

THOKOZANI KHUPE

And

MOVEMENT FOR DEMOCRATIC CHANGE-T

Versus

DOUGLAS TOGARASEYI MWONZORA N.O

And

MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS (NO)

And

MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 3 FEBRUARY AND 8 FEBRUARY 2022

Urgent Chamber Application

N.Sithole, for the applicants

T. Maanda, for the 1st respondent

L. Dube with Ms N. Ntuliki, for the 2nd and 3rd respondents

MAKONESE J: 1st applicant who holds herself out as the Acting President of the political formation known as the Movement for Democratic Change (T) , hereinafter referred to as MDC-T, brought this application under a Certificate of Urgency. This is an application for an interdict. Applicants seek an order in the following terms:

“Pending finalisation of the matter, applicants be and are hereby granted the following relief:-

INTERIM RELIEF SOUGHT

1. The 2nd and 3rd respondents are hereby interdicted and prohibited from disbursing the sum of ZWL\$149 850 000,00 due to the Movement for Democratic Change (T) in terms of the Political Parties Finances Act (Chapter 2:11) to any political party or person
2. That should such funding have been disbursed as on the date of this order, the recipient of such funds be interdicted and prohibited from spending or using any of such funds for any purpose whatsoever, such that the recipient be and is hereby ordered to keep such funds safe and intact.

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made

In the following terms:

1. It be and is hereby declared that the monies due under the Political Parties Finances Act belong to the Movement For Democratic Change (T) led by Acting President Doctor Thokozani Khupe.
3. If the ZWL\$149 850 000 00 has been disbursed to any person, the ZWL\$149 850 000.00 be reversed and redirected to Movement for Democratic Change (T) led by Acting President Thokozani Khupe, account number AFC, Movement for Democratic Change (T), Branch, Bulawayo, Account Type; Corporate Account, Account Number; 100001481945.

ALTERNATIVELY

2nd and 3rd respondents be and are hereby ordered to pay ZWL\$74 925 000 due to the Movement for Democratic Change (T) led by the Acting President Thokozani Khupe in terms of the Political Parties Finance Act through its bank account AFC, Movement for Democratic Change (T), Branch, Bulawayo, Account Type; Corporate Account, Account Number; 100001481945.”

At the commencement of the hearing I enquired from counsel for the applicants and respondents whether the funds referred to in the Draft Order had been disbursed by the 2nd respondent. *Mr Maanda* appearing for the 1st respondent indicated that the funds had indeed been disbursed by 2nd respondent on the 2nd February 2022. The funds had already been deposited into an account held by the Movement for Democratic Change (T) (the account is under the effective control of 1st respondent). *Mr Sithole* appearing for the applicants indicated that he had not been made aware of this development. In light of that revelation, applicants sought an amendment to the Draft Order. The amendment was not opposed by 1st respondent. The Draft Order was accordingly amended by the deletion of paragraph 1 in the Interim Relief Sought and the deletion of paragraph 2 of the Final Order Sought.

The amendments sought and granted had far reaching consequences on the competency of the relief sought by applicant. This shall be dealt with later in this judgment.

In opposing this application, 1st respondent has raised various points *in limine* which I shall deal with in turn.

**1ST APPLICANT HAS NO AUTHORITY TO BRING THIS APPLICATION
AND HAS NOT PROPERLY CITED THE PARTIES**

1st respondent avers that 1st applicant has no authority to bring this application in the name of the 2nd applicant. Applicant therefore, is not properly before the court. 1st respondent contends that 1st applicant has not demonstrated in her papers that she was given any such authority to act on behalf of the 2nd applicant. It is further argued that at the time 1st applicant made a declaration that she had split from the Movement for Democratic Change (T) and formed a splinter group using the same name, she had been suspended by 1st respondent as a member of the 2nd applicant. 1st applicant has not challenged her suspension before any lawful body or organ of her political party. It is clear that when the application was filed, 1st applicant did not file any resolution from the Movement for Democratic Change (T) confirming that was authorised and empowered to act on behalf of 1st Applicant. In the absence of a resolution authorising 1st Applicant to bring these proceedings, the application is not properly before the court. See *Madzivire & Ors v Zvarivadza & Ors* 2006 (1) ZLR 514 (S). Although the cited case deals with a private limited company, which must act through its authorised directors, the principle laid down in the case applies with equal force in this matter. What complicates the position of the 1st applicant and her authority to act is that on 21st January 2022, she made a declaration that she terminated her membership with 2nd applicant. By virtue of her public declaration she was now President of a splinter group of the 2nd applicant. In support of this application 1st applicant annexed a copy of the declaration she made at Bulawayo. It reads in part as follows:

‘This day, the 21st January the year of our Lord 2022, I announce that the Movement for Democratic Change Tsvangirai has split and there are now two MDC-T Formations, one led by yours truly Dr Thokozani Khupe who is also the leader of the opposition in the National Assembly and the other. We are announcing this with a

heavy heart because this is not what we wanted but circumstances beyond our control have forced us to do this.....”

On the 24th of January 2022, 1st applicant wrote to the Speaker of the Parliament of Zimbabwe, confirming the split. The letter is in the following terms:

“This letter serves to inform you that the MDC (T) party has split into two political formations on 21st January 2022. One is led by Honourable Dr Thokozani Khupe who is the leader of opposition in the National Assembly and the other is led by Senator Douglas Mwonzora who is also the leader of the opposition in the Senate.

We are therefore appealing to you to treat both formations equally and exercise impartiality. We also implore your good offices to recognise and accept the new status quo.

Yours faithfully

Dr Thokozani Khupe

President MDC – T

cc MDC – T formation led by Douglas Mwonzora”

It is clear from the letter to the Speaker of Parliament that 1st applicant holds herself out as the President of the MDC–T. There has been no explanation as to how she became President or Acting President of the MDC –T formation save for the declaration she made to the Press on 21 January 2022. 1st applicant appears to have assumed authority as the leader of the split MDC–T by reason of her declaration. It was incumbent upon 1st Applicant to attach a resolution confirming her authority to bring these proceedings. Applicants have cited

the 1st respondent in his official capacity. 1st respondent was never due to receive any funds as an individual. The court cannot grant the interdict against the 1st respondent as he could never receive the funds in his personal capacity. The 1st respondent was never mentioned as the recipient of the monies in the Government Gazette. Applicants did not cite the MDC Alliance who are cited as the beneficiaries. The failure to cite the correct beneficiary of the funds is fatal to the applicants' case. This point *in limine* has been well taken. 1st applicant's authority to act has not been established.

WHETHER THE RELIEF SOUGHT BY APPLICANTS IS NOW MOOT

The 1st respondent contends that the matter is now moot in the sense that 1st applicant has been recalled from Parliament by the MDC –T party. 1st applicant has been suspended from the MDC–T party which she purports to represent. 1st applicant acknowledges that the funds which she seeks to interdict from disbursement by 2nd respondent have already been overtaken by events. The funds have been disbursed by the 2nd respondent and paid into an account held by the MDC –T formation controlled by 1st respondent. 1st respondent has made it clear in his opposing papers that the Political Parties' Funds are not paid to individuals. The monies are never paid any single individual but to a political party in terms of the Political Parties Finance Act (Chapter 2:11). In the amended draft order, 1st applicant seeks an interdict against any party or person holding such funds. The draft order seeks an order to the effect that if such funding has been disbursed the recipient (not named) of such funds be interdicted and prohibited from spending or using any of such funds for any purpose whatsoever, and the recipient should be ordered to keep the funds safe and intact. The problem that is immediately presented by the amended draft is that without paragraph 1 (now deleted) the order does not make sense and is moot in that 2nd respondent has already effected

the disbursement to the political outfit named MDC –T. What the 1st applicant would be seeking in effect is an interdict against itself.

The doctrine of mootness has been discussed in a number of authorities in this jurisdiction. The most recent case dealing with this doctrine is the matter of *Bere v Judicial Service Commission & Ors* SC 1/22. In this matter the Supreme Court makes reference to the case of *Thokozani Khupe & Anor v Parliament of Zimbabwe & Ors* CCZ 20-19 where at page 7, the court remarked that:

“A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the court’s jurisdiction ceases and the case becomes moot.... The question of mootness is an important issue that the court must take into account when faced with a dispute between the parties. It is incumbent upon the court to determine whether an application before it still presents a live dispute between the parties. The question of mootness of a dispute has featured repeatedly in this and other jurisdictions. The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of “such a nature that the decision sought will have no practical effect or result... A matter is not moot only at the commencement of proceedings. It may be considered moot at the time the decision on the matter is to be made.... The mere fact that the matter is moot does not constitute an absolute bar to a court to hear a matter. Whilst a matter may be moot as between the parties, that does not without more render it unjustifiable. The court retains discretion to hear a moot case where it is in the interest of justice to do so.

See: JT Publishing (Pty) Ltd v Minister of Safety & Security 1979 (3) SA 514 (CC) at 525 A-B.

In *Chombo v Clerk of Court, Harare Magistrates Court Rotten Row & Ors CCZ 12-20* at page 8 of the Court held that:

“It is settled law that a court retains the discretion to hear a matter even where it has become moot. The overriding consideration is whether or not it is in the interests of justice that the matter be heard..... A litigant seeking to have a matter that is moot determined by the courts must establish exceptional circumstances which justify the hearing of the matter. The question is whether the applicant has established just cause for the matter to be considered as falling under the exception to the doctrine of mootness” (underlining is mine)

From the above authorities it is clear that for a matter to be considered moot, the court would have established that events have occurred before the determination of the matter which have overtaken the dispute and terminated the controversy between the parties. It is trite that a matter is moot if further legal proceedings with regard to it can have no effect or events have placed it beyond the reach of the law. The court may only hear a matter that is moot where it is in the interests of justice to do so. As a general rule, courts must be wary of making a determination on a matter, which has been overtaken by events or is moot as such a determination leads to an ineffectual judgment.

In determining whether the matter has become moot I shall set out the chain of events that has led to the present proceedings and particularly the order sought as amended.

1. 1st applicant is a founder member and Acting President (or President) of the 2nd applicant, the MDC-T formation. The party was formed by Richard

Morgan Tsvangirai, Gibson Sibanda, Lovemore Matongo, Professor Welshman Ncube, Tendai Biti, including, 1st applicant and others, in 1999.

2. The MDC–T party however formed splinter groups over the years as the founding members disagreed on policy issues, amongst other things.
3. The Movement for Democratic Change Alliance was a composite political co-operation agreement brought into existence for the purpose of contesting the 2018 general election. The MDC Alliance disintegrated after the 2018 elections. 1st respondent declared himself the leader of the MDC Alliance, a position that is not disputed.
4. In this application it is critical to observe that for the purposes of disbursement of funds under the Political Parties Finance Act the 2nd respondent is responsible for allocating funds to political parties that contested in the general elections.
5. On 12th January 2022, 1st applicant was suspended from the MDC–T party by its President, 1st respondent, on various allegations of misconduct.
6. There is no evidence on record that 1st applicant has challenged her suspension through internal political channels.
7. On 21st January 2022 and at Bulawayo 1st applicant made an official declaration that there had been a split in the MDC–T party and that there now existed two MDC–T political formations.
8. On 24th January 2022 1st applicant addressed a letter to the Speaker of Parliament and other stakeholders, including the Minister of Justice Legal & Parliamentary Affairs confirming a split in the MDC–T party.

9. On 25th January 2022 the 2nd respondent published a Notice in the Government Gazette wherein it was indicated that the MDC Alliance was allocated a sum of ZWL\$149 850 000.00 in terms of the Political Finances Act as the party had received 29.91 % of the votes casted.
10. On 28th January 2022 the National Council of the Movement For Democratic Change (T) passed a resolution to the effect that 1st applicant had effectively left the MDC–T party and had ceased to be a member of the 2nd applicant.
11. At the date of the filing of the application and in her Founding Affidavit the 1st applicant makes a telling admission in paragraph 19 of her affidavit by indicating that she had been advised that her meeting of the 21st January 2022 was problematic in two ways. One of such is that as the Deputy President in the 2nd applicant’s party she had assumed automatic leadership as an Acting President in terms of the party Constitution.
12. Applicant avers in paragraph 20 of her Founding Affidavit that while she was on record as having declared a split on 21st January 2022 in Bulawayo, she was advised that the true legal position is that 1st respondent had been automatically expelled from membership of 2nd applicant on account of his political association with or support of the Movement For Democratic Change Alliance.

From the above summary it is evident that 1st applicant is blowing hot and cold. On one hand, 1st applicant claims through the 2nd applicant, the total amount payable to MDC–T. On the other hand claims fifty (50) per centum of the total amount. In her letters addressed to 2nd respondent, Secretary for the 2nd respondent’s Ministry, the Speaker of Parliament and the

Minister of Local Government and Public Works 1st applicant contends that there was a split between 1st applicant and 1st respondent which resulted in both parties sharing members of the National Assembly and Senate respectively. In terms of the law, the funding of political parties is disbursed to the party which has the minimum percentage of votes required. If there is any subsequent split, the law does not provide for a sharing of such funds. To that end therefore, the money having been disbursed by the 2nd respondent in terms of the Political Parties (Finance) Act in terms of the Government Gazette of the 24th of January 2022, there is no active dispute for determination. It must be pointed out that when the 2nd respondent published the Notice in the Government Gazette there was no legal challenge mounted by 1st applicant regarding the legality of the allocation of funds. This court is being invited to adjudicate on a matter that has become moot by reason of events that have occurred before the determination of these proceedings. Any order sought as amended would firstly, be meaningless, and secondly such an order would not be capable of enforcement. The interdict sought has been rendered academic. On realising that funds had already been disbursed in accordance with the law, and in the absence of any active litigation challenging the 2nd respondent's actions the applicants ought to have withdrawn the application. The doctrine of mootness applies.

FORM USED DEFECTIVE

I have been requested to determine whether the form used by the applicants is proper and in compliance with the Rules. Applicants aver that the Form used complies with Rule 59 (1) of the High Court Rules, 2021. A close examination of the application reveals that there was no compliance with the Rule 59 (1) and the Form used was wrong. The application is defective. No application has been made to condone the non-compliance. No explanation has been advanced for the flagrant disregard of the Form used. The applicants contend that

there is no prejudice to the applicants. The issue of the use of the wrong form has been discussed in various cases in this court. See: *Minister of Higher & Tertiary Education v BMA Fasteners* HB 42-19 and *Marick Trading (Pvt) Ltd v Old Mutual Life Assurance* HH 667-15. The 1st respondent has taken a casual approach to this point *in limine*. Legal practitioners are reminded that a flagrant disregard of the rules of this court is frowned upon by the courts. This point *in limine* does have merit.

DISPOSITION

I have examined the points *in limine* advanced by the 1st respondent. On the first point raised on authority to act, the 1st applicant has taken a somewhat cavalier approach to a serious issue. 1st applicant has not established who exactly she represents. If she is an Acting President of the MDC-T it has not been shown that there is a resolution by any person confirming her authority to act. If she is now President of the MDC-T party in terms of her 21st January 2022 declaration, this is contradicted by averments in her Founding Affidavit which suggest that on legal advice received the declaration was not necessary as 1st respondent had expelled himself from the party. 1st applicant's authority to act on behalf of a split MDC-T party or the MDC -T formation was not established. On that point alone, this court would dismiss the application. Secondly, and most importantly, the order sought as amended has been overtaken by events as the funds have been disbursed in terms of the law. There is no dispute as both counsel for the applicants and respondents confirmed that such funds have been disbursed. There is no challenge against the 2nd respondent regarding the disbursement of the funds. In reality there is no live dispute for determination. The matter has therefore become moot. This court declines jurisdiction to entertain the matter as the "*horse has bolted from the stable.*" The court may only hear a matter that has become moot where it is in the interests of justice. This has not been established by the applicants.

For the foregoing reasons, the points *in limine* are accordingly upheld, and the court makes the following order:

“1. The application be and is hereby dismissed with costs.”

Ncube Attorneys, applicants’ legal practitioners

Mwonzora & Associates c/o Mashayamombe & Co. Attorneys, 1st respondent’s legal practitioners

Civil Division of the Attorney-General’s Office, 2nd and 3rd respondents’ legal practitioners