

KIVEN MUTIMBANYOKA  
versus  
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS  
& NATIONAL HOUSING N.O  
and  
GIFT TICHAONA TSVERERE (in his personal capacity and  
in his official capacity as Mayor of Chitungwiza Municipality)  
and  
JABULANI MTUNZI (in his personal capacity and in his  
official capacity as Deputy Mayor of Chitungwiza Municipality)  
and  
THE ACTING CHAMBER SECRETARY  
MUNICIPALITY OF CHITUNGWIZA N.O.  
and  
MUNICIPALITY OF CHITUNGWIZA  
and  
THE DISTRICT ADMINISTRATOR  
CHITUNGWIZA DISTRICT N.O.  
and  
THE PROVINCIAL ADMINISTRATOR  
HARARE METROPOLITAN PROVINCE N.O.

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE,.....

### **Urgent Application**

*R S Nembo*, for the applicant  
*S Kalira*, for the 5<sup>th</sup> Respondent

MUSHORE J: This is an application for an interdict, suspending the Mayor and Deputy Mayor for Chitungwiza (2<sup>nd</sup> and 3<sup>rd</sup> respondents) from conducting mayoral duties and from receiving benefits in those respective capacities. The applicant is the losing candidate in the Mayoral elections for the Municipality of Chitungwiza which were held on the 4<sup>th</sup> September 2018. He is an elected councillor in that same district representing the Zanu-PF political party. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents who are members of the Movement for Democratic Change Alliance won the posts of Mayor and Deputy Mayor in the District of Chitungwiza. The applicant has filed a separate and substantive court action in HC 8463/18, which he is desirous

of prosecuting to finality. In that court action, the applicant is seeking declaratory and ancillary relief because he believes that the election of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents is tainted with illegality. At the time that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were elected into office, the applicant was a contender for the Mayor ship and a hopeful candidate for that post. He submitted that his rights to a free and fair election *inter alia* other rights have been infringed as a result of the unlawful election into office of the second and third respondents.

At the initial set down of the matter on my urgent roll, I allowed all of the respondents time (at their requests) to file opposing papers before I proceeded to hear the matter. Accordingly I postponed the hearing for one week to enable such filings. However, in the intervening period, it was only the fifth, sixth and seventh respondents who filed opposing papers, in which papers they submitted that they would abide with any order which the court might make in the matter. The second and third respondents did not file opposing papers, neither did they attend the hearing. No explanation had been proffered for their non-attendance, which the caused the applicant to apply for default judgment. Because granting a default justice would not have been proper in the dispensation of justice, in the light of the fact that in a petition of this sort, the merits of the matter should be fully ventilated, I invited applicant's counsel to make submissions on the merits of the matter.

#### URGENCY

Applicant's counsel cited the case of *Kuvarega v Registrar General* 1998 ZLR 118 as authority for the proposition that the applicant filed the present application "*when the need to act arose*". In addition he urged that the matter be regarded as urgent, bearing in mind that it was an electoral petition, and that the justices of the matter implied that the rules of natural justice were to be taken into consideration for transparency sake and in the interests of the public. Applicant's counsel did not have to go very far into persuading me that the matter was urgent. Thus the matter proceeded to be argued on an urgent basis.

#### MERITS

The applicant cited irregularity in the proceedings which , according to him, led to the second and third respondents being elected as Mayor and Deputy Mayor of Chitungwiza. Applicant enumerated several legal infractions having taken place during that election which he said rendered the election of the second and third respondents to be null and void. Applicant also made reference to some infringements of his constitutional rights as a citizen, councillor and Mayoral candidate having occurred in the process of the election. The applicant was present at the election complained of, and he testified in his affidavit that when the irregularities

were occurring, he and other councillors protested but that their objections to the process which was taking place were ignored.

In support of his submissions that all the requirements for the court granting him the remedy of an interdict, applicant cited the case of *Setlogelo v Setlogelo* 1914 AD 221 which defines the requirements for the grant of such a remedy as being that:

- (a) He has a *prima facie* right to the relief of an interdict;
- (b) The right was in imminent danger;
- (c) He has no other remedy available to him other than to approach this court for relief;
- (d) That if he was not granted the relief of an interdict, there was a likelihood of irreparable harm or prejudice occurring; and
- (e) The balance of convenience favours the grant of interdictory relief.

*In casu*, applicant prays that the *status quo ante* the election be ordered until such time that the main matter (HC 8643/18) is determined. Applicant has to demonstrate that the first four grounds of the above stated list of grounds be established.

This is how the events unfolded leading up to the second and third respondents being elected into office as submitted by the applicant.

On the 1 September 2018, applicant and other designate councillors received invitations to attend a meeting on 4 September 2018 from the Acting Chamber Secretary at the Chitungwiza Municipal Chambers for their swearing in ceremony as councillors. On 4 September 2018 the applicant and all other elected councillors were sworn into office by the Town Clerk. The only item which had been reflected on the agenda on the notice of 4 September 2018 meeting was the swearing in of councillors. However during the meeting, the Acting Chamber Secretary circulated a notice for a Special Meeting, proposing that both the elections of the Mayor and Deputy Mayor be held the following day, that being the 5<sup>th</sup> September 2018 at 10 o'clock. When the notice was being circulated, the Town Clerk advised the meeting that the notice of the Special Council meeting was improper, because in terms of the Urban Council's Act [*Chapter 29:15*], each councillor needed to be given 24 hours' notice for such a special meeting to lawfully take place. The Acting District Administrator disregarded the Town Clerks comment, and thereafter, in what the applicant described as being an act of defiance, informed the meeting that instead of the next day, the Special Council meeting concerned would take place on the same day at 1:30pm. A protest broke out outside among supporters for both parties (MDC and Zanu-PF). In the meeting, applicant and other Zanu-PF councillors immediately pointed out that the Special Meeting was illegal and unprocedural.

Applicant submitted that as a mayoral hopeful, he intended to contest for the Mayoral position, and that he required the allotted 24 hours so that he could lobby for the post of Mayor.

When the Acting Chamber Secretary (fourth respondent) heard the objections which were being made by the applicant and others, she summarily withdrew the notice for a Special Council and replaced it with a notice to hold the Special Meeting to be held on the same day, for the election of the Mayor and Deputy Mayor of Chitungwiza Municipality, that being on 4 September 2018. It became clear that the fourth respondent was acting in concert with the sixth respondent. It was at that point that the applicant and four other Zanu-PF councillors walked out of the meeting in protest. The Town Clerk reiterated that the process which was taking place was illegal. After departing the meeting, both the applicant and the 2<sup>nd</sup> respondent were nominated for the post of Mayor. Nevertheless the Special Council meeting went ahead. Furthermore, applicant is alleging that the vote count was done illegally and not by secret ballot; and that fourth respondent's tally of votes which were cast on open strips of paper is not binding on the Council and councillors.

Applicant claims that he was steamrolled out of the position of Mayor, with the whole process being tainted with illegality arising from the following of his observations:-

- (a) That there was insufficient notice of a Special Council Meeting given to the councillors, given as is required in terms of the Urban Councils Act.
- (b) The provisions upon which the meeting was called namely sections 17 (1) (c) as read with s 103 (b) were no longer law because they had long been repealed.
- (c) In terms of section 84 (3) of the Act is only the Minister who is authorised to call the first meeting of the Council and not the acting Chamber Secretary or the acting District Administrator as was the case for 4 September 2018 meeting.
- (d) The special council meeting was improperly sanctioned by the fourth respondent because in terms of s 84 (5) of the Act, it is the Mayor or Council itself that lawfully sanctions such a meeting.
- (e) The meeting was unlawfully held at 1:30pm because the Act specifically prohibits meetings taking place before half-past four unless it is sanctioned by the Mayor or a two-thirds quorum of the Council.

I have perused s 84 of the Act, and I am satisfied that all of the above issues complained of are valid points of concern, which raise the issues of invalidity and illegality in the manner in which the meeting was called and conducted. S 84 reads as follows:-

**“84 Meetings and special meetings of council**

(1) A council shall hold its first meeting on such date and at such place as the Minister may fix and thereafter the council shall, subject to this Act, meet for the dispatch of business and adjourn, close and otherwise regulate its meetings and proceedings as it thinks fit:

Provided that the council shall hold an ordinary meeting—

- (a) as soon as is practicable after each general election; and
- (b) at least once in each month.

(2) Save as otherwise provided in this Act, at any meeting of a council—

- (a) all the councillors present at that meeting shall vote on every matter which is put to the vote;
- (b) voting shall be by show of hands or by any mechanical means approved by the council;
- (c) all the questions coming or arising before that meeting shall be decided by a resolution passed by a majority of the votes cast and, in the event of an equality of votes, the mayor shall have a casting vote in addition to a deliberative vote.

(3) The mayor may, at any time, and at the request in writing of not less than one- third of the total membership of the council or of six councillors, whichever is the less, shall, within fourteen days of such request, call a special meeting of the council.

(4) Written notice of any special meeting called in terms of subsection (3) shall be sent to each councillor at least twenty- four hours before the meeting and shall specify the object of the meeting, and no matters, other than those specified in that notice, shall be discussed at that special meeting.

(5) Meetings of a council shall be held—

(a) in the case of an ordinary meeting, at such time and place as the council may determine;

(b) in the case of a special meeting, at such time and place as the mayor may determine:

Provided that no meeting of the council shall commence before half- past four o'clock in the afternoon unless—

(a) at least two - thirds of the total membership of the council have agreed that the meeting may commence earlier; or

(b) in view of exceptional circumstances, the mayor has directed that the meeting should commence earlier.

(6) Save as otherwise provided in this Act or in any other law, all acts, matters or things authorized or required to be done by a council may be decided by a majority of councillors voting at a meeting of the council at which a quorum is present.

I have perused the Minutes of the 4th September 2018 meeting and having gone through them; and having seen that they accord with the applicant's version of facts, I agree with the applicant that the rules of procedure were not followed, and that the meeting was not convened properly. Applicant has demonstrated that he has a *prima facie* right to the remedy of an interdict. There is no competing evidence against those facts on the record. Further, I have observed that the following of applicant's constitutional rights to a free and fair election and right to administrative justice were infringed.

**“Political rights**

(1) Every Zimbabwean citizen has the right—

- (a) to free, fair and regular elections for any elective public office established in terms of this Constitution or any other law; and
- (b) to make political choices freely.

(2) Subject to this Constitution, every Zimbabwean citizen has the right—

- (a) to form, to join and to participate in the activities of a political party or organisation of their choice;
  - (b) to campaign freely and peacefully for a political party or cause;
  - (c) to participate in peaceful political activity; and
  - (d) to participate, individually or collectively, in gatherings or groups or in any other manner, in peaceful activities to influence, challenge or support the policies of the Government or any political or whatever choice”
- (3) Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right—
- (a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and
  - (b) to stand for election for public office and, if elected, to hold such office.
- (4) For the purpose of promoting multi-party democracy, an Act of Parliament must provide for the funding of political parties.

**68 Right to administrative justice**

- (1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
- (3) An Act of Parliament must give effect to these rights, and must—
  - (a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
  - (b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration”

**The right being in imminent danger**

Applicant’s counsel emphasised the need by the court to right this irregular election procedure in the interests of justice. I agree with him. In order that all elections in Zimbabwe are regarded as being valid and free and fair in a democratic society where the rule of law must prevail, the rules pertaining to such elections have to be impeccably observed and adhered to. This clearly did not happen when the second and third respondents were elected into office. I believe there to be a well-grounded apprehension of irreparable harm occurring, because whilst the second and third respondents retain their titles bearing in mind the irregularities which I adverted to above; each and every act that they are or may perform in the furtherance of their offices are potentially illegitimate. In order not to erode the public’s confidence in the notion of democracy, the *status quo ante* the elections of second and third respondents, needs to be maintained until the main matter has been finally determined. Applicant’s counsel urged me to take judicial notice of the fact that the public confidence in the validity of elections in the Chitungwiza District has been dogged with issues of legitimacy for many past elections. In noting such, I find that all further actions in the offices currently occupied by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents must stall on a provisional basis.

Clearly applicant’s remedy lies only with this court.

It is for all the above reasons that I believe it to be appropriate to grant the relief prayed for.

Accordingly I provisionally order as follows:-

- “1. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents be and hereby suspended from carrying out any duties and/or receiving any benefits as Mayor and Deputy Mayor of the Municipality of Chitungwiza pending the determination by this Honourable Court of the matter in Case Number 8643/18.
2. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondents be and are hereby barred from assigning any duties or providing benefits to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in their purported roles as Mayor or Deputy Mayor of Chitungwiza, pending determination of the matter in Case Number HC 8643/18.

*Nembo Attorneys, Applicant's practitioners*  
*Matsikidze & Mucheche, 5<sup>th</sup> Respondent's legal practitioners*