

REPORTABLE (36)

(1) CITIZENS COALITION OF CHANGE (2) KWANELE
BANGO (3) AQUILINA KAYIDZA PAMBERI (4) TINASHE
KAMBARAMI (5) MEMORY NDLOVU (6) PROMISE
DALUBUHLE MKWANANZI (7) CAROLINE MAPAKO (8)
GARIKAYI MUGOVA (9) BRIAN GUMBO (10) GLADYS
MATHE (11) TAWANDA RUZIVE

v

(1) INNOCENT NCUBE (2) ZIMBABWE ELECTORAL COMMISSION
(3) MANALA MOTSI (4) EDDIE DUBE (5) KUNDAI NYIKA (6)
GOLDEN NDLOVU (7) MNOTHISI NSINGO (8) MOLINA DUBE
(9) MLUNGISI MOYO (10) MABUTHO MOYO (11) THABO
THWALA (12) THENJIWE NLEYA

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & CHATUKUTA JA
BULAWAYO: 18 MARCH 2024**

M.E.P. Moyo, for the appellants

T.M. Kanengoni, with *C. Nyika*, for the first and second respondents

N. Ndlovu, for the third to twelfth respondents

CHATUKUTA JA:

[1] This is an appeal against the whole judgment of the Electoral Court (court *a quo*), handed down on 15 August 2023. The court dismissed an urgent court application for a review of the decision of the nomination court, declining to accept the first appellant's nomination paper for the candidates on the party list for the Bulawayo Provincial Council. This was in respect of the general elections held on 23 and 24 August 2023.

After hearing submissions from counsel, the Court gave an *ex tempore* judgment in which it declined jurisdiction to hear the matter.

FACTUAL BACKGROUND

[2] The appellants filed an urgent court application for review in the Electoral Court (*court a quo*). In that application, they contended that, following the proclamation fixing 21 June 2023 as the date of the sitting of the nomination courts across the country for the purpose of submission of nomination papers, they filed their nomination papers including those for the party-list candidature of the Bulawayo Provincial Council with the nomination court sitting at Bulawayo Magistrates' Court, Tredgold Building, Bulawayo. The nomination officer received their nomination papers just before the deadline of 4 o'clock in the afternoon of the nomination day provided for by the Electoral Act [Chapter 2:13] (the Act). After examining the papers, the nomination officer found that they were defective and gave the appellants a chance to rectify the defects.

[3] The appellants alleged that, upon re-submission of the papers at 8 o'clock in the evening of the nomination day, the nomination officer rejected the nomination papers for the Bulawayo Provincial Council party-list. This was on the basis that they were not part of the papers initially submitted to him and that had therefore been submitted out of time.

PROCEEDINGS BEFORE THE COURT A QUO

[4] The appellants petitioned the court *a quo* to set aside the decision of the nomination court. The application was opposed by the respondents who, amongst other things, challenged the urgency of the matter. The procedure adopted by the appellants was also challenged. It was contended that the appellants ought to have appealed against the decision of the nomination court instead of seeking a review of the decision.

DETERMINATION BY THE COURT A QUO

[5] In determining the question of urgency, the court *a quo* held that the matter was urgent as disputes turning on the nomination of candidates must be resolved before the elections are conducted in line with the provisions of the Act.

[6] On the merits, the court held that the nomination paper for the Bulawayo Provincial Council party-list was not among the papers submitted before 4 o'clock in the afternoon of the nomination day which were found to have been defective requiring rectification. It further held that the attempt to file the Bulawayo Provincial Council party-list at 8 o'clock in the evening of the nomination day was in clear contravention of s 45 E (3) of the Act which does not permit a nomination paper of party-list candidates to be received after 4 in the afternoon of the nomination day. It was on this basis that the court *a quo* dismissed the application.

Aggrieved by the decision of the court *a quo* the appellants noted an appeal to this Court on the following grounds:

GROUND OF APPEAL

1. The court *a quo* erred in failing to appreciate the failure of the nomination court to keep a proper record of its proceedings which amounted to a gross irregularity cognizable under the court's powers of review as a consequence of which the court *a quo* could not have properly found in favour of the respondent.
2. The court *a quo* erred in failing to appreciate that in the absence of a record of proceedings which established that the appellants' papers were not part of those originally submitted, the court *a quo* had no basis in rejecting appellant's averments and agreeing with first and second respondent's averments.

3. The court *a quo* erred in finding that appellants had given a different version of the facts they relied upon in the earlier matter previously filed as HC1333/23 when the material averment of the appellants that they had handed on the nomination paper timeously and that the first respondent had lost their nomination paper had remained the same.
4. The court *a quo* erred in failing to engage and decide appellant's contention that first respondent decision to reject appellant's nomination paper was irrational and grossly unreasonable.

RELIEF SOUGHT

1. That the appeal is allowed with costs.
2. That the judgment of the court *a quo* is set aside and in its place substituted with the following;
 - “(a) first respondent's decision to reject the first applicant's nomination paper for its party list for the Bulawayo Provincial Council be and is hereby reviewed and set aside.
 - (b) the first respondent's declaration that third to twelfth respondent are duly elected members of the Bulawayo Provincial Council be and is hereby reviewed and set aside.
 - (c) first respondent resort to the provisions of section 45I of the Electoral Act [Chapter 2:13] be and is hereby reviewed and set aside with the result that the provisions of section 45E of the said Act shall by this review be deemed to have been satisfied.
 - (d) Respondents to pay costs of suit.

SUBMISSIONS BEFORE THIS COURT

- [7] At the hearing of the appeal Mr *Kanengoni*, for the first and second respondents, raised a point *in limine* that the appeal was now moot as it had been overtaken by events. He submitted that the nomination court had sat on 21 June 2023 pursuant to a proclamation by the President. The court *a quo* determined the application for review on 15 August 2023. The elections were subsequently held on 23 and 24 August 2023. An election return was duly announced. Winners of the election had been declared and sworn in.
- [8] He further submitted that once an election had been held the results thereof could only be overturned or upset through an electoral petition. He also argued that the provisions of the Act set out strict time limits within which electoral challenges must be heard and determined. This was because public policy demanded that there must be finality to the electoral process.
- [9] Mr *Ndlovu*, for the third to the twelfth respondents, associated himself with the submissions by Mr *Kanengoni*.
- [10] *Per contra*, Mr *Moyo*, for the appellants, submitted that the matter was not moot since it related to the party list and consequently there was no need to adhere to the process referred to by Mr *Kanengoni*. Upon engagement with the court, he failed to explain why it had been necessary for the first appellant to submit the party list to the nomination court if it was not necessary to adhere to the nomination process. He further failed to explain the practical and legal consequence of the relief sought in view of the fact that elections had already been held and winners had been sworn in.
- [11] Mr *Moyo* did not dispute that, as a basis for the matter being heard on an urgent basis by the court *a quo*, the appellants averred in the founding affidavit that the failure to

hear and determine the application before the elections would render the application for review moot. He however argued that since it was a point of law it was wrongly raised in the founding affidavit. He submitted that it would only amount to a concession if made as a submission to the Court.

THE ISSUE FOR DETERMINATION

[12] The only issue for determination is whether or not the appeal is moot.

THE LAW

[13] The doctrine of mootness and what it entails has been clearly explained in a number of cases. The case of *Khupe & Anor v Parliament of Zimbabwe & Ors* 2019 (3) ZLR 915 (CC) sets out what the doctrine of mootness entails. Firstly it sets out what constitutes mootness and its impact on the proceedings before the Court. This was explained at p 920 paras C – G as follows:

“A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances the court’s jurisdiction ceases and the case becomes moot ... The question of mootness is an important issue that the court must take into account when faced with a dispute between parties. It is incumbent upon the court to determine whether an application before it still presents a live dispute as between the parties.”

The Court further held as follows:

“The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of ‘such a nature that the decision sought will have no practical effect or result.’”

[14] Secondly, the *Khupe* case (*supra*) then sets out circumstances under which the courts may entertain a matter even though it has been deemed moot. This was clearly set out at 923 F - G as follows:

“The mere fact that the matter is moot does not constitute an absolute bar to a court to hear a matter. Whilst a matter may be moot as between the parties, that does not without more render it unjustifiable. The court retains a discretion to hear a moot case where it is in the interests of justice to do so. *J T Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) at 525A-B.”

The court further stated as follows:

“Courts in this jurisdiction do pay homage to the demands of the adversarial system of resolution of disputes. The adversarial system contemplates a situation in which both parties before a court have an interest in the outcome of the case. The system envisages a situation where the determination of the matters in dispute would have practical and tangible consequences for the contending parties. It would not be in the interests of justice for a court to determine a moot case where its decision has no practical effect on the parties”

[15] In *Zimbabwe School Examinations Council v Mukomeka & Anor* SC 10/20 at pp 4 – 5 it was explained as follows:

“Therefore, any judgment of this Court would not have any impact on their situation and no practical consequences would flow from granting the relief sought by the appellant. The Court must deal with a controversy that is live and not one that is moot. The appellant “must not have a mere academic interest in the right or obligation in question but ... some tangible and justifiable advantage” in relation to that right or obligation *per* CHIDYAUSIKU CJ in *Ngulube v Zimbabwe Electricity Authority & Anor* SC 52–2002. The present matter is clearly academic.”

[16] In the case of *Ndewere v President of Zimbabwe N.O & Ors* SC 57/22 in deciding the effect of mootness on a matter, the court held as follows at p 22:

“From the above authorities, it is settled that where the court makes a finding that an appeal is moot and declines to exercise its discretion to hear the appeal in the interests of justice, the court declines jurisdiction and dismisses the matter. That is the fate that befalls the present appeal.”

APPLICATION OF THE LAW TO THE FACTS

[17] Mr *Kanengoni* rightly contended that the concession that the failure to determine the application before the elections would render the application for review moot was not only made in the founding affidavit. It was also made in submissions before the court *a quo* as evident from its judgment. The court *a quo* took note of the submissions by the appellants' counsel in para 12 of its judgment which reads:

“Per contra Prof. *Ncube* counsel for the applicant submitted that r 31 of the rules provides that electoral matters require speedy processing and finalisation. And that should this matter not be dealt with as a matter of urgency, the election will come and go and this matter would remain pending just for academic interest, i.e., it would just be moot. Counsel submitted that this matter could not be allowed to remain in abeyance beyond the election date.”

The submissions found favour with the court. The court *a quo* held at para 15 of the judgment that:

“In general, my view is that as far as is reasonable possible disputes turning on the nomination of candidates must be resolved before the elections. A finding that such a matter is not urgent and striking it off the roll may tend to defeat the legislative intent to deal with electoral matters as quickly as possible.”

[18] *In casu*, Mr *Moyo* takes a contrary position on mootness to that taken by the appellants in the court *a quo*. The appellants cannot be allowed to approbate and reprobate. Once they accepted *a quo* that a failure to determine the matter before the 2023 general elections would render the matter moot they cannot now be heard long after the elections to argue that the dispute was still live.

[19] The elections having been held and councillors sworn into office, the court finds merit in the submissions by Mr *Kanengoni* that the matter has been overtaken by events and is therefore now moot.

[20] Having found that the matter is moot, the court turns to consider whether it is necessary to consider the merits of the appeal. As was set out in the *Khupe* case (*supra*) it is within the discretion of the court to determine the merits of a matter that has been deemed moot if it is clearly in the interest of justice to do so.

[21] In *casu*, the court's view is that it is not in the interests of justice for the matter to be considered on the merits. This is for the following reasons: Firstly the nomination of candidates can only relate to a general election that is pending. There is no longer such an election. Secondly, the effect of the relief sought by the appellants would be to render this Court a nomination court. It is clearly impossible for this Court to assume the functions of the nomination court. Lastly, the facts on which this appeal turns do not raise any peculiar issues be they factual or legal which would require the court to exercise its discretion to consider the merits of the matter.

DISPOSITION

[22] At the core of electoral justice is an effective resolution mechanism. To that end, public policy demands that electoral disputes must be brought before the court and determined timeously so as to bring finality to an electoral process. The present matter not having been concluded before the 2023 general elections, has been overtaken by events. The determination of this matter on the merits would be academic.

[23] It is for the above reasons that the court issued the following order:

“The court hereby withholds its jurisdiction to hear the matter.”

GWAUNZA DCJ : I agree

GUVAVA JA : I agree

Mathonsi Ncube Law Chambers, appellants' legal practitioners

Nyika, Kanengoni & Partners, 1st and 2nd respondents' legal practitioners

Cheda & Cheda, 3rd to 12th respondents' legal practitioners