

ZIMBABWE AFRICAN NATIONAL UNION
versus
ZIMBABWE ELECTORAL COMMISSION
and
CHAIRPERSON OF THE ZIMBABWE ELECTORAL
COMMISSION HONOURABLE JUSTICE PRISCILLA
CHIGUMBA N.O

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 29 May 2018 & 30 May 2018

Urgent Chamber Application

J. B Matandire, for the applicant
T Kanengoni, for the 1st & 2nd respondents

MUNANGATI-MANONGWA J: Basing on the right of access to information as provided under s 62 the applicant, a political party approached this court on an urgent basis seeking the following relief

“An Interim Order sought

- i) That within 48 hours of grant of this order first respondent files with this court a response to applicant’s letter dated 9 May 2018, adequately citing reasons outside precedence for its insistence on use of its claimed “special ballot paper
- ii) That first respondent stops the procurement of the special ballot paper pending the return date.

Final Order Sought

1. That first respondent uses ordinary (bond) paper for printing of the ballot papers at the 2018 national elections, while also allowing voters to use their own pens and pencils where voters so wish.”

The background facts to this case are as follows: On 9 May 2018 the applicant wrote to the first respondent Zimbabwe Electoral Commission (ZEC) through its Chairperson the second respondent herein demanding the stoppage of the intended use of “special paper” in the voting processes. It indicated in the letter that it genuinely and reasonably believed that the “special paper” would not guarantee fair elections in 2018. It further sought the respondents’ justification in using the so called “special paper.” There was a claim that the applicant had “received reliable scientific advices as to the possible and easy abuse of paper” and called upon ZEC “to take notice of the nation’s (voters) reasonable and considered apprehensions over the paper.”

These concerns also appear in the founding affidavit of Chawaona Wilbroad Kanoti the president of the applicant.

The applicant claims the special ballot paper was used in 2013 and the paper has “such a chemical composition that “swallows” a voter’s mark for the immediate appearance of an already existing water-mark against a favoured contestant’s name. In this regard applicant wants information on the nature, make and chemical composition of the ballot paper. Without this information the applicant’s fear of electoral manipulation has increased.

The respondents duly responded to the applicant indicating that it is ZEC’s constitutional mandate as *per* s 239 (a) of the Constitution of Zimbabwe Amendment (No 20) Act 2013 to design, print and distribute ballot papers among other functions. Equally, on issues of the type of paper to be used for the printing of the ballot papers ZEC had the administrative responsibility to make a decision on that aspect. The respondents further indicated that the printing of ballot paper has always been done on special paper whose type the Commission could not disclose to stakeholders for security reasons.

It is this response that has led the applicant to approach the court seeking the relief as indicated earlier. Given that the respondents are already working on procurement of the printing

of ballot papers the parties agreed the matter is urgent and the court is satisfied that indeed the matter is urgent.

The application is opposed. Mr *Matandire* for the applicant submitted that in a democratic society based on accountability, openness and responsiveness, the first respondent being tasked with the conduction of free and fair elections should never hesitate to give a candidate exercising his political right for standing for public office information he needs regarding the type, nature and use of the special ballot paper. He further argued that there is nothing at law that provides that the first respondent must use the special paper instead of bond paper. Thus the applicant's right was being undermined by the refusal of the respondent to give the information asked for.

The respondents maintained their stance as *per* their letter that s 239 (a) of the Constitution gives them the right to design, print and distribute ballot papers. Further s 235 ss 3 clearly states that no person may interfere with the functioning of the independent commission. The same is echoed in s 10 (A) (2) of the Electoral Act which states that no state agent or private person may interfere or direct the commission in the exercise of its functions.

Mr *Kanengoni* submitted that the applicants rely on rumours which characterize election proceedings, where constitutional independence of a body is guaranteed it takes more than rumor for the courts to interfere. There is no evidence of the rigging referred to in 2008 and 2013 elections where the special ballot paper was used. The first respondent had given a prompt satisfactory response. Further, the issue of security could not be ignored as the special paper is embedded with security features. The disclosure of the features and type of paper might lead to counterfeiting of ballot papers. The first respondent will invite the stakeholders to see the printing of the ballot papers. Further he submitted that the issue of votes using pens provided by ZEC was not pertinent as it was only meant for convenience. Voters can bring their own pens and pencils. The respondents called for the dismissal of the application for lack of merit. He urged the court to dismiss the unsubstantiated averment that ZEC and other political parties have an unholy alliance.

The grounds for the granting of an interim interdict are as follows:

- a) A *prima facie* right.
- b) A well-grounded apprehension of irreparable harm if the relief is not granted.
- c) That the balance of convenience favours the granting of an interim interdict.
- d) The applicant has no other remedy.

The applicant has argued that it has established a *prima facie* right by virtue of its entitlement to access to information. It is therefore entitled to reasons short of precedence why special ballot paper has to be used. By failing to respond to its enquiry satisfactorily, applicant's *prima facie* right is infringed and once the procurement of special ballot paper is done it will suffer irreparable harm. That there is no other satisfactory remedy except the interim interdict sought to compel first respondent to furnish reasons for use of the special ballot paper and stop procuring the paper. That the balance of convenience favours the granting of the interim order.

The court finds that the applicant indeed has a constitutionally guaranteed right to information. This right is founded in Section 62 of the Constitution which provides:

62 Access to information

- (1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.
- (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.
- (3).....

Thus the right to access to information is entrenched in the Constitution. The same Constitution requires that all state institutions discharge their power and functions in a transparent and accountable manner. The transparency translates *inter alia* to availing information and recognizing the right to such information not only for fostering public accountability but also for the protection of the rights of the person requesting the information and for the person to be able to exercise any right bestowed to them by law. Therefore in the exercise of their political rights particularly the right to free and fair elections citizens may require and demand certain information from the Zimbabwe Electoral Commission (hereafter referred to as "ZEC"). ZEC as the body constitutionally mandated to manage (organize, supervise and conduct elections) national elections among others is accountable to the electorate as regards the manner in which election processes are being handled from the preparation processes, the voting itself and ultimately the delivery of results.

The right is to access to information is not absolute. Section 62 (4) provides that access to information may be restricted "in the interests of defence, public security or professional

confidentiality to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom”. Whilst Section 62(4) of the Constitution refers to enactment of legislation to give effect to the right of access to information already there is in operation the Access to Information and Privacy Act [Cap 10:27]. Its provisions restrict access to information in instances where it is necessary for the protection or promotion of national defence, public security or professional confidentiality.

Section 86 (1) and (2) of the Constitution further allows the limitation of fundamental rights in given circumstances. It provides:

86 Limitation of rights and freedoms

- (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
- (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right or freedom concerned;
 - (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
 - (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
 - (f) whether there are any less restrictive means of achieving the purpose of the limitation.

The instances pertaining to restrictions of fundamental rights stated in Section 86(2)(b) quoted above are broader in perspective. In essence the right to access to information may only be limited through a law of general application such as legislation and the limitations thereto have to be justified. Such limitation should be to achieve a purpose that is compelling and acceptable in a constitutional democracy. It is not contentious that s 62 endows citizens with a right to request information held by the state, which is obliged to provide the requested information if the

information is needed for purposes of fostering public accountability. As shown above the law permits a restriction to the right where it can be established inter alia that by releasing the information to the applicant the rationale for the protection of the information gets eroded. Compelling reasons have to apply.

ZEC as a state agency or institution has an obligation to provide access to the information required by the applicant to protect or exercise any of the rights entitled to the applicant. It is noted that the applicant has a right to free and fair elections under the constitutionally provided political rights under s 67 of the constitution. Equally the applicant has a right to participate in political party activities. The question however becomes whether the requested information is required by the applicant to exercise its right or to foster public accountability.

The court does not see how the chemical composition, type and make of the ballot paper may assist the applicant in exercising its right to stand for public office or affect his right to free and fair elections, more so, when there is no evidence placed before the court that the type of paper or special ballot paper is such that it will impact upon free and fair elections. There is reference to serious allegations of electoral manipulation through the special ballot paper in 2013 elections, which process was colloquially referred to as the “NIKUVU debacle”. The allegations referred to are unproven and there is no report placed before the court to explain the so called “NIKUVU” debacle and how it threatens to affect the current elections with particular regard to the special ballot paper. The applicant stated that ZEC’ secrecy about the nature of the ballot paper has increased its concerns and its fears of electoral manipulation. There is no evidence placed before the court to buttress the allegations of an electoral manipulation and how it can be achieved through the use of the special ballot paper. The court has to be satisfied that there is a well grounded fear of harm or prejudice to be suffered by the applicant. There has to be reasonable apprehension of the respondents’ actions. As the challenge is on the chemical composition and type of the special ballot paper scientific evidence had to be presented to show the inappropriateness of the ballot paper.

Further nothing turns on the allegation that failure to supply the details of the nature of the paper is prejudicial. In any case the respondent made it clear that elections have always been done on special paper and they could not disclose the detail for security reasons. This reason is compelling as releasing such information compromises the elections in the court’s view. To simply

suggest that bond paper is appropriate is not only being naive but to underrate the very special process of elections. Apart from the choice of paper being the first respondent's exclusive prerogative, issues of security come into play. If the type, composition and nature of the paper is made public there is a danger of reproduction of the ballot paper by unscrupulous persons which actions would impact on the credibility of the whole election process. There is thus need for a secure ballot paper for credibility purposes. The credibility of an election process is measured against many considerations including how tamperproof the ballot paper is. The first respondent submitted that the special paper is embedded with visible and invisible security features which ensure a secure ballot.

That the ballot paper is a of special material should in the court's view create confidence in the electorate rather than create fear especially in the absence of evidence impacting on the appropriateness of the special paper. Given that elections are an indispensable feature of a democratic nation, it is incumbent upon ZEC to ensure that all election materials used be authentic and secure in terms of quality and composition. Anything short of that would be dereliction of duty given the respondents' important mandate to conduct free and credible elections. It is in the general public interest that ZEC conducts its mandate in a professional manner above reproach for it is out of holding credible elections that the nation's constitutional democracy continues to be upheld.

In realization of the need for transparency and accountability, the respondents have indicated that the name of the printer and number of ballot papers will be provided in future with the stakeholders being called to witness the printing thereof.

The applicant has failed to establish a well-grounded fear of irreparable harm if the relief sought is not granted. Neither does the balance of convenience favour the relief sought, if anything this was an ill-thought application devoid of merit. The court finds that the respondent's conduct is not found wanting in its dealings with the applicant, even when one considers that in a democratic society based on accountability, responsiveness and openness an electoral body tasked with ensuring that elections are conducted freely and fairly should readily avail information to a candidate or a party seeking to exercise his/its political rights.

The information provided was sufficient and there is no need for the court to order supply of more information neither is there a basis to stop the procurement of the special ballot paper.

In that regard the following order is made:

1. Application is dismissed with costs.

Kanoti & Partners, applicant's legal practitioners
Kanengoni and Partners, respondents' legal practitioners