

REPORTABLE (8)

(1) MOVEMENT FOR DEMOCRATIC CHANGE (TSVANGIRAI)

(2) DOUGLAS MWONZORA (3) DR THOKOZANI KHUPE

v

(1) LILIAN TIMVEOS (2) THABITHA KHUMALO (3) SPEAKER OF

THE NATIONAL ASSEMBLY (4) PRESIDENT OF THE SENATE (5)

CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION

SUPREME COURT OF ZIMBABAWE
GUVAVA JA, MAKONI JA & CHITAKUNYE JA
HARARE, 10, 11 JUNE 2021 & 31 JANUARY 2022

L. Madhuku, for the appellants

C. Kwaramba, for first and second respondents

K. Tundu, for third and fourth respondents

T. M. Kanengoni, for fifth respondent

CHITAKUNYE JA: This is an appeal against the whole judgment of the High Court handed down on 1 June 2020 granting an interdict in favour of the first and second respondents.

BACKGROUND

On 3 April 2020 the second appellant, in his capacity as Secretary General of the first appellant, sent identical letters to the third and fourth respondents recalling the first and second respondents from the Parliament of Zimbabwe. The reason for the recalls was that they had ceased to

be members of the first appellant, Movement for Democratic Change- Tsvangirai (MDC-T). On 5 May 2020, the third and fourth respondents informed their respective houses of the receipt of the second appellant's letter and vacancies created thereby. The Zimbabwe Electoral Commission (ZEC) was duly informed of the same so that the electoral process could begin in terms of s 39(3) of the Electoral Act [*Chapter 2:13*] (herein after referred to as the Act).

The first and second respondents were aggrieved by the recalls. They approached the High Court with an urgent chamber application in a bid to stop the appellants from replacing their seats in Parliament. The provisional order they sought was couched as follows:

TERMS OF FINAL ORDER SOUGHT

It is ordered that:

1. It is hereby declared that first, second and third respondents or anyone acting through them or on their behalf have no power or authority to replace second and third applicants (*sic*) who are members of the MDC – Alliance as members of the Senate and National Assembly respectively by members of the MDC-T, or any of their appointees and that such replacement of applicants is unlawful.
2. Pending a resolution of the applications in Case Nos. HC 2308/20, HC 2351/20 and HC 2352/20 the replacements of applicants as Members of Parliament by the respondents be and is hereby stayed.
3. Respondents to bear the costs, jointly and severally, the one paying the other to be absolved.

INTERIM RELIEF SOUGHT

Pending confirmation or discharge of the provisional order:

It is ordered that:

1. First, second and third respondents or anyone acting through them or on their behalf be and are hereby interdicted, barred and stopped from replacing applicants as members of the Senate and National Assembly respectively by members of MDC-T or any of their appointees.
2. Sixth respondent be temporarily interdicted from Gazetting the existence of vacancies in applicants' Constituencies for purposes of taking steps to have them filled by nominees of first, second and third respondents.

PROCEEDINGS IN THE COURT A QUO

In their founding affidavit the first and second respondents alleged that they did not belong to (MDC-T) but to Movement for Democratic Change Alliance (MDC-A) led by Nelson Chamisa a party completely different from MDC-T. According to them, only MDC-A could recall them from Parliament. They further alleged that they were nominated to be voted into Parliament under MDC-A.

In opposing the application, the second appellant contended that the first appellant was entitled to replace the first and second respondents as they were voted into office under the MDC-T party. Further, he averred that the relief sought by the first and second respondents had an effect of interfering with the first appellant's right to replace its own members of Parliament. He further stated that MDC-A is a pre-election pact of seven political parties that were constituted in terms of a Composite Political Agreement. The nominated candidates did not individually belong to the MDC-A, but to their respective political parties which formed the Alliance. Further, he averred that the matter was not urgent.

The third appellant raised the following preliminary points that:-

- i. The certificate of urgency was defective in that it did not state the date on which the need to act arose;
- ii. The Zimbabwe Electoral Commission ought to have been cited as a party and not citing the Chairperson;
- iii. The matter was not urgent as the founding affidavit did not have a cause of action;
- iv. There was material non-disclosure of the judgment under SC 56/20 which nullified the appointment of Nelson Chamisa as president;
- v. The interim and final relief sought was the same.
- vi. The court could not grant interim relief as the vacancies should be filled within 90 days.

On the merits, the third appellant associated herself with the arguments raised by the second appellant in as much as the argument that MDC-A is not a political party on its own. She further averred that the first and second respondents have an alternative remedy which was to have the main matter resolved expeditiously.

The third and fourth respondents also filed their opposition. In their opposition, they averred that the matter was not urgent as the alleged urgency was self-created. They further contended that the High Court did not have jurisdiction to entertain the matter as the matter was a constitutional one. They submitted that the first and second respondents' case was based on the allegation that Parliament failed to fulfil its constitutional obligations by violating s 129(1) (k) of the Constitution. This allegation therefore placed the matter within the exclusive jurisdiction of the Constitutional Court in terms of s 167(2) (d) of the Constitution.

The court *a quo* dismissed all the points *in limine*. It held that the certificate of urgency was not defective as it contained crucial information relating to the fears of the first and second respondents. It further held that the matter was urgent. On the question of non-citation of ZEC the court *a quo* held that the citation of the Chairperson of ZEC instead of ZEC was proper. It reasoned that the citation of ZEC in legal proceedings is governed by s 14 of the Electoral Act which provides that the State Liabilities Act [Chapter 8:14] applies whenever ZEC is to be cited in legal proceedings. The State Liabilities Act provides that when suing a Ministry, the Minister is to be cited. The court held that equating ZEC to a Ministry, the citing of the Chairperson of ZEC is proper. In this regard the court *a quo* also relied on the case of *Shumba & Anor v ZEC & Anor* 2008 (2) ZLR 65(S) (herein after referred to as the *Shumba* case)

On the issue of material non-disclosure, the court *a quo* held that judgments of the courts are in the public domain. It further held that the Supreme Court judgment declared what the position in the MDC was and this did not pertain to the expulsion of the first and second respondents from Parliament. It also found that the substance of the interim relief sought and the final order sought was not the same.

On the merits, the court *a quo* found that the first and second respondents had established a *prima facie* right which must be protected. It thus granted the order on the premise that the first and second respondents had established a *prima facie* case for the grant of the provisional order. The order granted reads as follows:

“Pending the determination, or disposal by this Court, of the proceedings under the reference case nos. HC 2351/20 and HC 2352/20, the first, second and third respondents, or anyone acting through them, or on their behalf, shall refrain and desist from, and they are hereby interdicted, barred and restrained from submitting any nomination papers in terms of s 39(4)(b) of the

Electoral Act[*Chapter 2:13*], or submitting or supplying the names of any other person for the purposes of filling up any perceived vacancies in the Parliament of Zimbabwe in respect of the seats held by the first and second applicants in the Senate and National Assembly respectively as at 3 April 2020.”

Dissatisfied with the decision of the court *a quo*, the appellants noted this appeal. The appellants raised 10 grounds of appeal.

SUBMISSIONS BEFORE THIS COURT

In motivating the appeal Professor *L Madhuku*, for the appellants, on reflection, abandoned the first two grounds relating to findings on urgency. He also seemed to have abandoned grounds 4 and 10 as he did not address these grounds. The grounds that remained pertained to the findings that the joinder of ZEC was not necessary, that the interim relief was not the same as the final relief, that the court *a quo* had jurisdiction to grant the interdict as it did not interfere with the process by ZEC, and that the respondents had established a case for the interdict.

Before counsel could make detailed submissions on the remaining grounds of appeal the court drew the attention of counsel for the parties to the order granted by the court *a quo* and whether such was in sync with the relief the first and second respondents had approached the court for.

In addressing this point counsel for the appellants submitted that though the grounds of appeal had not succinctly captured this anomaly, grounds 8 and 9, on the interim relief being the same as the final relief, were in fact intended to address the fact that the order granted was not proper as it was final in nature when the respondents had only sought a provisional order. He further submitted that the court *a quo* erred in granting a final order upon a finding that only a *prima facie* case had been

established. It was his view that this Court may exercise its powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*]

As regards the citation of the Chairperson of ZEC and not ZEC, Counsel for the appellants submitted that the court *a quo* also erred in finding that the joinder of ZEC was not necessary and the non-joinder was not fatal. He also submitted that the court *a quo* erred in law in not finding that it had no jurisdiction to interdict a lawful process, namely that it could not interdict the filling of vacancies that have arisen by operation of law.

Mr C. Kwaramba for the first and second respondents conceded that the court *a quo* erred by granting a final order based on a finding that first and second respondents had only established a *prima facie* case. He submitted that the only amendment he made to the interim relief sought was the abandonment of para 2 which sought to temporarily interdict ZEC from Gazetting the existence of vacancies in their respective constituencies. There was thus no other amendment to their prayer warranting the order that was granted. He confirmed that what the court *a quo* granted was not what his clients had approached the court for. Just as with the appellants' counsel, he submitted that he only saw that the court had granted such an order upon reading the judgment. In the circumstances he was not averse to this Court exercising its powers in terms of s 25 of the Act in resolving the irregularity.

Regarding the citation of the Chairperson of ZEC instead of ZEC, Counsel insisted that the citation or joinder of ZEC was not necessary and failure to do so was not fatal as no order was made against it.

Mr *T. Tundu* for the third and fourth respondents had no submissions to make save to indicate that his clients would abide by the decision of the court.

Counsel for the fifth respondent, Mr *T. M. Kanengoni*, indicated that whilst his client would abide by the court's decision there was, however, an unsatisfactory position of the law regarding whether ZEC should have been cited or not. In this regard he alluded to s 14 of the Electoral Act as amended by Act 3 of 2012 and the Shumba case (*supra*). He juxtaposed these with s 4A of the Electoral Act as amended by Act 3 of 2012 on the corporate status of ZEC and the Constitution of Zimbabwe Amendment (No.20) Act of 2013 which provides corporate status for independent commissions, of which ZEC is one.

ISSUES FOR DETERMINATION

Upon a careful consideration of the submissions made we are of the view that this appeal maybe disposed of on the basis of the order granted. The issue of citation is only pertinent in as far as it is necessary to bring to the fore the inconsistency alluded to. The issues for determination may thus be restricted to:

- i. Whether or not the order granted by the court *a quo* was proper in the circumstances
- ii. Whether or not the court *a quo* erred in finding that the citation of the chairperson of ZEC was proper and that non-joinder of ZEC as a party was not fatal to the proceedings as it was not necessary in terms of s 14 of the Electoral Act.

APPLICATION OF THE LAW TO THE FACTS.

1. WHETHER OR NOT THE ORDER GRANTED BY THE COURT *A QUO* WAS PROPER IN THE CIRCUMSTANCES

The appellants' counsel submitted that the order granted by the court *a quo* was not in sync with the relief that the first and second respondents had approached the court for. The order was not a provisional order at all and should not have been granted. The appellant's counsel submitted that the first and second respondents, in the urgent chamber application, had only established a *prima facie* case. Counsel for the first and second respondents conceded that whilst his clients approached the court *a quo* seeking a provisional order the court *a quo* granted a final order. He in effect conceded that the respondents had set out to establish a *prima facie* case for the grant of the interim relief. That the order granted is not the one the first and second respondents sought is thus common cause.

In our view in dealing with this case it is necessary to restate the law relating to the grant of interdicts.

It is a settled principle that for a party to be entitled to an interdict, he or she has to satisfy the Court that their particular case favours such with regards to the requirements for the granting of the interdict. An interdict is a summary court order, usually issued upon application, by which a person is ordered either to do something, stop doing something or refrain from doing something in order to stop or prevent an infringement of a certain right. The requirements for an interim interdict were set out in *Setlogelo v Setlogelo* 1914 AD 221 at 227 as:-

- i. A *prima facie* right, even if it be open to some doubt;
- ii. A well-grounded apprehension of irreparable harm if the relief is not granted;
- iii. That the balance of convenience favours the granting of an interim interdict;
- iv. That there is no other satisfactory remedy"

If the above conditions are met then the Court may grant the provisional order sought and provide for a return date for the parties to then make arguments on whether or not the final order sought can be granted. On the return day a party ought to establish a clear right as opposed to a *prima facie* right. The requirements for a final interdict on the other hand are:

- i. A clear right;
- ii. Irreparable harm actually committed or reasonably apprehended; and
- iii. The absence of an alternative remedy.

In *Herbstein and van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5th Ed 2009 at page 1459-60 the authors whilst noting the difficulty in defining the term ‘clear right’ acknowledged that:

“What is meant by the phrase is a right clearly established, that the word ‘clear’ relates to the degree of proof required to establish the right and should strictly not be used to qualify “right” at all. ... a clear right must be established on a balance of probabilities.”

From the authorities, it is clear that where a final interdict is sought, the right must be established clearly as opposed to it being *prima facie* established. Thus the word clear in the context of rights in an interdict does not qualify the right but rather expresses the scope to which the right has been established by evidence on a balance of probabilities. A *prima facie* case on the other hand does not have to be established on a balance of probabilities but can be granted even though open to doubt. A provisional order granted on the basis of a *prima facie* case affords the parties opportunity to fully argue their case on the return date.

In *Blue Rangers Estate (Pvt) Ltd v Muduwiri* SC 29/09 this Court aptly stated that:-

“For an order to have the effects of an interim relief it must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding.”

It is thus important to ascertain whether the order being granted affords the parties that opportunity to argue on the main relief that has to be proved on a balance of probabilities in the proceedings before that court. As the basis upon which the interim and the final order are granted are different it follows that where the relief being sought as an interim interdict has essentially the same effect as the final order, such is generally improper. The grant of an interim relief which is essentially the same as the final relief would lead to that order being set aside.

In *Registrar General of Elections v Combined Harare Residents Association & Anor SC*

7/02 at page 10 CHIDYAUSIKU C J succinctly stated the position as follows:

“On that basis also, I would set aside the interim relief granted by the court *a quo*. In my view, the relief sought and granted in the draft interim order is the same as that sought on the return day.

Where the relief sought as interim relief is essentially the same as the relief sought on the return day, the court’s correct approach should be to proceed by way of an urgent court application seeking final relief – see *Econet v Mujuru HH-58-97*.”

In *casu* the court *a quo* misdirected itself in granting a relief that had not been sought and which required no return date when all that first and second respondents had established was a *prima facie* case and not a clear right on a balance of probabilities.

It is common cause that the first and second respondents approached the court *a quo* seeking an interim relief as outlined above. The only amendment they made was to abandon the paragraph interdicting ZEC. Thus their draft order remained as before save for the removal of para 2 of the interim

relief. Thus whilst the first and second respondents sought interim relief pending the confirmation or discharge of the provisional order on the return day, the court *a quo* went on a frolic of its own and granted them a final order that they had not asked for. In doing so the court simply plucked para 2 of the draft final order and embellished it with verbosity after which it granted the order under the pretext that it was a provisional order. The order granted did not require a return day and had no incentive for the parties to seek to come to court on a return date as it was granted pending the conclusion of other cases with their own procedures that were yet to be finalised. The effect of the order is that the first and second respondents obtained a final order, in this matter, on merely establishing a *prima facie* case. There was nothing to return to court for at all. Where the order does not provide for a return date, it is a final order as regards those proceedings and such must only be granted where a clear right has been established on a balance of probabilities.

In *Nzara & Others v Kashumba & Others* SC 18/18 this Court reiterated the need for a court to adhere to issues placed before it and not to go on a frolic of its own on issues not motivated by the parties. At page 13-14 of the cyclostyled judgment the court aptly stated that:

“The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court.

This position has become settled in our law. Each party places before the court a prayer he or she wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order. These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties’ issues. It is only when the issues or the facts are not clear that the court can seek their clarification to enable it to correctly apply the law to those facts in determining the issues placed before it by the parties. The judgment of the court *a quo* unfortunately fell short of these guiding principles. In seeking to find middle ground, the court *a quo* granted orders which had not been sought by either party. It granted the first and fourth

respondents a further grace period and a referral to arbitration. The first and fourth respondents had not sought such orders.

Such orders cannot be sustained at law. **Where a court is of the view that an order not sought by the parties may meet the justice of the case, it must put that possible relief to the parties and allow them an opportunity to address it on such an order.**”(Emphasis added)

In *casu*, in granting an order whose genesis is in para 2 of the draft final order, the court *a quo* indirectly accepted that the interim relief sought was essentially the same as the final relief despite its earlier ruling that the two were not the same. The court *a quo* found itself entangled in a web of uncertainty on what order to give. In the process it considered factors not placed before it and granted an order which was final in effect without seeking the input of the parties on the order it intended to grant as this order was materially different from the order sought and upon which the parties had argued.

Whilst r 240 of the High Court Rules 1971 provided that in granting an order the court may vary the order, this is not a licence to substitute a provisional order sought by a litigant with a final order. Any variation of the order sought must still leave the order granted as a provisional order subject to confirmation or discharge on the return date. The order was thus improper and cannot stand. It must be set aside. In view of this irregularity there is no proper appeal before us.

2. WHETHER OR NOT THE COURT A *QUO* ERRED IN FINDING THAT THE CITATION OF THE CHAIRPERSON OF ZEC WAS PROPER AND THAT NON-JOINDER OF ZEC AS A PARTY WAS NOT FATAL TO THE PROCEEDINGS AS IT WAS NOT NECESSARY IN TERMS OF S 14 OF THE ELECTORAL ACT

The finding on the first issue in effect disposes of this appeal. However, we considered it pertinent, and for the sake of completeness, to address the issue of non-citation of ZEC in view of the

apparent inconsistencies in the law. This matter brings to the fore the need for the appropriate authorities to address the unwelcome inconsistency through legislative intervention. It is common cause that in arriving at its decision the court *a quo* relied on s 14 of the Electoral Act as amended and the Shumba case (*supra*). In that case this court held, *inter alia*, that it was clear from s 18 of the Act that the Chairperson of ZEC is to be cited wherever ZEC is being sued. The then s 18 was similar to the current s 14 relied upon by the court *a quo* which provides that:

“(1) Subject to subsection (1), the State Liabilities Act [*Chapter 8:14*] applies, with any necessary changes, to legal proceedings against the Commission as if the Chairperson of the Commission were a Minister.”

Whilst the law as espoused in the Shumba case was the legal position obtaining at the time, it is common cause that subsequent to that case, the Electoral Amendment Act 2012 (No.3 of 2012) was passed. This amendment introduced, *inter alia*, s 4A to the Act which granted corporate status to ZEC in these terms:

“(1) The Zimbabwe Electoral Commission shall be a body corporate capable of suing and being sued and subject to the Constitution and this Act, of performing all acts that bodies corporate may by law perform.”

An unsatisfactory state was created by the amended s 14 above which seemed to contradict the corporate status granted in s 4A. This position became untenable with the amendment of the Constitution of Zimbabwe in 2013.

The Constitution as amended in 2013 provides for independent commissions, of which ZEC is one, under Chapter 12. Section 319 thereof states that:-

“The commissions are bodies corporate with perpetual succession and are capable of suing and being sued in their own names.”

It is clear that s 14 of the Act is inconsistent with s 319 of the Constitution. Such inconsistency is resolved by reference to s 2(1) of the Constitution which states that:

“This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”

The position of the law prior to the aforesaid amendments where ZEC could only be sued through its Chairperson is now invalid to the extent of that inconsistency. ZEC has been clothed with *legal persona* and is thus capable of suing or being sued in its own name. The court *a quo* therefore erred in relying on the law prior to the aforesaid Constitutional Amendment.

Though the question as to whether the non-citation of ZEC was fatal in this matter was contentious, it is our view that in the light of the fact that the first and second respondents abandoned the paragraph which sought to interdict ZEC in its operations and the order granted has no paragraph interdicting ZEC in its Electoral processes, it is no longer necessary to determine the point.

COSTS

In light of the fact that the determining factor of this matter had not been expressly raised by any of the parties we see no justification to penalise any party with an order of costs. The justice of the case demands that each party bears their own costs.

DISPOSITION

In terms of s 25 of the Supreme Court Act [*Chapter 7:13*] this Court may review proceedings where it finds that an irregularity was committed. The court *a quo* erred and misdirected itself in granting an order that had not been sought by the parties. The order must be set aside.

Accordingly, it is ordered as follows:

1. The matter be and is hereby struck of the roll.
2. In the exercise of the court's review powers in terms of s 25 of the Supreme Court Act [*Chapter 7:13*] the judgment of the court *a quo* in case number HC 2527/20 be and is hereby set aside.
3. Each party shall bear their own costs

GUVAVA JA

I agree

MAKONI JA

I agree

Lovemore Madhuku Lawyers, legal practitioners

Mbidzo Muchadehama & Makoni, 1st and 2nd respondents' legal practitioners.

Chihambakwe Mutizwa & Partners, 3rd and 4th respondents' legal practitioners

Nyika Kanengoni & Partners, 5th respondent's legal practitioners