

BLESSING NHENDE  
versus  
MOVEMENT FOR DEMOCRATIC CHANGE – T (MDC T)  
and  
BARNABAS NDIRA  
and  
ZIMBABWE ELECTORAL COMMISSION (ZEC)

HIGH COURT OF ZIMBABWE  
PHIRI J  
HARARE, 1 and 11 June, 2018

### **Urgent chamber application**

*A Masango*, for the applicant  
*J Kadoko*, for the 1<sup>st</sup> & 2<sup>nd</sup> respondents  
*T Kanengoni*, for the 3<sup>rd</sup> respondent

PHIRI J: This was an urgent chamber application in respect of which the applicant was seeking interim relief couched in the following terms;

“Pending determination of this matter the applicant is granted the following relief:

- (1) Endorsement of 2<sup>nd</sup> respondent as aspiring councillor for Ward 21 be and is hereby nullified.
- (2) 1<sup>st</sup> respondent be and is hereby ordered to rectifying its records by the deletion of applicants name as aspiring candidate for Ward 19 and applicant be registered as an aspiring candidate for ward 21.
- (3) 1<sup>st</sup> respondent is hereby ordered to make necessary arrangements for the holding of primary elections for Ward 21 should it be necessary.
- (4) Costs of suit.”

At the hearing of this matter it was agreed that the third respondent was not to be held as a party to these proceedings as it is constitutionally mandated to regulate General elections and as such is a Neutral Arbiter in respect of National General Elections. It was agreed by all parties that the third respondent should not be part and parcel of the current proceedings.

Accordingly this court ordered by consent and with no order as to costs that the third respondent not be held to be party to the proceedings.

The applicant’s cause of complaint

In its founding affidavit the applicant averred that he submitted his application to the first respondent, to contest as aspiring councillor in the forthcoming 2018 General Harmonised Elections for Local Authorities.

He contended that he had submitted his application to stand as councillor in Ward 21 Mabvuku.

He alleged that the first respondent announced that the applicant had been successful in his application but was placed on a list of candidates for those aspiring to contest for Ward 19.

The applicant submitted that he pointed out this anomaly that he had submitted his application for Ward 21 and not Ward 19. He alleged that this was an administrative error on the part of the first respondent.

He also submitted that the first respondent “made him to appeal” which he reluctantly did.

He submitted that he was denied “the consensus” deliberations which were initiated in Ward 21 Harare which resulted in second respondent being “appointed” as the aspiring candidate, and, this was before the first respondent had deliberated on his appeal.

He also pointed out that there had been a resolution that Ward 21 was to be reserved to what was termed the “youth quota”

The applicant submitted that in terms of the first respondent’s Constitution, which was, subsequently, filed of record, a youth is defined as a person between 16 to 35 years old. (See Article 8.1 of the Constitution of the first respondent).

The applicant submitted that the second respondent is aged 38 years and does not qualify to be a youth.

#### APPLICANTS ANSWERING AFFIDAVIT

Annexed to the applicant’s Answering Affidavit was firstly annexure “B” which contained a list of candidate for Mabvuku and alongside each name of the candidate and Ward 21 is the endorsement.

“Designated to Youth.”

#### APPEAL

Also annexed to the applicants Answering Affidavit was a letter dated 12<sup>th</sup> May, 2018 addressed to the National Chairman and copied to the Secretary General and the Director of Election (for the first respondents) and it was couched in the following terms:

“Dear Sir

Re: Follow-up on Appeal Blessing Nhende – Ward 21, Harare

Reference is made to the above subject I received a message that a team from your office is coming for voters roll validation in our ward (ward 21) Harare. Would you please kindly provide the details of the Arbiter General so that I can make a follow up on my appeal.

Please note that other candidates are campaigning since 20<sup>th</sup> April, 2018 and to me it would be unfair since up to now you have not responded to my appeal .....

### URGENCY

On behalf of the applicant it was submitted that this matter was urgent given the fact that the Nomination date for the Harmonized Elections was the 14<sup>th</sup> June 2018, and, given the apparent delays, on the first respondent's part, in addressing his appeal and or cause of complaint the applicant would suffer prejudice and irreparable harm if this application was not urgently deliberated upon.

### FIRST RESPONDENT'S NOTICE OF OPPOSITION

The first respondent filed its notice of opposition to the applicant's urgent application.

The first respondent raised a point *in limine* submitting that the applicant had prematurely approached this court without exhausting the domestic remedies due to him as provided for in the first respondents constitution.

The first respondent submitted that the applicant had a right to approach the "Arbiter General" of the party or appeal to the appropriate Chairperson in terms of clause 6.1 of its Disciplinary Code of conduct and regulations of the party.

The applicant insisted at the preliminary hearing that they had lodged an appeal.

This court postponed the matter and gave an order that the first respondent had to produce its original appeals record book or a certified copy thereof.

On the return date this was, unfortunately, not done. This court then made its ruling dismissing the points *in limine* raised by the first respondent and held that this matter was urgent and should be deliberated upon on the merits.

### THE MERITS

#### APPLICANT'S SUBMISSIONS

The applicant persisted with his claim that Ward 21 was reserved for the "Youth Quota" and that the first respondents constitution defined "Youth as a person between the ages of 16 to 35 years.

The applicant contended that he qualified to be considered as a "youth". He submitted his identity particulars which showed that he was born on the 18<sup>th</sup> May, 1990.

One thus qualified to be considered for nomination in terms of the youth quota designated for Ward 21.

The applicant persisted with his claim that his name was erroneously posted in Ward 19.

He also persisted with his claim that he had appealed but had not received any response from the first respondent and consequently he would suffer irreparable harm if the first respondent does not process his appeal.

The applicant submitted that this court should grant the interim relief he sought in view of the delays first respondent by not timeously attending to his appeal.

The applicant was seeking nullification of the second respondent as the candidate for Ward 21.

#### RESPONDENT'S SUBMISSIONS

It was submitted on behalf of the first respondent that there was no proof that a notice of appeal was filed by the applicant.

It was also argued on behalf of the first respondent that Ward 21 was never reserved for people below the age of 35. To this end it was submitted that there was no resolution passed by the first respondent that ward 21 was reserved for the youths.

It was also submitted that no documents had been placed before this court to prove that Ward 21 had been reserved for the youth.

It was also contended that the applicant had not placed any documents, before this court, showing that applicants name had been erroneously placed in Ward 19.

Another submission made was that payment of fees was not a guarantee that one would automatically be nominated as a candidate.

It was however accepted that "consensus" had been a method used to select candidature for Ward 21.

#### THE COURTS FINDINGS

It is the finding of this court that the applicant has, on a balance of probability established its case that the purported nomination of the second respondent as candidate for Ward 21, Mabvuku be nullified.

This court is of the view that the respondents failed to sufficiently challenge the allegation made by the applicant that his name had been erroneously been placed as a candidate for Ward 19.

The court is also satisfied that the papers filed of record, by the applicant, do establish the fact that Ward 21, Mabvuku had been reserved for the youth quota.

Similarly the court is satisfied that the applicant submitted proof that he qualifies and meets the criteria of a “youth” as designated by the first respondents constitution.

Clearly the second respondent does not qualify as a “youth” in terms of the constitution of the first respondent. The second respondent was born on 17 January 1980. He is 38 years old, and accordingly does not satisfy the requirement stipulated by the first respondent’s constitution.

This court also finds that the applicant has established, on the papers filed of record, and, on a balance of probability, the fact that he indeed lodged an appeal with the first respondent. This appeal appears not to have been deliberated upon by the first respondent.

In view of the fact that the first respondent has not seriously and expeditiously deliberated on the applicants appeal (bolstered by the applicants letter of 12 May 2018) this court finds that the applicant stands prejudiced in not being considered as a candidate for Ward 21 Mabvuku.

Applicant was also not given the opportunity to participate in the “consensus” process of nomination of the candidate for Ward 21.

In the circumstances it is the considered view of this court that the first respondent should allow the applicant to be considered for nomination as a candidate for Ward 21.

Ultimately the final decision as to whether or not the applicant should be considered as a candidate lies in the general membership of the first respondents in Ward 21, Mabvuku.

If, indeed first respondent is a “Democratic Movement” it should allow its membership to have the final say and there will be no prejudice suffered if primary elections are held in Ward 21, Mabvuku well before the nomination day which is 14 June 2018.

Accordingly this court gives the following order;

It is hereby ordered that

- a) Endorsement of second respondent as aspiring councillor for Ward 21, Mabvuku, Harare be and is hereby nullified.
- b) The first respondent is hereby ordered to make the necessary arrangements for the holding of primary elections for Ward 21, Mabvuku, Harare should it be necessary, before 14 June 2018.
- c) The first respondent to pay costs of suit.

*C Muronda & Maunga*, applicant's legal practitioners  
Mwonzora & Associates, 1<sup>st</sup> and 2<sup>nd</sup> respondents legal practitioners  
*Zimbabwe Electoral Commission*, 3<sup>rd</sup> respondent's legal practitioners