

JACOB MAFUME  
and  
ARNOLD BATIRAI DUBE  
and  
PEOPLE'S DEMOCRATIC PARTY  
versus  
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS N.O.  
and  
TOWN CLERK N.O. – CITY OF HARARE  
and  
TOWN CLERK N.O. – CITY OF BULAWAYO  
and  
CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION  
and  
ZIMBABWE ELECTORAL COMMISSION  
and  
CITY OF HARARE  
and  
BENJAMIN RUKANDA

HIGH COURT OF ZIMBABWE  
MUNGWARI J  
HARARE, 11 April & 15 July 2022

### **Urgent Chamber Application**

*T Bhatasara*, for the applicants  
*L Muradzikwa*, for the 1<sup>st</sup> respondent  
*J Bhamu*, for the 2<sup>nd</sup> and 6<sup>th</sup> respondent  
No appearance for 3<sup>rd</sup> respondent  
*T Kanengoni*, for 4<sup>th</sup> and 5<sup>th</sup> respondents

**MUNGWARI J:**

#### **Introduction**

The first and second applicants are elected councilors for Wards 17 and 24 for Harare and Bulawayo City Councils respectively. They were elected into office in July 2018 on tickets of a political party called the People's Democratic Party (PDP) which contested the elections under a coalition of political parties going by the moniker MDC-A. First applicant is also the mayor of Harare.

The third applicant is the People's Democratic Party, a grouping recognized as a political organization in Zimbabwe. It sponsored the participation of first and second applicants as well as various other candidates in the country's harmonized elections in 2018.

First respondent is the Minister of Local Government and Public Works. He is the Minister responsible for the administration of the Urban Councils Act [*Chapter 29:15*] amongst other responsibilities.

The second and third respondents are Town Clerks for the cities of Harare and Bulawayo respectively. The position of the Town Clerk is created by s 132(2) of the Urban Councils Act [*Chapter 29:15*]. They are cited in these proceedings in their official capacities.

The fourth respondent is the Chairperson of the fifth respondent the Zimbabwe Electoral Commission. She is also cited in her official capacity. The fifth respondent is a Constitutional Commission established in terms of s 238 of the constitution. Its functions are set out in s 239 of the Constitution. In broad terms, it prepares for, conducts and supervises elections.

The sixth respondent is the City of Harare a body corporate established in terms of the Urban Councils Act. It conducts internal elections to choose a mayor from amongst elected councilors in Harare.

The seventh respondent is Benjamin Rukanda who is described by the applicants as a person "whose further details I do not know". He is the person who wrote the letter that first respondent purportedly relied on to write the letters which form the basis of the contest in these proceedings on 28 March 2022.

### **Background**

The essence of this dispute is best understood by reference to case HC5292/20. In that case 9 plaintiffs, brought an action before this court, challenging their purported recall from their parliamentary membership by Benjamin Rukanda. It is noteworthy that of the 9 plaintiffs in HC 5292/20, two of them, Jacob Mafume and Arnold Batirai Dube appear as first and second applicants in this matter. The first defendant in the same matter is the seventh respondent in this matter.

It was their contention that the People's Democratic Party had split into two major factions, one led by Tendai Biti (PDP-T) and another led by Lucia Matibenga (PDP-M). As a result, so they argued, Benjamin Rukanda could not purport to recall them as he belonged to PDP M, a separate political outfit from PDP-T to which they belonged. In that action they wanted the court to declare Settlement Chikwinya the lawful secretary general of the PDP-T faction.

Further, they wanted it known that Settlement Chikwinya, with the authority of their faction leader Tendai Biti was the only official spokesperson of the party. All official party issues could only be communicated through him.

On 14 April 20220, this court per TSANGA J in case number 5292/20 granted a judgement in default of the defendants. The effect of the judgment was that the recall of the plaintiffs from being members of the national assembly was set aside. Consequently, the Speaker of Parliament was directed to disregard the letters of recall. It was ruled that Jacob Mafume, Arnold Batirai Dube and the 7 others were not members of the breakaway PDP faction led by Lucia Matibenga. They instead belonged to the Tendai Biti faction. It followed that only the authorized representatives of the PDP T could act on behalf of the organization. Benjamin Rukanda was specifically barred from acting on behalf of the Tendai Biti group. This court held that Rukanda had no power to recall the plaintiffs some of whom appear as first and second applicants in the instant case. That order is extant. Because of its centrality I reproduce it hereunder:

**“IT IS HEREBY ORDERED THAT:**

- a) The 2<sup>nd</sup> plaintiff be is hereby declared the Secretary General of the 9<sup>th</sup> plaintiff
- b) Annexure A to the summons (letter by 1<sup>st</sup> defendant to 2<sup>nd</sup> defendant dated 14 September 2020) purporting to recall the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> plaintiffs is null and void and is hereby set aside.
- c) The 3<sup>rd</sup> and 4<sup>th</sup> defendants be and are hereby ordered to disregard ‘Annexure A’ referred in paragraph (b) above or any further communications addressed to them by the 2<sup>nd</sup> defendant or 1<sup>st</sup> defendant purporting that the 1<sup>st</sup> defendant represents the 9<sup>th</sup> plaintiff.
- d) Only the duly authorized representative of the People’s Democratic Party led by Tendai Biti in particular Settlement Chikwinya as Secretary General has the power to act on behalf of the organization.
- e) The Secretary General of the 9<sup>th</sup> Plaintiff can only author official communications to public institutions concerning resolutions and state of the party when he is duly authorized by the President.
- f) The 3<sup>rd</sup> and 4<sup>th</sup> defendants be and are hereby barred from acting on any directive or letter or instruction other than a directive from Settlement Chikwinya concerning 9<sup>th</sup> Plaintiff.
- g) The 1<sup>st</sup> defendant is to pay the costs on a legal practitioner client scale.”

**Applicants’ Case**

On 31 March 2022, the applicants got wind of the fact that, the first respondent had on 28 March 2022 authored a letter directed to second and third respondents. In that letter the first respondent purported that he had received communication from the People’s Democratic Party recalling the first and second applicants from being councilors in their respective cities because they had ceased to be members of the PDP after they joined another political party called Citizens Coalition for Change (CCC). As a result, the first respondent declared wards 17 in Mount Pleasant, Harare and 24 in Bulawayo vacant. He directed the second and third

respondents to inform the Zimbabwe Electoral Commission of the vacancies within 21 days of receipt of his letter.

In terms of s 121 of the Electoral Act, second and third respondents must comply with the first respondent's directive. Once the Zimbabwe Electoral Commission has been informed of the vacancies as directed, it will be obliged to take steps to fill the vacancies as required by law.

The applicants claim to have a direct interest in the matter. What brings the applicants to court on an urgent basis is that consequent to the declaration of the existence of vacancies, their rights as enshrined in sections 56, 58, 67 and 68 of the Constitution of Zimbabwe will be violated if the second and third respondents act on the basis of the letter authored by first respondent. They therefore seek an order compelling second and third respondents to disregard the contents of the letters and for the fourth, fifth and sixth respondents to maintain the status quo and desist from calling for a by election or elections for the position of mayor. They also seek an order for the letter authored by the seventh respondent and directed to the first respondent to be set aside. The order reads as follows:

**“TERMS OF FINAL ORDER SOUGHT**

That you show cause why a final order should not be made in the following terms:

1. Pending the resolution of the matter under case number HC2233/22, 2<sup>nd</sup> -6<sup>th</sup> Respondents, their agents or anyone acting on their behalf shall not initiate action, continue with any action or conduct or comply with 1<sup>st</sup> Respondent's letter dated 28 March 2022(or any other date).Specifically 2<sup>nd</sup> -3<sup>rd</sup> Respondents shall not notify 4<sup>th</sup> and 5<sup>th</sup> Respondents of any vacancy in ward 17 and ward 24.If such notification has been done, the 4<sup>th</sup> and 5<sup>th</sup> Respondents are interdicted from acting on such notification.
2. The letter by 7<sup>th</sup> Respondent to 1<sup>st</sup> Respondent dated 22 March 2022 be and is hereby set aside as null and void and of no legal consequence.
3. The 1<sup>st</sup> and 7<sup>th</sup> Respondents shall pay cost of suit.

**TERMS OF THE INTERIM RELIEF GRANTED**

- 1.1 The 2<sup>nd</sup> -6<sup>th</sup> Respondents, their agents or anyone acting on their behalf shall not act in terms of or in compliance with the 1<sup>st</sup> Respondent's letter of 28 March 2022.The 6<sup>th</sup> Respondent is interdicted from conducting elections to select a Mayor in Harare to replace 1<sup>st</sup> Applicant.”

On 11 April 2022, the parties appeared before this court for argument of the matter. Strangely the first respondent through his legal representative Mr *Muradzikwa* from the Civil Division of the Attorney-General's office informed the court that he no longer opposed the application. Mr *Muradzikwa* submitted that the first respondent, after authoring the disputed letter to second and third respondents had later realized that there was an extant court order

prohibiting the seventh respondent from making any further recalls of members of the PDP-T faction. Mr *Muradzikwa* in the material part of his submissions said:

“The minister was misled by the contents of the 7<sup>th</sup> Respondent’s letter dated 22 March 2022. It is the same letter as well, which prompted him to act and in our consent order as well, we have also captured that under paragraph 3. Under paragraph 3 we clearly stated that once the minister had received that letter, he had to act on his constitutional obligation which he actually did. That is the basis upon which the 1<sup>st</sup> Respondent will only concede on. In light of the above, my lady, those will be my submissions. I will insist that perhaps the 1<sup>st</sup> Respondent in light of the opposition of the 7<sup>th</sup> Respondent will now abide by the decision of the court... We became the catalyst of this matter on the basis of the letter written by 7<sup>th</sup> Respondent. The minister was not aware of the extant order. Now that the minister is aware of the extant order he appreciates that he is bound by the order. That will be all”

I must restate that this application stems from the first respondent’s letter directing second and third respondents to take steps to fill the vacancies created by the recall of first and second applicants. That process was slated to commence within 21 days from date of receipt of the letter. If the first respondent however chooses to resile from that position, and concede that he was misled in writing the letter the case takes a completely new perspective. Be that as it maybe the court was left with no choice but to note the first respondent’s new position.

On their part second and sixth respondents through their counsel Mr *Bhamu* indicated that they were not opposed to the application and would abide by the court’s decision.

The third respondent was in default of appearance and did not file any opposing papers. Further, the applicants decided to withdraw their application against the fourth and fifth respondents. Thereafter, Mr *Kanengoni* for those respondents was excused from further attendance. These developments meant that the applicants and seventh respondents remained as the main protagonists.

### **Seventh Respondent’s Case**

The seventh respondent filed a notice of opposition in which he argued that the judgment per TSANGA J was granted in default. He was not aware of those legal proceedings. He stated further, that the impugned letter of recall was written in 2020. The one he authored on 22 March 2022 was simply a reminder to the authorities of the recall to the applicants. He insisted that the order by TSANGA J was based on the same applicants’ recall after having joined the MDC Alliance party and not CCC. The causes of action, so he stated, are different. The extant order cannot be a bar to the recall of the same applicants on allegations of joining CCC. TSANGA J’s order did not affect the recall of 22 March 2022. Seventh respondent conceded that prior to 2020 he and Lucia Matibenga joined a coalition led by Dr Joice Mujuru. In spite of this concession, he maintained that PDP remained one and that the party elected him as the

Secretary General and authorized him to act on its behalf. He insisted that the letter of recall that he authored was proper and lawful.

### **Preliminary Issues and Objections**

I was not spared the ritual of commencing almost every application with the raising of an objection *in limine*. The seventh respondent argued that the matter was not urgent as the purported urgency was self-created. He said the applicants knew about the recall letter of 2020. They ought to have challenged it then, but did not and opted to sit on their laurels.

### **Urgency**

The court invited submissions from both parties on the issue of urgency. Applicants insisted that they had acted with speed since the day they learnt of the letter. They only had 21 days in terms of the law before the process of their recall would commence in earnest. Because of the tight time frames, they only had a few days within which they could seek to protect their rights. The urgency was in my view clear as the applicants acted without delay from the time they learnt of the letter. They had challenged the 2020 letter of recall through court applications and thought the matter was now being held in abeyance. As at 11 April 2022 they only had 7 days left before the letters could be acted upon. The urgency was therefore not self-created.

### **Incompetent Relief Sought**

Instead of responding to the point *in limine*, respondent's legal counsel completely abandoned the issue of urgency and chose instead to raise another point *in limine* from the bar. He argued that the relief sought was incompetent in particular that the interim relief does not speak to the conduct of the seventh respondent. He insisted that this was a point of law and as such it could be raised anytime.

In response, Mr *Bhatasara* submitted that one of the principles on which interim relief is granted is that it must not be used to interdict action already taken or past invasion of rights. The applicants could not therefore seek to interdict the seventh respondent because at the time they approached the court the seventh respondent had already taken action by writing the impugned letter. It is a process not an event and the cited respondents had not yet taken any action. They are the ones who were targeted by the interim relief. Reference to the seventh respondent was only made in the final order. In the case of *Mayor Logistics v Zimra CCZ 7/14* the court said:

“An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favor of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right. It is

axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct.” (my underlining for emphasis)

*In casu* respondent had already authored the letter of recall. The writing of the letter is thus water under the bridge. He cannot be interdicted from doing so. The letter has already been forwarded to the intended beneficiary. His actions are in the past. The point *in limine* is without merit and must accordingly fail.

### **The dispute**

The only issue that arises for determination is whether the seventh respondent was mandated by the faction of the PDP to which the applicants belonged, to author the letters of recall against the first and second applicants.

### **The law**

#### **Establishment of *prima facie* right**

The law is settled that no authority is required for that proposition that in seeking to obtain a provisional interdict an applicant is expected to show that the right which he or she seeks to protect is either clear, if not clear that it is *prima facie* established though open to some doubt.

In seeking to establish this right the applicants made it clear to the court that the parties have been embroiled in a number of legal disputes among which are HC5292/20 and HH516/21. They even incorporated all pleadings relating to HC5292/20 and made reference to an extract of the proceedings in HH 516/21. That extract was read into the current proceedings without objection from the seventh respondent. The findings of this court per MAFUSIRE J in that matter were as follows:

“Mr Simango admits that the original PDP split.”

The irony of that finding is that the same Mr *Simango* still appears for the respondent in this matter. He is now insisting that PDP is one. But even if one was in doubt, paragraph 15 of seventh respondent’s founding affidavit all but confirms that admission. In paragraph 15, 7<sup>th</sup> respondent states as follows:

“Indeed Lucia Matibenga and myself joined a coalition led by Dr Joice Mujuru that was within our rights.”

With these concessions and deliberate misrepresentations it cannot be doubted that the seventh respondent belongs to a political party which is different from that of the applicants. PDP split due to factionalism within it. In more than one decision, this court found that first and second applicants belong to PDP T faction with the Secretary General being Settlement Chikwinya. The seventh respondent belongs to PDP M, led by Lucia Matibenga. He is a secretary general in that party. His responsibilities are confined to that party and cannot extend to other political groupings.

Counsel for seventh respondent sought to add that the PDP had convened a meeting in which the recall of the applicants was deliberated upon and a resolution to that effect taken with the full knowledge of the order by TSANGA J. That assertion unfortunately, flies in the face of the seventh respondent's own evidence in which he alleged that he was not aware of any legal proceedings in relation to the order granted against him. The two assertions are mutually exclusive of each other and smack of dishonesty.

To further compound seventh respondent's problems, paragraph 4 of his notice of opposition suggests that the letter is not new but just a reminder of an earlier recall already known to the applicants. But in his arguments the seventh respondent's counsel made another volte-face and sought to make the court believe that the letter was new and based on a fresh cause of action. Paragraphs 4, 17 and 39 of seventh respondent's founding affidavit reiterated the same thing, that the letter was a reminder stemming from the 2020 recall in which he attempted to recall the same applicants alleging that they were members of the MDC-Alliance. Needless to say, the argument is self-defeating. It only pointed to a lack of probity on the part of the seventh respondent and possibly his counsel. Significantly however, those contradictions place the letter in question under the ambit of the court order which set it aside. As a result no reminder can be made on something that was set aside. Even assuming that it is still a new letter it was still written in contravention of a valid court order. Either way the actions of the seventh respondent are invalid.

What is clear is that when the seventh respondent wrote the letter to first respondent on 22 March 2022 he was aware of the existence of the order of this court which stripped him of any authority over the applicants' political outfit. He therefore wrote the letter in contravention of the extant order. His letter is a nullity. Nothing can flow from that nullity. The first respondent could not purport to act on a nullity. His reversal of the earlier stance in opposing the application could only be a realization of the futility of such actions.

The extant High Court order recognizes Settlement Chikwinya as the secretary general of the PDP to which the applicants belong. If new processes had been undertaken then proof of those ought to have been attached, for seventh respondent to convince the court that the order had been overtaken by events. As it stands there is nothing. Settlement Chikwinya is still the secretary general. Any changes to seventh respondent's PDP M cannot affect the PDP T. It was not Settlement Chikwinya who wrote to the first<sup>t</sup> respondent to recall the applicants. The applicants therefore established a clear right that they as members of the PDP T faction had been affected by the actions of the respondent which infringed on their rights in terms of sections 56,58,67,68 of the constitution.

### **Well-grounded apprehension of irreparable harm or injury**

The chronology of events reveals that the letter of recall was not written by Settlement Chikwinya. It was made by an imposter, the seventh respondent who now seeks to have the letter acted upon by all the other respondents. If that happens then irreparable harm will befall the applicants. If respondents comply with the directive by first respondent the process may not be reversible. A by election will be called for and with it may come the loss of seats. The loss of a council seat and the position of mayor are irreparable effects. Consequently the applicants will lose their stature and benefits. They will be politically damaged in the eyes of their supporters.

### **Balance of Convenience**

In this case the balance of convenience lies in the applicants' favour. The seventh respondent is simply an opportunist posing as the Secretary General for the PDP T. There is no conceivable prejudice to any of the respondents if the interdict is granted. The process was motivated by an invalid letter. The balance of hardship favors the applicants who stand to suffer if the respondents are not interdicted from acting on the letter.

### **Availability of other remedies**

There is no other remedy which can adequately vindicate the applicants' rights and stop the process from proceeding other than an interdict. Herbstein & van Winsen, *The Civil Practice of the High Courts of South Africa* 5 ed, pp 1467-1468 articulates this principle:

- “The question of the absence of an alternative remedy must be understood in the context of the remedy envisaged by law. For it to qualify as an alternative remedy, it must:
- (a) be adequate, having regard to the circumstances of the matter;
  - (b) be ordinary and reasonable;
  - (c) be a legal remedy;
  - (d) grant similar protection.”

*In casu* there is none. The seventh respondent is unrelenting and is bent on ensuring that the recalls that he continues to make, for even those who are not members of his party, are carried through. The demands of the matter therefore call for urgent action in the form and stature of a provisional interdict. I am therefore satisfied that the applicant made out a case for the relief it seeks.

**Disposition**

Accordingly a provisional order is granted in terms of the draft.

*Bhatasara Attorneys*, for the applicants'  
*Civil Division of the Attorney General's Office*, for the first respondent  
*Mbizo Muchadehama & Makoni*, for the second & sixth respondents'  
*Nyika Kanengoni & Partners*, for the fourth & fifth respondents'  
*Nyikadzino Simango & Associates*, for the seventh respondent