THE MOVEMENT FOR DEMOCRATIC CHANGE – TSVANGIRAYI

And

THOKOZANI KHUPHE

And

NOMVULA MGUNI

Versus

MOVEMENT FOR DEMOCRATIC CHANGE ALLIANCE

And

DOUGLAS TOGARASEYI MWONZORA (N.O)

And

THE CHAIR PERSON OF THE ZIMBABWE ELECTORAL COMMISSION

And

ZIMBABWE ELECTORAL COMMISSION

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 10 FEBRUARY 2022 & 17 FEBRUARY 2022

Urgent chamber application

N. Sithole for the applicants
J. Kadoka for the 2nd respondent
A. Demo for the Speaker of the Parliament of Zimbabwe

DUBE-BANDA J: This is an urgent application. This application was lodged in this court on 4th February 2022. It was placed before me and I directed that it be served on the respondents together with a notice of set-down for the 10th February 2022. The application is opposed by 2nd respondent and the Speaker of Parliament. 3rd and 4th respondents filed a notice to abide by the decision of this court.

In this application, applicants seek an interim and final reliefs couched in the following terms:

Terms of the final order sought

It be and is hereby declared that:

1. The matter filed under cover HC 202/22 having been determined and ;

2. 2nd and 3rd applicants' expulsion from the Parliament of Zimbabwe having been declared unlawful;

3. It be and is hereby declared that 1st and 2nd respondents or any person(s) acting through them or on their behalf or purportedly drawing any power or authority from them has no power or authority to replace or purport to replace 2nd and 3rd applicants' seats in the Parliament of Zimbabwe, as held by the 2nd and 3rd applicant as on the 26th of January 2022.

4. 1st and 2nd respondents be and are hereby ordered, jointly and severally, one paying the other to be absolved, to pay costs of this application on an attorney and client scale.

Interim relief granted

1. Pending the determination of the 1st, 2nd and 3rd applicants' application for declaratory orders and ancillary relief under cover of case number HC 202/22, 1st and 2nd respondents, and any persons(s) acting through them or on their behalf or drawing authority from them or purporting so to do, be and are hereby interdicted, prohibited and barred from submitting any nomination papers in terms of section 39(4) of the Electoral Act [Chapter 2:13], or substituting or furnishing names of any other person for the purposes of filling up vacancies as have been declared vacant in respect of seats held by the 2nd and 3rd applicants in the Parliament of Zimbabwe.

Service of the provisional order

1. The applicant's legal practitioners, assignees or agents be and is hereby authorised to effect service of application and provisional order on the respondents.

Factual background

This application will be better understood against the background that follows. The facts of this matter appear in the founding papers, opposing affidavit of 2nd respondent and the submissions made by Mr *Demo* counsel for the Speaker of the Parliament of Zimbabwe (Speaker).

1st applicant the Movement for Democratic Change – Tsvangirai (MDC – T) is a political party. 2nd applicant is Thokozani Khupe. In the founding affidavit she refers to herself as the Acting Vice-President, Vice President and also as Acting President of the MDC - T. The 3rd applicant is Nomvula Mguni. In the applicants' papers she is said to be the Deputy Secretary General of the MDC – T, this is however disputed in 2nd respondent's opposing affidavit.

In the founding affidavit 1st respondent is described as a common law *universitas* capable of suing and being sued. 2nd respondent is described as the President of the 1st respondent. In his opposing affidavit 2nd respondent (Mwonzora) says he is the leader of 1st respondent. He described 1st respondent as a group of independent political parties with no legal *persona*. In the founding affidavit the 3rd respondent is said to be the Speaker of Parliament, however the heading of the application has the Chairperson of the Zimbabwe Electoral Commission as the 3rd respondent. In the heading the 4th respondent is the Zimbabwe Electoral Commission, however it is described as the 5th respondent in the founding affidavit. No attempt was made during the hearing to address these anomalies.

The papers show that there is a contestation of leadership in the MDC – T, and the protagonists are Khupe and Mwonzora, 2nd applicant and 3rd respondent respectively. Khupe contends that Mwonzora was until the 3rd January 2022 been the President of MDC- T. He is alleged to have relinquished this office when he was automatically expelled from the party. The automatic expulsion is alleged to have activated when he assumed leadership of another political party, i.e. Movement for Democratic Change – Alliance 1st respondent in this application.

On his part Mwonzora says Khupe was suspended from MDC – T on the 12 January 2022, and her membership of the Party was terminated on the 28 January 2022. It is averred that the membership of 3rd applicant was also terminated. Mwonzora contends that the

termination of 2nd and 3rd applicants remain extant, in that it has neither been revoked by MDC – T nor by a court of law.

Mwonzora escalated the dispute to the National Assembly. On the 21 January 2022, he wrote a letter to the Speaker notifying him that Khupe and Mguni have ceased to belong to MDC – T and where therefore being recalled from the National Assembly. The Speaker has acted on the notification by Mwonzora as shown by the facts placed on record by Mr *Demo*.

Mr. *Demo* outlined the background facts as follows, that on the 21st January 2022 the Speaker received a letter from MDC – T. The letter notified the Speaker that in terms of section 129(1) (k) of the Constitution of Zimbabwe Amendment (No. 20) 2013, Khupe and Nguni, 2nd and 3rd applicants respectively have ceased to belong to the Party and are being recalled from the Parliament of Zimbabwe. In pursuance thereof, on the 26th January 2022, the Speaker wrote letters to 2nd and 3rd applicants notifying each one of them that he had received a Notice of Recall in terms of section 129(1)(k) of the Constitution. They were advised that they have ceased to be members of the National Assembly. The Speaker notified the President of Zimbabwe and the Zimbabwe Electoral Commission of the existence of vacancies in the National Assembly.

To answer and meet the dispute that has arisen in MDC – T, on the 4th February 2022, 1st, 2nd and 3rd applicants filed court application for a *declaratur* (HC 202/22). Respondents in HC 202/22 are Movement for Democratic Change Alliance and Mwonzora. In this application applicants seek an order that pending the finalisation HC 202/22, 1st and 2nd respondents be interdicted, prohibited and barred from submitting any nomination papers or substituting or furnishing names of any other person for the purposes of filling up vacancies as have been declared vacant in respect of seats held by the 2nd and 3rd applicants in the Parliament of Zimbabwe. It is against this background that applicants have launched this application seeking the relief mentioned above.

2nd respondent and the Speaker raised a number of points *in limine* to which I now turn. In the main the points *in limine* taken by these two litigants are similar.

Points *in limine*

The 2nd respondent raised a number of points *in limine* and filed an affidavit in support of the opposition. There is some confusion in the citation of the Speaker. In the heading of the

application the 3rd respondent is the Chairperson of the Zimbabwe Electoral Commission, however in the founding affidavit the 3rd respondent is cited as the Speaker. Mr *Demo* appeared for the Speaker and raised a number of points *in limine.* I heard the parties only in respect of the points *in limine.*

In his opposition affidavit 2nd respondent raised the following points *in limine*, *viz* that the matter was not urgent; that applicants have an available alternative remedy in terms of section 39(6) of the Electoral Act [Chapter 2:13]; that 1st respondent is not a legal *persona* capable of suing and being sued; that 2nd applicant has no authority to represent the 1st applicant; that the attempt to interdict 3rd and 4th respondent from performing their constitutional duties is bad at law; non-disclosure of material facts and that the applicants have not cited the Speaker despite referring to him in the founding affidavit.

The Speaker did not file opposing papers, however Mr *Demo* in his oral submissions took the following points *in limine*, *viz* improper citation of the Speaker; applicants are seeking a final relief disguised as an interim relief; nature of the final relief is incompetent in that it seeks to bar other arms of government from executing their constitutional obligations; applicants have neither served the application in HC 202/22 nor attached a copy to this application for this court to access the prospects of success of that application; and that 2nd and 3rd applicants have no *locus standi* to represent 1st applicant in these proceedings.

I directed counsel to address me on the points *in limine* only. I now turn to deal with the above points *in limine*.

Final relief disguised as interim relief

Mr. *Demo* argued that applicants are seeking a final relief disguised as an interim relief. Counsel submitted that the so-called interim relief is not subject to confirmation or discharge on the return date. It is argued that there is no reference whatsoever to the return date. It is submitted that the interim relief sought is anchored on a presupposition that HC 202/22 will be granted.

Per contra Mr *Sithole* counsel for the applicants submitted that the interim relief sought in this case is identical word for word with one granted by this court in *Timveous & Ors v Mwonzora Ors* HH 370/20, the only difference being the names of the parties and the dates. Counsel further submitted that the criticism in respect of the interim relief is persuasive. He

then applied for an amendment of both the interim and the final relief sought. The amendment was opposed by the respondents.

Applicants approached this court seeking what they term an interim relief, however the order sought has all the hallmarks of a final relief. The so-called interim relief is sought pending an application under cover of case number HC 202/22. The order sought is final *viz-a-viz* this application. I say so because it seeks to be operative pending HC 202/22 a case with its own procedures that is yet to be finalised. See: *Movement for Democratic Change & Ors v Timveous & Ors* SC 9/22. In fact the application in HC 202/22 has not even been served on the respondents. In respect of this application the interdict sought is final. In *Movement for Democratic Change & Ors v Timveous & Ors* the court held thus:

> The order granted did not require a return day and had no incentive for the parties to seek to come to court on a return date as it was granted pending the conclusion of other cases with their own procedures that were yet to be finalised. The effect of the order is that the first and second respondents obtained a final order, in this matter, on merely establishing a *prima facie* case. There was nothing to return to court for at all. Where the order does not provide for a return date, it is a final order as regards those proceedings and such must only be granted where a clear right has been established on a balance of probabilities.

This applies with equal force in this case. In *K and G Mining Syndicate v Mugangavari & Anor* HB 32/22 I remarked that an interim relief must seek to protect a litigant pending the return date of the same matter and not pending another matter before the courts. What may protect a litigant pending the conclusion of a separate matter may be a final order obtained on the return date. I stand by those remarks. As was held in *Movement for Democratic Change & Ors v Timveous & Ors (supra)* once applicants obtain the relief sought they would have obtained a final order on merely by establishing a *prima facie* case. Such is impermissible, a final order may be obtained after a clear right had been established on a balance of probabilities.

Once an interdict sought is granted applicants would have achieved their goal. Their goal is to interdict the filling up of vacancies as have been declared vacant in respect of seats held by the 2nd and 3rd applicants in the Parliament of Zimbabwe. This is the final relief that they are litigating to achieve. Their mission would have been accomplished. This application would have been sealed. See: *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 2009. There would be nothing to confirm on the return date. Applicant would have achieved this milestone

under the guise of a provisional order and on a *prima facie* case. Such finality cannot be achieved *via* a provisional order. Applicants are seeking a final relief disguised as an interim relief. The provisional order sought in this application is incompetent and bad at law. See: *S v Williams & 9 Ors* CC 14/17; *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 09; *Chiwenga v Mubaiwa* SC 86/20; *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368; *J.C. Conolly and Sons (Private) Limited v R.C. Ndhlukula the Minister of Lands and Rural Resettlement* SC 22/18.

Further and allied to the above it is pertinent to note that Form No. 26A of the High Court Rules, 2021 is clear about how a provisional order must be look like. It says:

> Terms of the final order sought
>
> That you show cause to this Honourable Court why a final order should not be granted in the following terms
>
> (*set out the terms of the relief sought*)
>
> Interim relief granted
>
> Pending the finalisation of this matter, the applicant is granted the following relief
>
> (*set out the nature of any interim relief or interdict granted by the Court*)
>
> Service of provisional order
>
> (*set out any order of the court regarding service of the provisional order*)

Under the "Interim relief grated" Form 26A is clear that such relief is granted "pending the finalisation of this matter." Not some other matter pending before the courts but "this matter." The wording of Form 26A is for a purpose and that is to avoid litigants seeking and obtaining relief that is pending the finalisation of "some other matter." Once the interim relief obtained is pending finalisation of some other matter, it ceases to be an interim relief *viz* "this matter" and becomes a final relief *viz* "this matter." This must be basic. This must be elementary.

In *casu,* under the terms of the final relief sought the wording is *"it be and is hereby declared that*" and under interim relief granted the wording is "*pending the determination of the 1st, 2nd and 3rd applicants' application for declaratory orders and ancillary relief filed under cover of case number HC 202/22 ……"* This is where the process got off the rails. This

resulted in applicants seeking a final relief disguised as an interim relief. If applicants had followed the wording in Form 26A they could not have got lost.

Mr *Sithole* submitted that the interim relief sought in this application is identical word for word with one granted by this court in *Timveous & Ors v Mwonzora Ors* HH 370/20, the only difference being the names of the parties and the dates. This might well be so, but what Mr *Sithole* ignored was that the judgment in *Timveous & Ors v Mwonzora Ors* HH 370/20 was set aside by the Supreme Court in *Movement for Democratic Change & Ors v Timveous & Ors* SC 9/22. It is incompetent to rely on a judgment that has been set aside by a superior court.

Mr *Sithole* in some way recognized this defect in this application when in his submissions he euphemistically stated that "the criticism in respect of the interim relief is persuasive." He then applied for an amendment of both the interim and the final relief sought by the applicants. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Anor* SC 43/13 the court held thus:

> I would certainly agree with the above remarks. Although the learned judge in that case did not suggest that such a defect renders an application a nullity, it seems to me that, whilst no hard and fast rule can be laid down, there may well be cases where a court would be justified in holding, in such a situation, that the application is not therefore urgent and that it should be dealt with as an ordinary court application. There may also be cases where the court itself, as it is empowered to do, may amend the relief sought in order to make it clear that what is granted is interim protection whilst the final order sought would be the subject of argument on the return date. Rule 240 of the High Court Rules permits a court, after hearing argument, to vary an order sought. It is this power to grant an order that is consistent with the facts which a court can use in order to obviate a situation where final relief is granted by way of a provisional order.

Again in respect of amending a draft order in *Movement for Democratic Change & Ors v Timveous & Ors (supra)* the court said:

> Whilst rule 240 of the High Court Rules 1971 provided that in granting an order the court may vary the order, this is not a licence to substitute a provisional order sought by a litigant with a final order. Any variation of the order sought must still leave the order granted as a provisional order subject to confirmation or discharge on the return date. The order was thus improper and cannot stand. It must be set aside.

What exercised my mind was whether or not I should permit the amendment of the draft interim relief as prayed for by Mr *Sithole.* Mr *Demo* submitted that the amendment proposed had no basis in the papers before court. I agree. The challenge with the proposed amendment of the interim relief sought is that it would also require that the final relief sought be amended. This is so because the final relief sought does not speak to the interim relief sought. I repeat what I said in the *K and G Mining Syndicate v Mugangavari & Anor* (*supra*) that it is not for this court to start panel beating an incompetent draft order. The applicant sought relief that was incompetent and a nullity at law. A nullity cannot be amended. Rule 60 (9) of the High Court Rules, 2021 which sanctions the granting of a provisional order either in terms of the draft filed or as varied does not sanction amending an incompetent draft order, or a nullity. What is appropriate is to strike out the entire chamber application without any further ado. See: *Chiwenga v Mubaiwa* SC 86/20.

In the result I find that the interim relief sought is defective and a nullity, and I take the view that for this reason this application is not urgent. See: *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Anor* (*supra).* This finding is dispositive of this application. This application stands to be struck off the roll of urgent matters. Having found that this matter is not urgent, it is not necessary for me to consider the remaining points *in limine* taken by the 2nd respondents and the Speaker.

Having upheld the point *in limine* that applicants seek a final order disguised as an interim relief, and such is incompetent, ordinarily it would have been unnecessary to deal with the issue of the alleged lack of authority of the 2nd respondent to represent MDC – T. On the facts of this case, it is important to do so for the purpose of completeness, as the answer to this issue has a bearing on the issue of whether MDC – T can be ordered to pay the costs of suit.

2nd respondent contends that Khupe has no authority to represent MDC – T in these proceedings. It is argued that although 3rd applicant who signed Khupe's authority, does not say which organ of the MDC – T made such a resolution. It is submitted that the resolution is a forgery. Further it is submitted that 3rd applicant is not the Deputy Secretary General of the MDC – T. It is contended that the Secretary-General is one Mpariwa, and the Deputy Secretary-General is one Dr. Tichivonani Mavetere.

These are serious factual disputations contained in the 2nd respondent's opposing affidavit. No answering affidavit was filed to meet these factual allegations. Failure to file an answering affidavit leaves this court with one version, that of 2nd respondent. This position was stated in the case of *Sengeredo* v *Eric Cable N.O.* HH 32/08 where MAKARAU JP, (as she then was) at page 2 stated that-

> In my view, the purpose of an answering affidavit is akin to that of a replication in an action. It is filed not merely for the form but to specifically meet and traverse all the averments made in the opposing affidavit that have the effect of defeating the applicant's claim. Like in any pleading filed with the Court, all issues that are not specifically denied and traversed in the answering affidavit are to be taken as if they have been admitted… It is my further view that answering affidavits, like all other affidavits, must be drafted with precision and must meet the sting of the defence being raised in the opposing affidavit.

In respect of this issue this court has one version, which says the 3rd applicant is not the Deputy Secretary of the MDC –T. That the resolution placed before court is a façade and a forgery. That Khupe has no authority to represent MDC – T in these proceedings. I noted that respondents kept submitting that Khupe had no authority to represent MDC–T in this litigation. This is somehow incorrect, Khupe is not representing MDC- Tin these proceedings, the Party is represented by its lawyers. See: *Bere v JSC and 6 Others* SC 1/2022; *Willoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Anor* HH 178/14. On the basis of the facts of this case I decided to overlook this mischaracterisation of the Khupe' position viz MDC-T in this matter. What Khupe has done is to make MDC-T a party to this suit.

Mr. *Sithole* in his submissions did not deal with this issue in a satisfactory manner. Counsel was content to submit that "*we have strangers in the house, 1st and 2nd respondents are strangers and cannot dictate and tell us what to do."* This was clearly inadequate. What was required was to show that Khupe had authority to make MDC–T a party to these proceedings. Such was not shown.

As a political party MDC – T cannot be made a party to a litigation by a person who has not been authorised to do so. Khupe lacked authority to make MDC – T a party to these proceedings. She did not have the authority to file this application on behalf of the MDC - T.

The net effect of 2nd respondent's submissions is that 2nd applicant is on a frolic of her own. I agree. It is on this basis that I cannot order MDC –T to pay the costs of suit.

The general rule is that the costs follow the result. There is no reason why this court should depart from such rule in this case. The 2nd and 3rd applicants are to pay the respondents costs, including that of the Speaker on the scale as between party and party.

In the result, I make the following order:

1. The point *in limine* that the interim relief sought by the applicants is incompetent and bad at law in that they are seeking a final order disguised as an interim relief is upheld.

2. This application is not urgent and is struck off the roll of urgent matters with cost of suit as against 2nd and 3rd applicants.

Ncube Attorneys applicants' legal practitioners
Mwonzora & Associates 2nd respondent's legal practitioners
Nyika Kanengoni & Partners 3rd and 4th respondents' legal practitioners
Chihambakwe Mutizwa & Partners legal practitioners for the Speaker of Parliament