

MORGAN TSVANGIRAI
and
REGISTRAR-GENERAL OF ELECTIONS
and
TOBAIWA MUDEDE

Applicant
First Respondent
Second Respondent

HC 10237/04

MORGAN TSVANGIRAI
and
ROBERT GABRIEL MUGABE
and
THE ELECTORAL SUPERVISORY COMMISSION
and
THE REGISTRAR-GENERAL OF ELECTIONS

Applicant
First Respondent
Second Respondent
Third Respondent

HIGH COURT OF ZIMBABWE
OMERJEE J
HARARE, 19 and 27 May, 2005

Opposed Court Application

Adv. DeBourbon S.C., for the applicant
Mr Mutsonziwa, for the 1st and 2nd respondents (in case No. HC 10321/03)
Mrs Mabeza, for the 3rd respondent (in case No. HC 10327/04)

OMERJEE J, Two applications were filed separately with the Registrar of the High Court. The first matter, Case No. HC 10321/03 is an application by the applicant for contempt of court against the Registrar General in his official and personal capacities. The second matter is an application in terms of section 78(5) of the Electoral Act [*Chapter 2:01*] for an order compelling the Registrar General of Elections to allow the applicant to inspect the ballot papers and other election material used in the 2002 Presidential Election.

As both matters are linked to each other the applicant formally requested that they be administered in one hearing. The request was not opposed by both counsel for the respondents.

1. The Contempt Application (10321/03)

The applicant is Morgan Tsvangirai the leader of a political party in Zimbabwe called the Movement for Democratic Change (hereinafter referred to as the "M.D.C.").

The first respondent is cited as the Registrar General of Elections, in terms of the Electoral Act [*Chapter 2:01*] in his official capacity. Tobaiwa Mudede is cited in his personal capacity as the second respondent. This application was lodged on 20th November 2003 when the said Electoral Act was still in force. That Act ("the previous Act") was repealed and substituted by the Electoral Act [*Chapter 2:13*] which came into effect on the 1st February 2005. (hereinafter referred to as "the present Act"). The first respondent as at the date this application was lodged, was responsible *inter alia* for the safe custody of ballot papers and other election material pursuant to the provisions of section 78 of the previous Act. It is on the basis of the duties and obligations imposed upon the first respondent in terms of section 78, that these proceedings were instituted by the applicant. The present Act, by virtue of section 70, reposes responsibility for the execution of that function, upon the Chief Elections Officer, appointed in terms of section 11 of the Zimbabwe Electoral Commission Act [*Chapter 2:12*]. On account of changes to the law regarding the holding of elections in Zimbabwe, the responsibility for the safe custody of ballot paper and other election material is now a function no longer carried out by the first respondent.

For the purposes of the clarity and to the extent that the first respondent is no longer in charge of the responsibility for the safe custody of ballot papers and other

election material, it is necessary at the outset, to determine whether or not as a result of change to the law, the first respondent can be cited for contempt in these circumstances. The present Act, in section 193 contains savings provisions. Section 193 provides in subsection (2) thereof that the previous Act is repealed. Section 193(3)(d) provides as follows:

"(3) Despite subsection (2) -

(a)

(b)

(c)

(d) every claim, application or objection made, notice issues, proclamation, rule, regulation or other statutory instrument published or other matter or thing whatsoever made, done or commenced in terms of the repealed Act which, immediately before the fixed date, had or was capable of acquiring legal effect shall continue to have or to be capable of acquiring legal effect in terms of this Act in all respects as if it had been made, issued, published, done or commenced, as the case may be, in terms of the appropriate provision of this Act." (emphasis supplied)

A clear interpretation of this provision is that any legal proceedings or claim, initiated under the previous Act, remains legally valid in all respects. Therefore these proceedings initiated by the applicant before the present Act came into effect cannot be impugned in view of the clear wording of the aforementioned provision.

The Background

The applicant was the M.D.C. candidate in the Presidential Elections held during the period 9th to 11th March 2002. Following the announcement of the results of that election, the applicant instituted legal proceedings by way of an election petition challenging the outcome of that election. (Refer *Morgan Tsvangirai v Registrar General of Elections and Others HC 3616/2002*). That petition is still pending determination before the High Court. In pursuance of that petition, the applicant

sought compliance on the part of the first respondent with his statutory obligation in terms of section 78(3) of the previous Act which provides as follows:

- "(3) As soon as may be after polling day, the constituency registrar shall transmit to the Registrar General in separate packets -
- (a) all the packets referred to in subsection (2); and
 - (b) the statement in terms of subsection (3) of section sixty and the report of the result of the verification thereof; and shall endorse on each packet a description of its contents and the date of the election to which it relates.

The obligation in terms of the law is spelt out in clear and unambiguous terms. The legislature has clearly stipulated that the obligation rests with the constituency registrar to transmit all the sealed packets to the respondent at his offices. The applicant obtained several orders from the High Court with a view to giving effect to the statutory obligations imposed upon the first respondent to transmit or cause to be transmitted to Harare all the ballot boxes and other election material used in the Presidential Elections of 2002. The details relating to the various court orders obtained by the applicant are adequately dealt with by CHINHENGO J in HC 879/2003 and may be summarised as follows:

- "(a) The order by GUVAVA J in *Morgan Tsvangirai v The Registrar of Elections* case No. HC 8225/2002 dated 12 September 2002 that -
- "1. The respondent shall not destroy and instead shall keep in his safe custody and not alter or amend in anyway all the documents referred in section 78 of the Electoral Act [*Chapter 2:01*], pending the outcome of the Election Petition instituted by the applicant in case No. HC 3616/2002 against the respondent and three others.
 - 2. It is recorded that to avoid any logistical issues, the legal representatives and a representative of the applicant, together with a representative of the attorney-General shall meet with the respondent and/or officials of his office to agree the place and manner in which the documents referred to in paragraph 1 shall be stored pending the resolution of the Election petition in case No. HC 3616/2002. Any dispute in regard to such arrangements may be referred to a Judge of this Honourable Court on the present papers, supplemented as necessary by the parties.

3. The costs of this application shall be determined by this Honourable Court when it adjudicates upon the Election Petition in case HC 3616/2002."

(b) The order by MATIKA J in *The Registrar-General of Elections v Morgan Tsvangirai* HC 8657/2002 dated 26 September 2002 that -

- "1. Applicant be and is hereby authorised the use of ballot boxes and seals in the March 2002 Presidential Election.
2. Applicant be and is hereby refused to deal with the ballot papers as per section 78(4) of the Electoral act [Chapter 2:01]
3. Costs of this application shall be determined by this Honourable Court when it adjudicates upon the Election Petition in case No. HC 3616/2002."

If the respondent (applicant in HC 8657/2002) had been permitted to deal with the ballot papers in terms of s 78(4) of the Act he would have been entitled in terms of that section to cause them to be destroyed after a period of six months from the date of polling. The refusal by the learned Judge that the ballot papers be dealt with in terms of s 78(4) meant that the respondent had to deal with them in terms of s 78(3) of the Act which, among other things, requires the ballot papers to be transmitted to him. As to the meaning of "transmit" see my judgment in HH 142/2003 *supra* at p 13-14.

(c) The interim order by MAKONI J in *Morgan Tsvangirai v The Registrar General of Elections* HC 9021/2002 dated 16 October 2002 that -

"Pending the determination of this chamber application, the respondent shall preserve, and shall ensure that all constituency registrars in Zimbabwe (who are under his direction and control) shall preserve in sealed packets all counted and rejected ballot papers together with counterfoils and used voters' rolls used in all polling stations in all constituencies in Zimbabwe during the said Presidential Election held on 9-11 March 2002 and shall ensure that the said constituency registrars shall transmit the same to him forthwith for him to hold in his safe custody."

(d) The order by OMERJEE J on 13 November 2002 confirming the provisional order granted by MAKONI J-

- "1. That in relation to the Presidential Election held on 9-11 March 2002, in order to prove all the constituency registrars in Zimbabwe (who under the direction and control of the respondent), have complied with subsection (1) - (3) of section 78 of the Electoral Act and that the respondent has himself complied with subsection (3) of section 78 of the said Act, the respondent be and is hereby order to produce to this Honourable Court within three (3) days of the date of this order at some suitable venue in Harare nominated by this Honourable Court, all

separate sealed packets referred to in subsection (1) of section 78 of the said Act in compliance with subsections (2) and (3) of the Act in respect of all counted and rejected ballot papers together with counterfoils and used voters' rolls used in all polling stations in all constituencies in Zimbabwe during the said Presidential Election held on 9-11 March 2002.

2. That the costs of the application shall be determined by this Honourable Court when it adjudicates upon the Election petition in case No. HC 3616/2002."

All the orders referred to concerned themselves with ensuring compliance by the first respondent with his obligations under section 78 of the previous Act. What then followed were proceedings instituted by the applicant for the nomination by this court of the place where the election material was to be lodged pursuant to a formal order issued by HLATSHWAYO J. Following a hearing, CHINHENGO J issued an order in terms of a draft order as amended as follows:-

"IT IS ORDERED:

1. THAT in relation to the Presidential Election held on 9-11 March 2002, in order to prove that all the Constituency Registrars in Zimbabwe (who are under the direction and control of the respondent), have complied with subsections (1) - (3) of section 78 of the Electoral Act and that the respondent has himself complied with subsection (3) of section 78 of the said Act, the respondent be and is hereby ordered to produce to this honourable court by no later than three (3) days of the date of service of this order, at the offices of the registrar of this honourable court at Harare all the separate sealed packets referred to in subsection (1) of section 78 of the said Act in compliance with subsections (2) and (3) of section 78 of the said Act in respect of all counted and rejected ballot papers together with counterfoils and used voter' rolls used in all polling stations in all constituencies in Zimbabwe during the said presidential Election held on 9 - 11 March 2002.
2. For the avoidance of doubt the separate sealed packets referred to in paragraph 1 shall be retained by the respondent in terms of s 78(4) of the Electoral Act [*Chapter 2:01*].
3. That the respondent pays the applicant's costs of suit."

The sole issue for determination by this court is whether or not the respondents are in contempt of court for failing to comply with the aforementioned

order of this honourable court in HC 879/2003 issued by CHINHENGO J on the 15th October 2003. This application is opposed by the respondents on the basis that the failure to comply with the terms of the said order is not wilful and thus the respondents are not in contempt of court. It is contended on behalf of the first respondent that he lacks adequate resources *inter alia* in terms of storage space, and finances to comply with the terms of the court order. This submission by the respondents is not a new submission. It was first raised and adjudicated upon by GOWORA J in HC 10273/02 at page 4 of the cyclostyled judgment where the learned Judge stated as follows:

"The order by MAKONI J is enforcing the applicant to comply with what is a statutory duty. The election materials should have been sealed in packets and sent to the applicant by the constituency registrar shortly after the last polling day. The respondent should not have been put to the expense of applying to court, for the applicant to be compelled to comply with the provisions of the Act. In compliance with the Act, the applicant should have made provision for the storage space of the materials from the constituency registrars. As far back as the 12th September, 2002, the applicant has had knowledge of the respondent's interest in the ballot papers and should have made adequate arrangements for the transmission and storage in Harare in compliance with the provisions of section 78(3) of the Act. The transmission of the papers to Harare, is not in my view, a function outside the ambit of the applicant's functions, such that a specific request for funds should be made to Treasury. It is an administrative function which is part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections."

The same argument was also advanced by the first respondent in proceedings before CHINHENGO J in Case No. HC 879/2003. At pages 6-9 of the cyclostyled judgement CHINHENGO J stated as follows:-

"1. The response by the Treasury was dated 3 February 2003 and it reads:

"Request for Funding to Transport Presidential Election Residue

Please refer to your minute reference E2/1/1/2003 dated 3 February 2003.

Whilst noting your request for additional funds, I regret to inform you that I am unable to provide the resources you require due to financial constraints. You are therefore urged to reprioritize from within your budget in order to accommodate this new requirement. (emphasis added)

The application for directions was made in terms of Order 23 of the High Court Rules. This was incorrect. Order 23 of the High Court Rules permits only for applications for directions of a procedural nature. In terms of Order 23 Rule 151 it is provided that -

The "Treasury" properly and even cleverly worded its response to the respondent's application for funds. It realised, as did the respondent (see *The Registrar General of Elections v Morgan Tsvangirai* HH 142-03 at p 6) that this was a matter of national importance. It directed the respondent to "reprioritize from within your budget". The "Treasury" surely must have known that there were funds within the respondent's budget which could be used to fund the transportation and storage of the ballot papers. The respondent has not shown on the papers before me either that the "Treasury" was wrong in its view regarding the availability of funds from within the respondent's existing budget or that he has no such funds in his budget and is unable to proceed in the manner as mandated. A bald statement to the effect that the respondent has no funds cannot be sufficient. The application for directions in terms of Order 23 of the High Court Rules must therefore be dismissed.

The third ground of opposing the relief sought by the applicant was the same as that raised in the application for directions, namely, that the respondent has no money to meet the cost of transporting to, and storing the ballot papers in Harare. He specifically stated in paragraphs 7 and 8 of the opposing affidavit the following:

- "7. I have approached Treasury to try and bring the material to Harare but Treasury indicated they had no funds for transport and storage.
8. I am thus unable to bring the election material to Harare due to lack of funds and I stand guided by this honourable court on the next step to take."

Two points arise from these averments. The "Treasury" did not only say that it was not providing the funds but it also said that the respondent could utilise the funds in its budget by virement. The second point is that the applicant confesses his full appreciation that he had been ordered by this court to cause the ballot papers to be transmitted to Harare and stored there. Thus, as I have already stated, the order to bring the ballot papers to Harare has already been made. What has not happened from December 2002 to date is compliance by the respondent with that order. It must be clear therefore that the request that the ballot papers not be brought to Harare because of the alleged lack of funds is an attempt by the respondent not only to disregard the order of this court

but, more importantly it is an attempt by him to have this court revisit its earlier decision. That cannot be done as this court is *functus officio* in respect of the issue as to whether or not the ballot papers should be transmitted to and stored by the respondent in Harare - see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977(4) SA 298(a) 306G, *Stambolie v Commissioner of Police* 1989 (3) ZLR 287 (SC) at 299 and *Kassim v Kassim* 1989 (3) ZLR 234 (HC) at 242.

The issue of lack of funds was raised by the respondent in its application for stay of execution of the order requiring him to transport and store the ballot papers in Harare. GOWORA J in her judgment in Case No. HC 10273/2002 dealt with that issue and at p 4 of her judgment, she said:

"The transportation of papers to Harare, is not, in my view, a function outside the ambit of the applicant's functions, such that a specific request for funds should be made to Treasury. It is an administrative function which is part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections."

The same point had been made by MATIKA J in his judgement in Case No. HC 8657/2002.

It is necessary, I think, that the respondent should bear in mind that in terms of s 15 of the Electoral Act his office is a public office and forms part of the Public Service. He is required to exercise such functions as are imposed or conferred upon him by the Electoral Act and that although in the exercise of his functions he is not subject to the direction or control of any person or authority other than the Electoral Directorate, he can best carry out his function by meticulous planning and compliance with the provisions of the Electoral Act. Where the Electoral Act imposes on him the duty to do anything, as does s 78 as read with s 15(3)(a) of the Act in relation to the transmission of ballot papers after a poll, he must comply with the law. Where he faces difficulties in giving effect to the provisions of the Electoral Act or an order of this court, he should explain his predicament, if such it is, to the responsible executive authorities. Where the requirements of the Electoral Act are clear as to his duties it would not be proper for him to approach the courts for directions on a matter which lies exclusively within the province of the executive. The court cannot amend the provisions of an Act so that, as in this case, the respondent may not carry out a duty imposed on him by statute - see the remarks of CHIDYAUSIKU CJ in *The Registrar-General of Elections v Combined Harare Residents Association & Anor* SC 7/2002 at p 6-7 of the cyclostyled judgment."

In casu there is no dispute that the first respondent has not complied with the court order issued by this court in Case No. HC 879/03. The issue for determination

is whether or not the failure to comply with the court order is wilful and *mala fides*. It is a trite proposition that where a court order has not been complied with there arises an inference of both wilfulness and *mala fides* on the part of the contemnor. The onus then shifts to the first respondent to rebut that inference on a balance of probabilities. See *Lindsay v Lindsay* 1995(1) ZLR 296 (S) at 299 B - C. The submission by the first respondent based on the lack of resources cannot avail him in this matter. By late 2002 the first respondent was aware of the need to comply with the mandatory provisions of section 78 of the previous Act. Apart from the reasoning relied upon both by GOWORA J and CHINHENGO J on the issue of lack of resources, (which I respectfully agree with), the first respondent has had two additional opportunities to specifically bid for such resources in the 2004 and 2005 annual budget estimates, respectively. The first respondent failed to place before this court any evidence suggesting that he had made any attempts to bid for such additional funds. The absence of any such evidence, must necessarily lead this court to draw the inference, that the first respondent was unconcerned with obtaining funds to give effect to court orders.

The first respondent was content with suggesting a form of inspection not sanctioned by the law or by any order of court, as a way of circumventing compliance with the court order of CHINHENGO J of 15th October 2003. To date there has simply been no compliance by the first respondent with that order of court. In the premise the first respondent has manifestly failed to discharge the onus cast upon him to show that his conduct was not wilful and *mala fides*.

The first respondent also contended that he ought not be cited for contempt of court as he was removed as a party to the main petition in proceedings brought under

HC 8225/2002. That submission does not assist the first respondent. He is cited for contempt on the basis that the previous Act imposed upon him the statutory duty to deal with ballot papers and other election materials in the manner laid down in section 78 of that Act. His citation for purposes of contempt arises primarily from the statutory duty imposed upon him in terms of section 78 of the previous Act and not, necessarily on whether or not he was cited as a party in the main presidential petition. As such, the court holds that the first respondent is properly cited for purposes of in these contempt proceedings.

In the result, the first respondent is found to be in contempt of court. The first respondent holds a senior and important position in the employ of government. He has ignored several court orders issued in this matter arising from the statutory duties imposed upon him in his official capacity. He has acted with impunity and disdain. It is unbecoming of any public official or anybody else for that matter, to ignore court orders. To condone such conduct would be to undermine public confidence in the overall administration of justice and in particular, in the integrity and dignity of our Courts.

The courts are duty bound to deal with such conduct suitably appropriately, regard being had to all relevant circumstances.

It was further submitted on behalf of the second respondent that citing him in his personal capacity not competent. is improper. The law in this regard was dealt with in *Mhora & Anor v Minister of Home Affairs & Anor* 1990(2) ZLR 236 (H.C.) where the learned judge stated as follows at page 241 F-H:

"Another area where the public servant may be held personally liable is where a statute casts a duty on him, personally to do something. In this case, Miss *Waddell* for the State, rightly pointed out that the public servant is liable, not

because he is an employee of the State, but because the statute has set him up as an agent of the legislature."

So long as the party in his official capacity was served with an order of court, where he has failed to comply with such order he can be cited personally in subsequent contempt proceedings arising from non-compliance with that court order. See *Wilson v Minister of Defence & Others* 1999(1) ZLR 144 H at 158 F-G.

The second respondent is therefore properly cited as a party to the contempt proceedings in his personal capacity.

Accordingly it is ordered as follows:

1. The first and second respondents jointly and severally the one paying the others to be absolved to pay a fine of five million dollars within a period of seven days of service of this order upon him.
2. The second respondent is hereby sentenced to undergo 60 days imprisonment, the whole of which is suspended for 10 days from the date of service of this order upon him, on condition that he fully complies with the order of this Honourable Court issued in case No. HC 879/2003 dated 15th October 2003 by CHINHENGO J.
3. Should the second respondent fail to comply with the terms of paragraph two above, he shall immediately be committed to prison to serve the sentence imposed upon him in paragraph two.
4. The respondents shall jointly and severally, the one paying the other to be absolved, pay the applicant's costs of suit on a legal practitioner and client scale.
2. **THE INSPECTION APPLICATION (H 10237/04)**

The second matter concerns an application in terms of section 78(5) of the Electoral Act [*Chapter 2:01*] (hereinafter referred to as "the previous Act") for an order compelling the Registrar General of Elections to allow the applicant to inspect ballot papers and other election materials used in the Presidential Elections of March 2002. This application is premised on the basis that the applicant as party to the pending presidential petition, has a legal entitlement to have access to and inspect fully all such material.

In the heads of argument filed on behalf of the third respondent, the relief sought by the applicant was initially opposed. The grounds for such opposition were premised principally on the submission, that by virtue of the coming into force of the Electoral Act 25/2004 on 1st February 2005 (hereinafter referred to as "the present Act") the third respondent no longer has any legal control over ballot papers and other election material. As such, the submission goes, that any order granted against the third respondent in this regard would be unenforceable and would be a *brutum fulmen*.

In the course of submissions during the hearing, the attention of counsel representing the third respondent was drawn by counsel for the applicant, to the provisions of section 193(3)(d) of the present Act, quoted herein before.

Counsel for the third respondent, then requested the opportunity to consider the legal import of that provision. That opportunity was duly granted by the Court. Upon resumption of the hearing, counsel for the third respondent formally abandoned her opposition to this application on the basis that the grounds for such opposition, in view of the provisions of section 193(3)(d) could not be sustained as a matter of law.

This attitude by counsel is correct. Section 193 (3) (d) is a savings provision and does not absolve the third respondent from complying with any obligations

imposed upon him by law, under the previous Act. Counsel for the third respondent is to be commended for the stance taken in this matter as it is consistent with the law and is in keeping with counsels duty to the court.

The first and second respondents in this matter were served with the court application and applicant's heads of argument respectively, in the latter part of 2004. They are cited for formal purposes and no specific relief was sought against either of them. Neither the first nor second respondents have filed any opposition nor any opposing affidavits. They were accordingly barred from being heard in terms of subrule (3) of rule 233 of the High Court Rules. The effect of this is that the first and second respondents are deemed not to be opposed to the relief sought by the applicant.

Counsel for the third respondent having formally made the concession outlined above, agreed to an order in terms of the draft order filed of record as amended in the penultimate sentence of paragraph 2 thereof, by the deletion of reference to "three days" and the substitution of "thirty days."

In the result an order by consent in terms of the Draft Order as amended was granted as follows:

- "1. IT IS ORDERED in terms of section 78(5) of the Electoral Act [*Chapter 2:01*] that the third respondent shall open and allow the applicant and/or his duly appointed representatives to inspect all the sealed packets containing all counted and rejected ballot papers together with counterfoils and voters' rolls, used in all polling stations in all constituencies in Zimbabwe during the Presidential Election held on 9 - 11 March 2002.
2. IT IS ORDERED that the third respondent shall permit the applicant and/or his duly appointed representatives:
 - (a) to examine the seals on the packets referred to in paragraph (1) above and make a record of any seal which appears to any of them to have been tampered with; and

- (b) to open all the Presidential Elections documents referred to in paragraph (1) above;
at the offices of the Registrar of this Honourable Court at Harare by no later than thirty days (30) days of the date of service of this order on him and shall be entitled to examine, count and make notes or other records of and concerning the contents thereof and make a copy, by photocopy, scanning or otherwise, of any voters' rolls including any supplementary voters' rolls therein, for the purpose of the Election Petition
3. The applicant and/or his duly appointed representatives shall undertake such inspection and examination in the presence of officers employed in the office of the third respondent and during normal office hours, unless other times are agreed between the applicant and/or his representatives and the third respondent and/or his officers.
4. IT IS ORDERED that the third respondent shall pay the costs of suit of the applicant and of the first and second respondents."

Messrs Coghlan Welsh & Guest, applicants legal practitioners

Civil Division of the Attorney General's Office, counsel for the respondents