

JONATHAN NATHANIEL MOYO
and
MOSES MZILA NDLOVU
and
PATRICK DUBE
and
SIYABONGA NCUBE
versus
AUSTIN ZVOMA N.O. CLERK OF PARLIAMENT OF ZIMBABWE
and
LOVEMORE MOYO

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 9 July 2009 and 9 March 2010

Opposed Application

Mr. T. Hussein, for the applicants
Ms. Damiso, for the 1st respondent
Adv. Chaskalson, for the 2nd respondent

PATEL J: The applicants in this matter are all duly elected Members of Parliament. The 1st respondent is the Clerk of Parliament, cited herein in his official capacity. The 2nd respondent was elected to the position of Speaker of the House of Assembly on the 25th of August 2008.

The applicants challenge the validity of the 2nd respondent's election as Speaker on several grounds. They originally sought an order setting aside the 2nd respondent's election and, consequentially, an order nullifying all acts performed by him *qua* Speaker. However, at the hearing of this case, counsel for the applicants conceded the excessiveness and enormity of the consequential relief sought and opted not to pursue that aspect.

Background

By virtue of section 39(2) of the Constitution of Zimbabwe, the Speaker must be elected in accordance with the Standing Orders of the

House of Assembly. On the 25th of August 2008, following the swearing-in of Members of Parliament (Members), the 1st respondent announced the procedure for the election of the Speaker. As there was more than one person proposed as Speaker, the election was to be conducted by secret ballot as enjoined by Order Nos. 4 and 6.

According to the applicants, what ensued in Parliament thereafter was chaotic and disorderly and quite contrary to the requirements of a secret ballot. The 1st respondent concedes that there was an unprecedented number of Members in the Chamber on that day but denies that the voting process was disorderly or improper. The 2nd respondent supports this position and also raises several preliminary objections to the application, pertaining to *locus standi*, non-joinder and the exhaustion of domestic remedies.

The Issues

In his opposing papers, the 2nd respondent questioned the jurisdiction of this Court and the nature of the relief claimed by the applicants. In particular, it was averred that the matter fell within the purview of Parliamentary privilege and was therefore not justiciable and that the declaratory relief sought by the applicants could not properly be granted in the circumstances of this case. However, these objections were withdrawn and not specifically pursued by counsel at the hearing of this matter.

In the event, the preliminary and substantive issues for determination in this matter, as I perceive them, are as follows:

- (i) Whether the applicants have *locus standi* herein.
- (ii) Whether other Members and entities should have been cited as respondents.
- (iii) Whether the applicants should have exhausted domestic remedies available in Parliament before approaching this Court.
- (iv) Whether the 1st respondent conducted the election of the Speaker properly and procedurally and whether Members

belonging to the MDC-T party displayed their votes to their colleagues in Parliament.

- (v) Whether the requirements of a secret ballot as enjoined by Standing Orders and the Constitution were violated.
- (vi) Whether the above irregularities, if any, justify setting aside the election of the 2nd respondent as Speaker.

Locus Standi of Applicants

The 2nd respondent challenges the applicants' *locus standi* on the grounds that they do not allege any violation of their own right to vote by secret ballot and that it is the losing candidate, one Paul Themba Nyathi, who should have been the principal applicant in this case.

The latter point is untenable for the simple reason that Mr. Nyathi, who was not an MP on the date of the election, has chosen, for reasons known only to himself, not to attack the election process. As for the applicants themselves, they were clearly entitled as Members to participate in the election conducted by the 1st respondent and they unquestionably had a real and substantial interest in the outcome of that election. That being so, they are also entitled to challenge the legitimacy of the election process to ensure that it is conducted in accordance with the prescribed procedures and that it yields a legitimate result.

In the present context, section 3 of the Administrative Justice Act [*Chapter 10:28*], which codifies and restates the common law position, is directly relevant. Section 3(1)(a) requires every administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person to "act lawfully, reasonably and in a fair manner". In terms of section 4(1), "any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief".

There can be no doubt, in my view, that the conduct of the Speaker's election affected the interests and legitimate expectations of

the applicants in the outcome of the election. If they claim to be aggrieved by the 1st respondent's alleged failure to act lawfully, reasonably and fairly in the conduct of that election, they are eminently entitled to approach this Court for appropriate relief. I am therefore satisfied that the applicants have the requisite *locus standi* in this matter and that the 1st respondent's objection thereto cannot be sustained.

Non-joinder of Other Respondents

The 2nd respondent contends that, in addition to the respondents *in casu*, the applicants should have cited all other Members who participated in the election as well as the MDC-T party itself. Because a *declaratur* is sought, so it is argued, the Court should proceed on the basis of full information from all relevant parties.

I must confess that I am unable to see any merit in this contention. In terms of Order No. 6, the 1st respondent is assigned the responsibility for conducting the election of the Speaker. It is the 1st respondent, whose conduct is impugned by the applicants, and the 2nd respondent, who was declared the winner of the election, who are the most apposite respondents in the present contestation. It is their specific actions that are pointedly challenged and their interests that are directly affected by the declaratory relief presently sought.

Quite apart from the practical and logistical implications of citing over 200 respondents, the other Members and the MDC-T party were not responsible for administering the election process and are not being called upon to rectify the conduct complained of. If the 2nd respondent's argument were to be taken to its logical conclusion, it would warrant the citation of every Zimbabwean as having some legitimate interest in the election to the highest office of Parliament.

Rule 87(1) of the Rules of this Court provides that "no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party". Even where any misjoinder or non-joinder does occur, the Court remains with the discretion to "determine the issues or

questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter". While I accept that not all possibly relevant parties have been cited as respondents herein, I do not think that their non-joinder is fatal to these proceedings inasmuch as the determination of the issues in dispute will not directly impact upon their rights and interests.

Exhaustion of Domestic Remedies

The 2nd respondent avers that the applicants did not lodge any formal objection or complaint with the 1st respondent before the election result was announced. It was incumbent upon the applicants to have exhausted relevant Parliamentary processes before approaching this Court. In this regard, *Adv. Chaskalson* relies upon the decision in *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at 491-492 (para. 218). He submits, quite correctly, that the nature of the relief sought by the applicants carries far-reaching implications for the separation of powers doctrine because it asks the judiciary to interfere with the internal proceedings of Parliament. Consequently, the Court should not recognise the applicants' *locus standi* to claim such relief unless they have made proper and diligent attempts in Parliament to redress the conduct complained of or provide a satisfactory explanation for their failure to do so.

As is clearly recognised in section 5 of the Privileges, Immunities and Powers of Parliament Act [*Chapter 2:08*], Members enjoy full freedom of speech and debate in Parliament and the proceedings of Parliament are generally immune from being questioned or impeached in any court of law. In other words, as a general rule, Parliament is at large to regulate its own proceedings without external interference. However, it is well-established that in a constitutional democracy such as ours, this general immunity is necessarily and invariably subject to the provisions of the Constitution. This subordination to the primacy of the Constitution is entrenched and clearly recognised in sections 3

and 49 of the Constitution. See *Smith v Mutasa N.O. & Another* 1989 (3) ZLR 183 (SC) at 190; *Chairman, Public Service Commission & Others v Zimbabwe Teachers Association & Others* 1996 (1) ZLR 637 (S) at 651 and 656.

The election of the Speaker is a process that is not exclusive to Parliamentary privileges and powers. It is explicitly regulated by section 39 of the Constitution and there can be no doubt that it is a matter that is justiciable by the courts to ensure due compliance with the Constitution and the Standing Orders. Nevertheless, I fully endorse the approach enunciated by the Constitutional Court of South Africa in the *Doctors for Life* case, *supra*, and concur that this Court should be loath to interfere with the internal proceedings of Parliament unless it is shown that the applicants have attempted to exhaust relevant Parliamentary processes in the first instance.

In the instant case, it appears from the 1st applicant's affidavit that several queries were raised by certain Members during the election process but the 1st respondent refused to take any questions throughout the election. What is not clear from the papers is whether the queries that were raised were by way of formal objection or mere interjection. In this respect, *Ms. Damiso* submits that the 1st respondent was entitled to ignore informal protests or interjections and that any MP wishing to be heard had to make a formal objection by standing up and raising a "point of order" as envisaged in Order Nos. 49 and 61. As against this, *Mr. Hussein* argues that, although the conduct of normal Parliamentary business does admit the possibility of formal objections, there is no equivalent procedure prescribed in the Constitution or in the Standing Orders with respect to the election of the Speaker that enables the Clerk of Parliament to deal with formal objections.

Having regard to the Standing Orders taken as a whole, I am inclined to agree with *Mr. Hussein*. Order Nos. 49 and 61 relating to formal speeches and objections are contained in the Section titled PUBLIC BUSINESS and, more specifically, in the Sub-section titled

Order in House and Rules of Debate. As appears from Order Nos. 7 and 17, the Speaker holds the Chair for the conduct of public business generally. In the absence of the Speaker, the Deputy Speaker assumes the Chair and, in the absence of both, the Chair is assigned to the Deputy Chairperson of Committees or a member of the Chairperson's panel. At no stage does the Clerk of Parliament exercise the powers of the Chair in the conduct of ordinary public business to which the procedures outlined in Order Nos. 49 and 61 apply. The only occasion on which the Clerk holds the Chair is for the purpose of conducting the election of the Speaker in terms of Order Nos. 3 to 7. These Standing Orders are contained in the Section titled PROCEEDINGS ON MEETING OF NEW PARLIAMENT. As I have already noted, Order Nos. 49 and 61 which provide for formal objections are to be found in an entirely different Section and, therefore, they do not apply to Order Nos. 3 to 7 governing the election of the Speaker. Arguably, the power of the Chair to take and deal with formal objections could and should be implied, *mutatis mutandis*, in the latter context as well. However, a strict interpretation of the Standing Orders precludes any such importation in the absence of clear language to that effect.

It follows from all of this that the Standing Orders do not prescribe any procedure for the raising of formal objections during the election of the Speaker and before the election result is announced. It also follows that, in the absence of any such procedure, there was no internal Parliamentary process that the applicants could be required to exhaust before approaching this Court for the relief that they seek. That being so, the 2nd respondent's preliminary objection in this regard cannot succeed and must be dismissed.

Conduct of Election

At the beginning of the election *in casu*, the 1st respondent laid out in some detail the procedure to be followed. However, during the election process, there were several deviations from the procedure prescribed, as appears from the papers and exhibits filed herein. In

particular, some Members folded their completed ballot papers outside the polling booth and several MDC-T Members openly displayed their ballot papers to their colleagues. Again, most of the Members did not leave the Chamber after casting their votes. All in all, it would appear that the 1st respondent did not stamp his authority on the conduct of the proceedings and was unable to prevent or stop the above-mentioned irregularities.

In his opposing papers, the 1st respondent explains that the membership of the House of Assembly had increased from 150 to 210 Members, all of whom were now elected and the majority of whom were opposition MDC Members. These factors contributed to a more exuberant atmosphere in the House which affected the dynamics of the election process. However, according to the 1st respondent, the proceedings were not disorderly or chaotic and all the Members in the House were able to vote freely and without any impediment.

Violation of Secret Ballot Requirements

Mr. Hussein submits that the displaying of votes by participants in any election, as a matter of principle, violates the secrecy of the ballot because the votes displayed become known and influence the voting behaviour of the other participants. In the specific case of an election to the position of Speaker, there are several compelling reasons for maintaining the secrecy of the ballot. On the one hand, the person elected to that position should remain unaware of how particular Members voted in order to retain his or her impartiality in the proceedings of the House. On the other hand, Members should be able to elect a Speaker endowed with the requisite authority and independence without fear of sanction from their political party or constituency. Moreover, according to the *Lectric Law Library Lexicon* (at www.lectlaw.com), the term “secret ballot” is defined as:

“the expression by ballot, voting machine or otherwise but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that

the person expressing such choice cannot be identified with the choice expressed”.

As against this, *Ms Damiso* contends that only 6 out of the total number of 208 Members were specifically identified by the applicant as having displayed their votes. Therefore, there was substantial compliance with the secret ballot requirement. In any event, she submits that the definition relied upon by the applicants is overly theoretical and technically deficient. A more functional definition is provided in *Webster's New College Dictionary* with the following essential elements:- the provision of official ballot papers printed at public expense; on which the names of the nominated candidates appear; which are distributed only at the polling place; and which are marked in secret. Again, in *Steel and Engineering Industries Federation & Others v National Union of Metalworkers of South Africa (2)* 1993 (4) SA 196 (TPD) at 200-201, the requirements for a secret ballot were held to be as follows:- only those qualified must vote; the number of votes cast and the votes for and against must be counted; each voter must be able to vote privately and in secret; only the votes of eligible voters must be counted. In essence, so long as voters are able to cast their votes in secret, they are entitled to voluntarily display their votes to others, in keeping with the freedom of expression guaranteed by section 20 of the Constitution.

Adv. Chaskalson also relies on the *Steel* case, *supra*, for the proposition that the requirements of a secret ballot are designed to protect voters from having to display their votes. Therefore, a voter can waive the secrecy of his own vote by free choice. This is a right vested in the voter himself. In the instant case, the crucial question is whether or not it was reasonably possible for the Members in the House to cast their votes in secret. In this regard, he submits that all the Members marked their ballots in secrecy within the polling booths provided. None of the Members complained of having been coerced or pressurised to expose their votes. Moreover, the applicants' claim that the majority of the MDC-T Members displayed their votes is not borne

out by the evidence. In any event, those Members who did display their votes did so purely voluntarily without complaining that their voting rights had been violated. In short, such voluntary disclosure did not violate the secrecy of the election vote.

Whether Setting Aside of Election Justified

As regards the conduct of the election *in casu* generally, the papers before the Court evince several conflicts of fact as to what transpired at the time. The applicants' assertions that the proceedings were brazenly unruly are squarely rebutted by the averments of the 1st respondent. In this situation, the approach to be adopted was explained by GUBBAY JA in *Zimbabwe Bonded Fibreglass (Pvt) Ltd v Peech* 1987 (2) ZLR 338 (S) at 339, as follows:

“It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact.”

Having regard to the overall scenario prevailing in the House on the day in question, it seems reasonably clear that the election proceedings under review were not conducted in an ideal manner. Nevertheless, despite the imperfections alluded to above, it cannot be said that the process was so disorderly as to be utterly chaotic. On the contrary, all the Members in the House were duly called upon to vote and were able to cast their votes in the polling booths provided. Taking into account the usual volatility associated with the conduct of Parliamentary business generally, I am inclined to take the robust view that the election proceedings as a whole were sufficiently regulated to enable the election to take place to a satisfactory conclusion.

Turning to the open display of votes by at least 6 or possibly more of the voting Members, I agree with *Mr. Hussein* that the

provisions of section 39(2) of the Constitution as read with Standing Order No. 6 are peremptory and must be strictly complied with. Thus, if it is shown that the requirements of a secret ballot have been violated in any election to the position of Speaker, the election result should in principle be declared a nullity. This would be so unless it is shown that nullification would lead to great injustice or public inconvenience. See *Pio v Franklin N.O. & Another* 1949 (3) SA 442 (CPD); *Trans-Afrika Credit and Savings Bank Ltd v Union Guarantee and Insurance Co. Ltd* 1963 (2) SA 92 (CPD).

Having regard to the dictionary definitions and the case authorities cited by counsel, the gravamen of a secret ballot, in my view, is that each voter is enabled to cast his vote privately and in secret, without fear of having his voting choice identified or ascertained by others. In this respect, it is incumbent upon the regulating authority to provide the requisite wherewithal for that purpose. The courts should not interfere unless it is shown that the objective conditions put in place for the election precluded the possibility of a secret vote. Beyond this, it is then a matter purely for the individual voter if he chooses to divulge, whether publicly or in private, the specific manner in which he has cast his vote. If he does so of his own volition, without any external coercion or intimidation, and howsoever his conduct might influence other voters, this cannot detract from the secrecy of his vote or vitiate the secrecy of the ballot as a whole.

On the evidence before this Court, there is nothing to show that any of the Members in the House did not cast their votes in secret or that the Members who did display their votes did so under any threat or duress. It is fairly clear that Hon. Biti took the lead in brandishing his vote and that several of his colleagues were then emboldened into emulating his possibly impolitic example. However, they did so of their own free will and, more significantly, they did so after having cast their votes in secret.

In the present context, it is necessary to bear in mind that declaratory relief of the nature sought *in casu* is always discretionary. This is clearly recognised in section 14 of the High Court Act [*Chapter 7:06*]. In principle, suitable circumstances must be shown to exist to justify any exercise of the Court's declaratory discretion. As I have already stated earlier, Parliament is generally at large to regulate its own proceedings without external interference. As a rule, the courts should be loath to interfere with the internal proceedings of Parliament unless there is a failure to comply with constitutional strictures. In the instant case, I do not perceive any such failure and am unable to find any other basis for setting aside the election of the Speaker.

Disposition

It follows from all of the foregoing that the applicants have failed to establish any justification, either as regards the general conduct of the impugned election or with respect to the secrecy of the votes cast or otherwise, for setting aside or nullifying the election of the 2nd respondent as Speaker of the House of Assembly.

On the other hand, I am unable to discern any valid ground for penalising any one or all of the applicants with a punitive award of costs as is claimed by the 2nd respondent. I do not understand this application to be merely frivolous or vexatious or to have been actuated by malice or other ulterior motive.

In the result, the application is dismissed with costs on the ordinary scale.