Constitution

which spells out the duties of a President. The history and background heading to second applicant being appointed as acting President of first applicant is heralded in the founding affidavit. His role and how he rose to that position is not seriously questioned by any of the respondents. I dismiss this point *in limine*.

Respondents argue that this application ought to have been launched under Rule 107 of the High Court Rule, 2021. Mr Ndlovu for the applicants opines that a mere reference to the Constitution does not convert an application into a Constitutional application. Further that a party has the right to seek a declaratory order as per s 14 of the High Court Act.

The definition of what constitutes a constitutional matter is found in s 332 of the Constitution.

This definition is clarified in a number of cases including *Boniface Magurure & Ors* v *Cargo Carriers International Hauleers (Private) Ltd t/a Sabot* CCZ 15/16.

At p 7 MALABA DCJ (as he then was) said:-

> "A constitutional matter arises where there is an alleged infringement of a constitutional provision. It does not arise where the conduct the legality of which is challenged is caused by a law of general application the validity of which is not impugned. The question whether an alleged conduct constitutes the conduct proscribed by a statute requires not only proof that the alleged conduct was committed, it also entails that the statutory provision against which the legality of the conduct is tested to be interpreted to establish the content and scope of the conduct proscribed before it is applied to the conduct found proved."

I find that the application does not amount to a constitutional application in the circumstances and I dismiss this point *in limine*.

Lack of urgency as a preliminary point was raised. First respondent avers that the urgency stems from the desire to stop the announcement on the 10th of December 2024 which change has already been effected and accepted. Effectively it is argued that the application has been rendered moot. It is important to note that only para 5 in the draft order speaks to stopping the announcement of the effected changes on 10th December 2024. The rest of the total six paragraphs speak to other issues as is clearly reflected in the draft order.

The Certificate of urgency is also under attack. It is not very clear why. It is deposed to by a legal practitioner who traverses the facts, refers to case law applicable and deals with the issue of urgency. I find it in order.

When I queried from counsel for the applicant the relevance of para 5 of the draft order he conceded that it has been overtaken by events and withdrew same. It is not correct that upon a withdrawal of para 5 there remains no other relief sought.

The applicants aver that the need to act arose on 6 December 2024 when they learnt of respondents' conduct. They aver that they filed the instant applicant the following day. Reference here is made to the notice of the fourth ordinary meeting of the CSRO which appears at pp 153-154 of the record.

The averments by applicants are borne by the record.

It follows in the circumstances that they acted with urgency in the circumstances. I find that the point *in limine* of lack of urgency has no merit and is dismissed.

Another point *in limine* raised is that the High Court lacks jurisdiction to deal with this matter. Second respondent opines that the draft order in part seeks to have a declarator that second respondent failed as obligated in s 151(2) of the Constitution and that the removal from the CSRO was unlawful and *ultra vires* the Constitution. Reference is made to ss 135, 151(2), 151(5) of the Constitution. Reliance is also placed upon the case of *Mushore* v *Speaker of National Assembly* and 2 others HH 327/23.

The major difference however between the *Mushore* v *Speaker of National Assembly and 2 others* (*supra*) is that case deals with alleged failure to fulfil a Constitutional obligation which is not the case here. In the instant case it is sought that the actions of the second respondent be declared ultra vires the Constitution I dismiss this point *in limine*.

The other point *in limine* as raised by the second respondent asks the question whether the second respondent's conduct was unlawful. I find that this is not a preliminary point as it on its own does not dispose of the issues raised in the application. It is an issue enmeshed in the merits of the matter.

In fact, an answer to the question as raised digs deep into the circumstances of the matter, the merits of the case and the relief as sought by the applicants.

Estoppel is also raised as a preliminary point by second respondent. It is averred that applicants accepted the appointing authority of the first respondent on 29 May 2024. Flowing there from it is averred that third and fifth applicants by their conduct accepted the validity of the letter of 29 May 2024 and thus cannot question the first respondent's authority. Applicants counter

argue that the doctrine of estoppel does not arise in this case. It is averred that the first applicant never reshuffled members of the SROC. The recall of the members by the first respondent is what is vindicated in this matter. I am inclined to agree with the applicants for the reasons given above that the doctrine of estoppel is not applicable in the instance case. I dismiss this point *in limine*.

I find in the circumstances that all the points in limine as raised are dismissed.

I move to the merits. I have already found that the applicants have a direct and substantial interest in the matter. This court I have also found has jurisdiction to entertain this matter and that this matter is not a constitutional matter that should be dealt with as per Rule 107 of the High Court Rules. Section 151(2) of the Constitution provides as follows:-

> "(1) Parliament must appoint a Committee to be known as the Committee on Standing Rules and Orders for the purpose of:
> (a) supervising the administration of Parliament.
> (b) formulating standing orders.
> (c) considering and deciding all matters concerning Parliament and
> (d) exercising any other functions that may be conferred or imposed on the committee by this Constitution or by Standing Orders or any other law.
> (2) The Committee on Standing Rules and Orders must consist of the Speaker and the President of the Senate and the following Members of the parliament
> (a) the Deputy Speaker
> (b) the Deputy President of the Senate
> (c) the Minister responsible for finance and two other Ministers appointed by the President
> (d) the leader of Government Business in each House.
> (e) the leader of the Opposition in each House
> (f) the chief whips of all the political parties represented in each House.
> (g) the President of the National Council of Chiefs
> (h) two members who are not Ministers or Deputy Ministers one being a Senator appointed ` to the committee by the President of the State and one being a Member of the National Assembly appointed by the Speaker and
> (i) eight members who are Ministers or Deputy Ministers, four being reelected to the committee by the Senate and four being elected by the National Assembly.
> (3) Members must be appointed or elected to the Committee on Standing Rules and Orders as soon as possible after the beginning of the first session of each parliament and they must be selected so that the Committee reflects as nearly as possible the political and gender composition of the combined Houses of Parliament.
> (4) The Committee on Standing Rules and Orders is appointed for the life of each Parliament
> (5) The Committee on Standing Rules and Orders is chaired by the Speaker or in his or her absence by the President of the Senate
> (6) The procedure to be followed by the committee on Standing Rules and Orders must be prescribed in Standing Order
> (7) Wherever a vacancy occurs in the Committee on Standing Rules and Orders a member must be elected or appointed as the case may be, as soon as possible to fill the vacancy."

I have deliberately regurgitated the whole of section 151 to reflect why a |Committee on Standing Rules and Orders must be appointed, who must be appointed, and the need for gender balance. It is also helpful to set out the context. Notably s 151(4) reflects that the Committee on Standing Rules and Order is appointed for the life of each Parliament.

To show the importance of the Committee the word "must" is used throughout from s 151(1) to s 151(7) of the Constitution.

I am in agreement with applicants that Parliament must have a fixed Standing Committee on Standing Rules and Orders until the lapse of Parliament. A deviation from the same thus amounts to unlawful conduct.

I note that applicants for some reasons erroneously referred to the acronym for the Committee on Standing Rules and Orders as (SROC) instead of CSRO as correctly pointed out in argument by the respondents. The CHITAPI J judgement as it has been referred to is also extract and no appeal has not been lodged against it.

The Order rendered in the said judgements which full citation is *Citizens for Coalition for Chang*e v *Sengezo Tshabangu, Speaker of the National Assembly* N.O President of the Senate N.O *and Minister of Local Government and Public Works N.O HH 652/23* reads in full as follows:

TERMS OF FINAL ORDER SOUGHT

1. That the provisional order be and is hereby confirmed
2. That the first respondent has no authority to engage second third and fourth respondents on any matter involving applicants and its members.
3. That any action taken by the first respondent purportedly on behalf of applicant after the issuance of summons under HCH 6872/23 be and is hereby declared to be null and void.
4. First respondent is to pay costs on a client and Attorney scale.

INTERIM ORDER GRANTED

1. Pending the determination of case number HC 6872/23 the first respondent is interdicted from recalling or purporting to issue any letter of recall of any member of the National Assembly, Senate or Local Authority elected under the applicant or CCC ticket and the second, third and fourth respondents shall not effect any recalls made by first respondent in that regard.

Applicants place reliance on the CHITAPI J judgment and interpret it to import that first respondent is effectively barred from recalling or purporting to issue any letter of recall. Further that the reshuffle in this case amounts to a recall "literally and at law."

The argument by applicants is that the office bearers held office in the CSRO but no longer hold such office which amounts to a recall. I also find that the position of Chief Whip is not sanctioned by the Constitution and is thus unlawful.

I agree that removing members from the CSRO and replacing them with others amounts to a recall. Effectively, first respondent disobeyed the order rendered in HH 652/23.

In the totality of the circumstances, I find that the application is meritorious and should be granted.

I am of the view that costs on a higher scale are uncalled for in such a case which seeks to clarify issues of importance to members of the same party. I am inclined to grant costs against first and third respondents on an ordinary scale.

To that end the order as per the draft order is granted with the following amendments. Paragraph 5 thereof is deleted. The acronym SROC is deleted wherever it appears in the order and substituted with CSRO.

Paragraph 6 dealing with costs is amended to reflect that costs shall be paid by first and third respondent, the one paying the other to be absolved.

Mathonsi, Ncube Law Chambers, applicant's legal practitioners
Messrs Ncube Attorneys, first and third respondent's legal practitioners
Chihambakwe and Partners, second respondent's legal practitioners