SENGEZO TSHABANGU
versus
SESEL ZVIDZAYI (N.O)
and
CONCILLIA CHINANZVAVANA (N.O)
and
GILBERT KAGODORA (N.O)
and
SHEPHERD MUSHONGA N.O
and
CITIZENS COALITION FOR CHANGE

HIGH COURT OF ZIMBABWE
DUBE JP
HARARE: 21 March & 11 April 2025

Urgent Court Application

L Uriri, for the applicant
M. Ndhlovu, for the respondents

DUBE JP:

Introduction

1. In this court application, the applicant approached the court seeking relief on an urgent basis for a declaration that the CCC Party's office bearers and main organs elected on 26 My 2019 expired on 27 May 2024 and that the decision made by the disciplinary committee constituted of office bearers whose tenure of office had expired to expel him from the party is null and void liable to be set aside. The *declaratur* was brought in terms of s14 of the High Court Act [*Chapter 7:06*] as read with rule 59 (6) of the High Court Rules,2021. In the alternative, he sought it to be declared that the appointment of the disciplinary committee, its members and conduct of disciplinary proceedings that led to his expulsion is *ultra vires* the disciplinary code of conduct of the party. After hearing the parties, I allowed the application on the basis of a preliminary point raised by the applicant.

Factual Background

2. The dispute at hand pits the applicant Sengezo Tshabangu, who contends that he is the leader of the opposition in Parliament, a senator and the interim secretary general of the Citizens Coalition for Change [CCC], a political party. The first respondent is Sesel Zvidzayi, cited in his official capacity as the Chairperson of the National Disciplinary Committee of the CCC, the party, that expelled the applicant from it. The other respondents are Concilia Chinanzvavana and Gilbert Kagodora, the second and third respondents and the fourth respondent Shepherd Mushonga, cited in their official capacities as members of the said party's National Disciplinary Committee. The fifth respondent is the CCC.
3. The applicant's case is based on the following synopsis. The applicant was a member of the party until his expulsion. On 6 December 2024, Parliament's Committee on Standing Rules and Orders (CSRO) resolved to appoint members of Parliament to leadership of portfolio committees. On 10 December 2024, first and fifth respondents together with Welshman Ncube, Lynette Kareni and Edwin Mushoriwa, filed an urgent chamber application for an interdict against the applicant and the Speaker of the National Assembly under HCH 5606/24, seeking an order to interdict the announcement of appointments of members of Parliament to the leadership of portfolio committees made by the CSRO on 6 December 2024 and to have the appointments of the CCC party's members of Parliament to portfolio committees declared unlawful, null and void. In the intervening time, the appointments were announced in the National Assembly on 10 December 2024 and in the Senate on 11 December 2024. Wamambo J granted the interdict on 8 January 2025, which decision the applicant appealed. Leave to execute pending the appeal was dismissed.
4. The applicant averred that the office bearers of the party's main organs and office bearers elected at the Gweru Congress on 26 May 2019, save for the Parliamentary Caucus and Local Government Caucus expired on 27 May 2024. He submitted that no elections for new office bearers having been held, any office bearer elected at the Gweru Congress who continues to hold office does so unlawfully in breach of Article 6.2.2 as read with Article 6.2.3 (g) of the party constitution. He contended that the first to fourth respondents having been elected at the Gweru Congress continue to hold their positions unlawfully and argued that the constitution of the party has no saving provisions which entitle the first to fourth respondents to continue holding office. He claimed that not all of the terms of office of the

leadership of the fifth respondent have expired contending that the term of office of the interim secretary has not expired.

5. In addition, he asserted that the appointment of the first to fourth respondents to the National Disciplinary Committee was done *ultra vires* the disciplinary code of conduct and regulations of the party, the code, is unlawful and irregular, their terms of office having expired. He posited that as the interim Secretary of the party, he has no knowledge of the appointment of the first to fourth respondents to the disciplinary committee and never generated the notice or sanctioned it. He challenged the authority of Welshman Ncube to appoint the disciplinary committee arguing that he is rotating by himself as Acting President contrary to the provisions of the constitution.
6. The applicant averred that he learnt through a notice on social media on 9 January 2025, that the purported office of the Acting President had suspended him from the party and position as Interim Secretary General, the leader of the opposition in Parliament and Senate with immediate effect. In addition, that the notice was eventually served on him as a letter from a person purporting to be the Acting President of the party who purported to be suspending him. He averred that on 5 February 2025, a defective notice of a disciplinary hearing without a charge and alleged acts of misconduct was generated by the fourth respondent purporting to act as the arbiter general of the party and was dropped off at his residence calling upon him to attend a disciplinary hearing on 12 February 2025. He posited that he was not given timely notice of the hearing thereby impeding time to prepare for the hearing.
7. The applicant challenged the conduct of the disciplinary committee on a number of grounds. Chief among the objections was a challenge on the jurisdiction of the disciplinary committee to try him, the venue of the disciplinary hearing which he said was held at a private property belonging to Willias Madzimure, a non-neutral venue. He submitted that the failure by the first respondent to rule on objections he raised amounted to procedural irregularity. He asserted that a request for recusal of the first respondent who was a party to pending matters before the Supreme Court under SC26/25 and High Court matters under HCH5606/24 and HCH275/25 was refused.
8. He averred that he can only be subjected to a disciplinary hearing after concurrence of at least two-thirds of the National Council members since he is a member of the Standing Committee as provided in article 12.1 of the Code. He contended that the appointment,

entire processes of the disciplinary Committee, decisions and actions are unlawful and illegal and his subsequent dismissal from the party null and void and liable to be set aside they having no force or effect. It is against this background that the applicant challenged the disciplinary committee that found him guilty on four charges and expelled him from the party.

9. He sought relief on the following terms:

> **"Relief Sought**
> The term of office of the 5th respondent's office bearers and main organs elected on the 26th May 2019, save for its Parliamentary Caucus and local Government Caucus as set out in Article 6 of its Constitution, expired on 27th May 2024.
>
> a) Any office bearer elected on 25th May 2019, at the Gweru Congress, who continues to hold his or her their position is doing so unlawfully and in breach of Article 6.2.2 as read with Article 6.3.3(g) of the Party's Constitution.
> b) An office bearer whose appointment was made by organs and/or officers whose terms had expired, including the 1st,2nd,3rd, and 4th respondent, were irregularly appointed and their appointment is null and void.
> c) Consequently, any decisions made, or actions taken by any officer bearer or organ since 27th May 2024, are deemed to have no legal force or effect and are hereby declared null and void.
> d) The entire disciplinary process of constituting the Disciplinary Committee that sat at number 60A Hibiscus Road, Lochnivar, Southerton, Harare on the 12th February 2025 to deliberate and decide on allegations of misconduct levelled by the 5th Respondent against the applicant be and are hereby declared null and void and are set aside.
> e) 1st,2nd,3rd, and 4th respondents be and are hereby ordered to pay the costs of this application, on an attorney's and client's scale, one paying, the other to be absolved.
>
> **ALTERNATIVELY**
>
> f) That the 1st respondent should have recused himself on account of bias having been negatively affected by the applicant's alleged actions and being a litigant against the applicant in the High Court and the Supreme Court on account of the same allegations.
> g) That the appointment of the National Disciplinary Committee is ultra vires article 3.1.2 of the Disciplinary Code of Conduct and Regulations.
> h) That the President is not the appointing authority and as such the letter dated 20 October 2024 purporting to appoint the 1st,2nd and 3rd as members of the National Disciplinary Committee is null and void.
> i) That the notice of hearing having been made on 30th January 2025 against the applicant having been presented on the date of hearing 12 February 2024, 12 days later, is ultra vires Article 7 of Annexure C of the Constitution, the disciplinary code of conduct and regulations of the 5th respondent.
> j) That the written notice of hearing does not specify the alleged acts of misconduct or the charges against the applicant or the provision of the constitution he is alleged to have acted in breach of in terms of article 8.1 of the Disciplinary Code of Conduct and is thus ultra vires the constitution.
> k) That the applicant being a member of the Standing Committee can only be subjected to a hearing after the concurrence of at least two-thirds of the National

Council members and the failure to comply with this provision renders the entire proceedings null and void.

l) That the disciplinary committee comprising of the 1st,2nd ,3rd and 4th respondents had no jurisdiction to try the applicant as this ultra vires article 12.1 of the code in the 5th respondent's constitution.

m) 1st,2nd,3rd and 4th respondents be and are hereby ordered to pay costs of the application on an attorney clients scale, one paying the others to be absolved''

10. The fifth respondent defended the application with the first to fourth respondents choosing to abide by the decision of the court on the reasoning that they were members of the disciplinary committee that rendered the decision and had no duty to defend the application. Whereas the High Court rules require that an arbitrator, umpire, judge or other adjudicating body whose decision is impugned should be cited, the accepted position is that such person should not be seen to be taking sides in the dispute or defending it, it being undesirable for an adjudicating body or tribunal to defend and participate in a process challenging a decision made by it. See *Blue Ribbon Foods Ltd* v *Dube NO & Anor* 1993 (2) ZLR 146 (S) where the court remarked thus:

> "…, an arbitrator, umpire, judge or other adjudicating body has one of two choices. The first is that he could file an affidavit setting out facts which he considers may be of assistance to the court. So long as such facts are stated colourlessly, no-one could object, but if the affidavit should err plainly in support of one of the parties it might expose the adjudication to the odium of the court…..,. The second choice of the arbitrator or umpire when served with the notice of motion for his removal, or to set aside his award, is to take no action and abide by the court's decision."

See also *TM Supermarkets (Pvt) Ltd* v *Chimhini* SC 41/19, *Makandi Tea & Coffee Estate (Pvt) Ltd* v *AG & Anor* HH 595/15, *Leopard Rock Hotel* v *Wallen Construction (Pvt) Ltd* 1994 (1)ZLR 255 (S).

Consequently, the applicant's suggestion that the first to fourth respondents failed to defend the application thereby enjoining the court to draw adverse inferences against them does not find favour with the court. There was no positive duty on the part of the first to fourth respondents to defend the application. For expediency, the fifth respondent will henceforth be referred to as the respondent.

11. The respondent submitted *in limine* that the certificate of urgency filed in support of the application is invalid on account of the fact that its maker focused on the disciplinary process instead of the date of expiration of the terms of office of the respondents which is when the need to act arose. It maintained that the applicant did not act with the urgency

envisaged and that the urgency relied on is self-created as the applicant took nine months to bring this application.

12. The respondent challenged the applicant's *locus standi* to bring this application arguing that he is barred from approaching the court for failure to pay his 2024 annual subscriptions in terms of article 5(4)(a) of the party's constitution. In addition, it contended that the applicant is barred from approaching this court for relief not only by the provisions of s5(4)(a) of the party's constitution for failing to exhaust domestic remedies but also in terms of the common law principle that judicial intervention must be preceded by the exhaustion of internal remedies.
13. It challenged further the propriety of the application, arguing that the applicant is challenging the outcome of the party's disciplinary proceedings against him and has brought a review application disguised as one for a declarator. The respondent further contended that the applicant has brought a constitutional application for violation of his rights under s68 of the Constitution of Zimbabwe and yet failed to proceed in terms of r107 of the High Court Rules, 2021, rendering this application invalid.
14. On the merits, the respondent refuted that the term of office of the office bearers elected at the Gweru congress expired maintaining that they hold office until their replacements are elected, are in lawful occupation of their positions functioning lawfully properly and effectively. The respondent submitted that the applicant is estopped from disputing the leadership of the respondent based on the fact that post May 2024, he acknowledged the leadership of the party and structures as seen in various pleadings and correspondences and had participated in judicial proceedings without challenging the leadership of the party's term of office. It refuted that the applicant is its Interim Secretary arguing that there is no such office in the party.
15. It maintained that the disciplinary committee was properly appointed and conferred with jurisdiction to determine the alleged acts of misconduct committed by the applicant and the alleged acts of misconduct fully specified. It maintained that the applicant was given the charge sheet on time together with the letter notifying him of the hearing and asserted that the notice of hearing fully complied with the dictates of the party constitution.
16. The respondent submitted that the applicant has dirty hands having sought to rely on a fake and fraudulently edited constitution. It challenged the absence of Article 5(4) (a) in the constitution relied upon by the applicant and submitted that this amounts to a material

dispute of fact. It further posited that a dispute of fact arises on the existence or otherwise of the Appeals Tribunal. It submitted that the application is replete with material disputes of fact which cannot be resolved on the papers. It urged the court to decline to deal with the application and/or it having failed to prove the relief sought, to dismiss the application.

17. Conversely, the applicant took two points *in limine*, the first is based on the observation that the respondent failed to file its notice of opposition together with the opposing affidavit as envisaged by r59 (7) of the High Court Rules 2021. In addition, it submitted that the notice of opposition and opposing affidavit was filed a day out of time in violation of the case management order issued by the court, which stipulated that the notice of opposition was to be filed by 5 March 2025 and that the effect of which to render the application unopposed.
18. He criticized the respondents' opposition on the basis that the deponent to the respondent's opposing affidavit lacks authority to depose to the opposing affidavit on behalf of the respondent. He submitted that the document relied on by the respondent does not speak to his authority, it having been drafted and signed on 23 January 2022 when he was not the president of the party. He contended that the contents of the resolution produced in support of the assertion that Welshmen Ncube has authority to represent the party does not speak to his authority in the present matter nor does it authorise the institution of any litigation by anyone. He argued in addition that the deponent to the opposing affidavit lacked authority to depose to an opposing affidavit on behalf of the respondent as the party's constitution provides that an acting president shall be appointed in an acting capacity on a rotational basis. He urged the court to expunge from the record the deposition of Welshman Ncube.
19. In response to the respondent's opposition, the applicant contended that the application is urgent. He contended that in the absence of any domestic remedies available, he should not be expected to invoke any. He asserted that the respondent made a bare allegation that he did not pay his annual subscriptions, and that if it was so, the respondent would not have set up a disciplinary hearing for a non-member and expelled him. The applicant refuted the existence of material disputes of facts incapable of being resolved on papers and insisted that the Constitution attached to his application is the correct one.

20. For expediency, the court resolved that the parties argue both the preliminary points as well as the merits of the application after which judgment would be rendered with the preliminary points being resolved first.

Is the application urgent

21. A court seized with an urgent court application is duty bound to consider the issue of urgency as a preliminary matter. The application must meet the threshold requirement for urgency. The law as regards the approach to take in urgent applications is well settled. In the *locus classicus* case of *Kuvarega* v *Registrar General & Anor* 1988 (1) ZLR 188 (HC), the court held that what constitutes urgency is not only the imminent arrival of the day of reckoning and that a matter is urgent, if at the time the need to act arises, the matter cannot wait. Further, that urgency which stems from a deliberate or careless absentation from action until the deadline draws near is not the type of urgency contemplated by the rules. See also *Documents Support Centre (Pvt) Ltd* v *Mapepire* 2006(2) ZLR 240 where the court said the following:

> "… urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

22. The standard for determining urgency is centred on time of occurrence or potential occurrence of the event, act or conduct complained of and the consequences complained of. The applicant must show that he acted when the need to act arose and that if the application is not dealt with immediately, there is a likelihood of irreparable harm or damage occurring to him.

23. The timing of an urgent application varies depending on the circumstances of each case. The date of expiry of the office bearer's tenure of office in this case is only important to show that by this date the term of office of the respondents had expired. There is a difference between expiry of a term of office where no offensive action has been taken and an unlawful act carried out without authority by a person whose term has expired. Where in an urgent application, the impugned conduct or action complained of is taken after expiry of a term of office, the need to act arises at the time when the offensive conduct or act is carried out. Where an unlawful act or decision is made by an office bearer after his term has expired, he acts outside his authority, the need to act to act arises when the alleged unlawful act takes place. Where a disciplinary committee is not properly constituted and sits without authority and its decision is challenged, the need to act arises when it sits as a disciplinary authority and expels or dismisses a member. The trigger for an urgent court

application in a case such as this is typically the unlawful conduct or action taken by the office bearer.

24. What caused the applicant to approach the court is the constitution of the disciplinary committee, the hearing and its outcome. Although the term of office of the party's office bearers expired on 27 May 2024, the respondents had not yet taken any action complained against. The trigger for this urgent court application is the unlawful action allegedly taken by the respondents of constituting the disciplinary action and subjecting the applicant to disciplinary proceedings without the requisite authority and not the mere expiry of their term. The terms of office of the first to fourth respondents having expired, the need to act arose when the respondent allegedly acted outside their authority by convening a disciplinary hearing which expelled the applicant from the party and not on the date of expiry of the members' term of office. The approach taken by the legal practitioner certifying the urgency of the matter of focusing on the disciplinary proceedings is correct. This application is time sensitive.
25. The applicant did act when the need to act arose and within a reasonable time after the conduct impugned occurred and did not delay in seeking recourse. The applicant became aware of the disciplinary committee ruling on the 19 February 2025. By 24 February 2025 he had filed this application barely 4 days later. The applicant did not sit on his laurels and has made a case for prioritization of this case.
26. The applicant has a reasonable apprehension that the respondents may recall him once he is not affiliated to the party and generally that the expulsion threatens his political tenure. He demonstrated the risk of harm or prejudice to him if the matter is not dealt with on an urgent basis. The harm or prejudice that he will likely suffer if this matter is not dealt with on an urgent basis cannot be compensated by an award of damages. The interests of justice demand that this matter be heard on an urgent basis warranting the matter to jump the queue.
27. I must express my disapproval of the lengthy certificate of urgency filed in support of this application that runs into 10 pages. The certificate of urgency is unusually long. Lengthy certificates of urgency are likely to be repetitive, lack focus and to have the effect of diluting the urgency of the matter. A certificate of urgency must be brief and to the point centering on essential averments and facts and should not carry unnecessary detail. In future, legal practitioners who do unnecessarily long certificates of urgency risk being penalised with

punitive orders of costs especially in cases where the applications sought to be supported are ultimately found not to be urgent.

Whether the deponent to the fifth respondent's opposing affidavit has authority to depose to the opposing affidavit

28. In addition to their oral submissions, both parties adhered to their heads of argument. At the hearing, the challenge related to the failure by the respondent to file its notice of opposition together with the opposing affidavit and file in compliance with the time lines specified in the case management order was abandoned by the applicant.
29. The point related to the authority of Welshman Ncube to depose to the opposing affidavit and oppose these proceedings on behalf of the respondent authority was raised in the applicant's answering affidavit and in applicant's heads of argument. The respondent chose to ignore this point and did not advert to it either in its heads of argument or at the hearing.
30. The general approach to proving authority to institute or defend proceedings was articulated in *Cuthbert Elakana Dube* v *Premier Service Medical Aid Society & Anor* SC 73/19, where the court said the following of authority to represent an entity:

> "A person who represents a legal entity, when challenged, must show that he is duly authorised to represent the entity. His mere claim that by virtue of the position he holds in such an entity he is duly authorised to represent the entity is not sufficient. He must produce a resolution of the board of that entity which confirms that the board is indeed aware of the proceedings and that it has given such a person the authority to act in the stead of the entity. I stress that the need to produce such proof is necessary only in those cases where the authority of the deponent is put in issue. This represents the current state of the law in this country."

31. Where a resolution conferring authority on a party to institute or defend proceedings on behalf of an entity has been produced, the resolution must in no uncertain terms, confirm the existence of authority to represent the entity concerned and that the entity has given authority for the deponent to act in its stead and is aware of the proceedings. The authority to institute or defend proceedings must be unequivocal. The resolution must relate to the proceedings in issue and identify the entity concerned correctly. Failure to do so renders any affidavit deposed to on behalf of the entity invalid liable to be struck out thereby entitling the court to dismiss the claim or defence due to any such errors.
32. The respondent's predicament starts with an averment in para 1 of the opposing affidavit which reads as follows:

"*I depose to this affidavit as duly authorised by the resolution of the 1st Applicant which I attach …*".

First to note is that the deponent to the opposing affidavit states that he is duly authorised by first applicant to depose to the opposing affidavit. This is factually incorrect. There is no first applicant in this matter there being only one applicant. The deponent to the opposing affidavit has failed to identify his principal. Secondly, Welshman Ncube does not represent any applicant in these proceedings. Essentially what he is saying is that he deposes to the affidavit on behalf of Sengezo Tshabangu or even a non-party for that matter. This mishap borne out of ineptitude results from copy pasting of pleadings. This practice can be costly for parties and result in pleadings being struck out. Pleadings should be drafted with diligence and attention to detail ensuring that they are prepared for each individual case and that parties are properly identified. An affidavit that fails to identify correctly parties in a litigation is invalid and has no force or effect at law.

33. The document marked Annexure CC1, is an Internal Resolution of a National Council Meeting dated 22 January 2022 and filed in support of this application. The resolution in issue was drafted and signed on 23 January 2022, over three years ago and the proceedings in issue were only instituted in February 2025. The resolution does not speak to this particular matter or any at all. The said meeting resolved issues of participation in by - elections, party relabelling, electoral reforms and fundraising strategies. It makes no reference to litigation and does not give authority to the deponent to the opposing affidavit to depose to defend this matter and consequently does not confer authority on him to represent and act on behalf of the respondent in the current proceedings.
34. The resolution does not speak to the authority of the deponent to the opposing affidavit to depose to it. Its importance to this matter was not addressed by the respondent. Effectively, Welshman Ncube has failed to provide proof of written authority from the respondent to depose to the opposing affidavit and to show that he was duly authorised to depose to the opposing affidavit on behalf of the respondent. Despite being made aware of the shortcomings of the resolution, no response was forthcoming and no corrective action was taken by the respondent.
35. There being no authority to defend this application, there is no opposition and the respondent's opposing affidavit is struck out rendering the application unopposed. The applicant's *point in limine* is upheld. That being the case, there is no basis for the court to

resolve the respondent's preliminary points and consider its defence on the merits. The matter ends here. Consequently, the applicant has shown an entitlement an order unopposed.

36. Faced with an order on the main and in the alternative, the court resolved this application on the basis of the main order as amended. The court narrowed down the order having formulated the view that it is too wide and may be covering parties not before the court. The costs of this application follow the event. There is no justification in making an order for payment of costs against the first to fourth respondents, they having not opposed the application. The court not having been addressed on the propriety of an order for costs on a higher scale, I find no justification for imposition of a punitive order of costs . Accordingly, it is declared and ordered as follows:

    1. The term of office of the first to fourth respondents and main organs elected on 26 May 2019 at the Gweru Congress, save for its Parliamentary Caucus and Local Government Caucus as set out in Article 6 of its Constitution expired on 27 May 2024 and hold office unlawfully and in breach of article 6.2.2 as read with Article 6.3.3(g) of the Party's Constitution
    2. The entire disciplinary process constituting the Disciplinary Committee that sat at number 60A Hibiscus Road, Lochnivar, Southerton, Harare on 12 February 2025 to deliberate and decide on allegations of misconduct levelled by the fifth respondent against the applicant be and are hereby declared null and void and are set aside.
    3. The fifth respondent be and is hereby ordered to pay the costs of this application.

T.J Mabhikwa & Partners, applicant's legal practitioners
Mathonsi Ncube Law Chambers, respondents' legal practitioners