

KUCACA IVUMILE PHULU
and
SETTLEMENT CHIKWINYA
and
WILLIAS MADZIMURE
and
REGAI TSUNGA
and
SICHELESILE MAHLANGU
and
TENDAI LAXTON BITI
and
PEOPLE'S DEMOCRATIC PARTY
versus
BENJAMIN RUKANDA
and
LUCIA MATIBENGA
and
PEOPLE'S DEMOCRATIC PARTY
(Matibenga's Breakaway Splinter)
and
JACOB MUDENDA N.O.
and
PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
and
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 September 2021

Date of written judgment: 22 September 2021

Opposed application

Adv *S. M. Hashiti*, with him Adv *E. Mubaiwa*, for the applicants
Mr *S. Simango*, with him Mr *B. Hwachi*, for the first, second & third respondents
Mr *K. Tundu*, for the fourth & fifth respondents
No appearance for the sixth respondent

MAFUSIRE J

[1] Applicants 1 to 6 are politicians. So are respondents 1 and 2. Applicant no 7 is a political party. So also is respondent no 3. Applicant no 7 and respondent no 3 use the same name, People’s Democratic Party (“PDP”). The one is a breakaway faction of the other. Respondent no 4 is the Speaker of Parliament (“the Speaker”). Parliament is respondent no 5. Respondent no 6 is the Zimbabwe Electoral Commission (“ZEC”). It has not participated in these proceedings.

[2] At all relevant times, applicants 1 to 6 were members of Parliament. Respondents 1 and 2 were not. The membership of applicants 1 to 6 in Parliament was terminated on 17 March 2021. The termination was at the instance of respondent no 1, allegedly on behalf of applicant no 7, and purportedly acting in terms of s 129(1)(k) of the Constitution of Zimbabwe. Section 129 of the Constitution provides for the termination of the seat for a Member of Parliament. Section 129(1)(k) in particular governs the process of “recall”. By this process the seat for a Member of Parliament becomes vacant:

“... if the Member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the Speaker or the President of the Senate, as the case may be, has declared that the Member has ceased to belong to it.”

[3] In these proceedings, the applicants seek the setting aside of the termination of their membership of Parliament on 17 March 2021. They also seek the restoration of their seats and the restoration of themselves to such of the committees of Parliament as they had been members of before that termination. Finally, they seek the costs of suit against respondents 1 to 3. The draft order is poorly worded. Verbatim, it reads:

“1. The declaration made by the 3rd (*sic*) Respondent, on the 17 March 2021 terminating the 1st to the 6th Applicants’ (*sic*) as Members of Parliament in terms of Section 129(1)(k) of the Constitution, be and is hereby set aside.

2. The 1st to 6th Applicants’ membership of Parliament be and is hereby forthwith (*sic*) without loss of status diminution and position (*sic*) and membership to the respective committees that the Applicants belonged to before the unlawful recall (*sic*).

3. That the 1st, 2nd and 3rd Respondents jointly and severally each paying the other to be absolved pay cost (*sic*) of suit.”

[4] Prior to the recall, the applicants' membership to Parliament followed their success in the national general election held on 31 July 2018. They participated in that election and won. They sat in Parliament on the ticket of a political party or political formation or a coalition of political parties known as the Movement for Democratic Change – Alliance, or MDC – Alliance, the leader of which was a Mr Nelson Chamisa. Respondents 1 and 2 also participated in that election but lost. Their participation was on the ticket of another political party or political formation or coalition of political parties called the Rainbow Coalition, the leader of which was a former Vice-President of this country, Mrs Joyce Mujuru.

[5] Before the national election aforesaid, the PDP had been formed by members who had broken away from the political party known as the Movement for Democratic Change – Tsvangirai, or MDC – T. Subsequently, and owing to differences over certain issues, the members of the PDP also split and pursued different political paths. However, both formations continued to use the name, PDP. The one formation was led by the sixth applicant herein, Mr Tendai Laxton Biti (“Biti”). The other was led by the third respondent herein, Ms Lucia Matibenga (“Matibenga”). The faction led by Biti is the seventh applicant herein. Together with several other political parties at the time, the seventh applicant came together to contest the 2018 election aforesaid as a member of the MDC – A. The faction led by Matibenga is the third respondent herein. Also together with yet another set of political parties at the time, it came together to contest the election as a member of the Rainbow Coalition. The applicants 1 to 6 campaigned and won. The respondents 1 and 2 campaigned and lost.

[6] On 14 September 2020 the first respondent, allegedly as secretary general of the PDP, submitted a letter to the Speaker, the fourth respondent herein, purportedly in terms of s 129(1)(k) of the Constitution, and purportedly recalling applicants 1 to 6 from Parliament on the basis that they had crossed the floor from the PDP party to the MDC – A party. The Speaker read out the letter in Parliament on 17 March 2021, thereby purportedly fulfilling the process of recall and sealing the termination of the membership to Parliament of applicants 1 to 6 allegedly in terms of the relevant electoral laws. The letter had not been copied to the applicants.

[7] Subsequent efforts by the applicants to stop or reverse the purported recall did not succeed. In proceedings instituted under the case reference no HC 5292/20, the applicants 1 to 6, together with several other politicians who had suffered similar fate elsewhere in their individual political endeavours, obtained a default judgment from this court on 14 April 2021. The relevant orders of that judgment declared or directed as follows:

- the second applicant herein, Settlement Chikwinya, is the Secretary General of the seventh applicant;
- the first respondent's letter of recall aforesaid is null and void and is thereby set aside;
- the third and fourth respondents herein, i.e. the Speaker and Parliament, are to disregard the first respondent's letter of recall aforesaid or any other communication to them from the first respondent purporting to represent the seventh applicant.

[8] The above default judgment is *extant*. Mr *Simango*, for respondents 1, 2 and 3, informs that there is an application for the setting aside of that judgment and that that application is pending before this court. In the present proceedings, the applicants' submissions, distilled, are that the first respondent's so-called letter of recall was fraudulent and therefore illegal since not only was he not a member of the seventh applicant, their party, let alone its secretary general, but also that he was not even the secretary general of the third respondent, Matibenga's breakaway splinter. As such, the argument concludes, it was wrongful for the Speaker to have recognised that letter and to have purported to act in terms of it.

[9] The Speaker and Parliament, i.e. respondents 4 and 5 respectively, have not opposed this application. They have elected to abide by the order of court. And as mentioned earlier, the sixth respondent, ZEC, has not participated in the proceedings at all. The first respondent has opposed the application. He purports to do so, or to be representing, or speaking on behalf of the second and third respondents as well. His major ground of opposition, in paraphrase, is that there may have been two factions of the PDP as at the times of the coalitions into MDC – A and Rainbow Coalition but that the PDP remained as one party. He also argues that applicants 1 to 6 automatically lost their right to the membership of the PDP when they decided to cross over to the MDC – A. He maintains that he was the secretary general of the PDP and was therefore the relevant and correct official of that party reposed with the power to submit the

aforesaid letter of recall. He then concludes that there is no basis for seeking to overturn his letter and the process of recall.

[10] In addition to his submissions on the merits as aforesaid, the first respondent has raised a *point limine* that there is no political party known as PDP (Matibenga Breakaway Splinter) as the third respondent is cited herein. It is argued that the only PDP party that there ever was is the seventh applicant. It is submitted that the President of this party is not Biti, but Matibenga.

[11] Following the filing of the notice of opposition, the applicants made some technical objections to the effect that, among other things, Matibenga and her breakaway splinter are not properly before the court in that no notice of opposition in Form No 29A has been filed for, or by them as required by the then High Court rules. It was also argued that even the first respondent himself is also not properly before the court because his opposing affidavit is just hearsay evidence since he has no personal knowledge of the factual allegations contained therein because he was neither the secretary general of the PDP nor was he present when the crucial events narrated therein occurred. These arguments have been persisted with before me.

[12] The applicants further submit that the Speaker and Parliament not having opposed the application, but having elected to abide by any ruling of the court; the respondents 2 and 3 not being properly before the court, and therefore not having opposed the application, the first respondent, who purports to be their agent, speaks for nobody, he has no mandate from any one and therefore, has no basis to oppose this application. The applicants submit further that this court having issued the default judgment aforesaid, which is still *extant*, all that remains to be done is to grant the consequential relief that this application seeks.

[13] Mr *Simango* has conceded the point that respondents 2 and 3 are not properly before the court. However, he argues that this court should not accept the applicants' submission relating to the default judgment because to do so would be to accept that the matter is now *res judicata* when no elements of *res judicata* have been proved, and in fact, cannot be proved, because the judgment was not on the merits, but merely granted in default. He argues that for *res judicata* to apply, the previous judgment must have been determined on the merits. He stresses that rescission of the default judgment has been sought and that the matter awaits set down.

[14] I reserved judgment on all the points in issue. Here now is my judgment. On the question of the so-called hearsay evidence in the first respondent's affidavit, I do not find the point as proved. It has not been shown that even if the applicant might not have been the secretary general of either formation of the PDP, he has no personal knowledge of the facts that are alleged therein. It has not been shown that he was not present when the crucial events narrated in his affidavit were unfolding or that he was not availed with the relevant and necessary documents from which his testimony is based. At any rate, much of the *factum probandum* is common cause. Therefore, the applicants' point *in limine* in this regard is dismissed.

[15] Regarding the rest of the points in contention, the first respondent has no case. He has no leg to stand on. A straightforward matter like this properly ought not to have overburdened the court and delayed the obvious. But this sort of thing happens when legal practitioners abdicate their responsibilities as officers of the court and opt to act like hired guns. A legal practitioner's first duty is to the court. He or she should have the courage and responsibility to advise their client when their cause is dead. The judgment of this court on 14 April 2021 is still *extant*. If this court has already declared that the first respondent is not the secretary general of the seventh applicant; that his so-called letter of recall was null and void and was thereby set aside, and further, if the Speaker and Parliament were directed to disregard it, whose cause then is the first respondent still advancing?

[16] The present matter no longer concerns the first respondent. He is out of the picture. The matter is now between the applicants and the Speaker and Parliament. It is now up to the Speaker and Parliament to decide whether or not they should resist the natural consequences of that judgment, namely to restore the status *quo ante* by installing the applicants 1 to 6 back into their seats. The Speaker and Parliament have made their decision already. They are not opposing the relief sought. They will abide by the order of court. Therefore, other than malice or spite, how can the first respondent ever oppose the relief being sought herein? This seems like an abuse of the parliamentary legal processes and privileges.

[17] The first respondent's argument that there is no political party known as the PDP (Matibenga's Breakaway Splinter) is frivolous. The words in brackets, 'Matibenga's

Breakaway Splinter’, are merely descriptive of the PDP faction that she leads, following the manner in which it is alleged to have come into existence. Mr *Simango* admits that the original PDP party split into two in 2017. As Mr *Hashiti* argues on behalf of the applicants, such descriptive words are used for ease of reference. Indeed they are for the convenience of any reader of the pleadings, including this court. They change nothing. I dismiss the first respondent’s own point *in limine*.

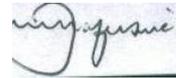
[18] The first respondent’s other argument that he could properly pen the so-called letter of recall purportedly on behalf of the PDP faction led by Biti and which had gone into a coalition under the MDC – Alliance, offends against reason. Respondents 1, 2 and 3 were quite happy to contest the 2018 general election, not only under an umbrella different from that which the seventh applicant had gone into, but actually in direct competition with it and its members. Respondents 1, 2 and 3 made their bed of roses. They must lie on it. They cannot seek to usurp other people’s beds. They should not behave like cuckoos. These are birds that do not build their own nests. They simply invade the nests of other birds and push out any eggs or nestlings in them so that they themselves can lay their own eggs in those nests. We are not birds. The simple point is that despite the continued use by the two factions of the name PDP, the situation on the ground was that the seventh applicant and the third respondent were totally two different political formations. Among other things, through the MDA – A and Rainbow Coalition, they were recognised and accepted as such by the sixth respondent, ZEC, for the purposes of the 2018 general election. It was that election that ushered applicants 1 to 6 into Parliament and left respondents 1 and 2 out.

[19] The application can only succeed. The power of recall from Parliament in s 129(1)(k) of the Constitution is reposed in the political party the Member of Parliament was a member of at the time of the election. The first and second respondents were not members of the seventh applicant at the time of the 2018 general election, or at any time thereafter. They had no power to recall the applicants. The application is hereby granted. An order in terms of the draft is hereby made as follows:

- i/ The termination of membership to the Parliament of Zimbabwe of the first, second, third, fourth, fifth and sixth applicants herein on 17 March 2021 is hereby set aside.

- ii/ The fourth and fifth respondents shall forthwith restore, or cause to be restored, the first, second, third, fourth, fifth and sixth applicants to their positions as Members of the Parliament of Zimbabwe, and to any such of the committees of Parliament as they were members of before the termination, without any loss of status or diminution of their positions.
- iii/ The costs of this application shall be paid by the first, second and third respondents, jointly and severally, the one paying the others to be absolved.

23 September 2021



Tendai Biti Law, applicants' legal practitioners

Nyikadzino, Simango & Associates, first, second and third respondent's legal practitioners

Chihambakwe, Mutizwa & Partners, fourth and fifth respondent's legal practitioners