PROF JONATHAN MOYO
and
MARGRET DONGO
versus
PRESIDENT ROBERT MUGABE N.O.
and
ZIMBABWE ELECTORAL COMMISSION
and
MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS

IN THE ELECTORAL COURT OF ZIMBABWE
GUVAVA J
HARARE, 11 and 12 February, 2008

C Mhike, for the applicants
Mrs *Mabiza*, for the first and third respondents
G Chikumbirike, for the second respondent

GUVAVA J: This matter was filed in this court by way of urgent chamber application on 4 February 2008. After hearing the matter I dismissed the application without giving reasons. These are the reasons for my decision.

The applicants were seeking the following interim relief:

1. The date that had been proclaimed under Proclamation 2 of 2008, to be the date for the nomination court to sit, be set aside.
2. No nomination court would therefore sit on the date that had previously been proclaimed under the subject of proclamation.
3. The applicants should be accorded their rights of reasonable access through the Government Gazette and other convenient channels of communication, to the information that makes it fairly easy and possible to determine names and boundaries of wards and constituencies in the country.
4. The terms of this provisional order shall apply and remain in full force and effect notwithstanding any appeal that may be filled against the order.

The facts which brought about this application may be summarized as follows:

The first applicant is a registered voter and is currently the Member of Parliament for Tsholotsho Constituency in Matabeleland North Province. The second applicant is also a

registered voter and an aspiring candidate in the forthcoming elections. The first respondent is the President for the Republic of Zimbabwe. He is cited in his official capacity in relation to the proclamations which he issued in accordance with his constitutional mandate. The second respondent is the Zimbabwe Electoral Commission whose constitutional responsibility includes determining the limits and the boundaries of the wards and constituencies to which Zimbabwe is divided for the purpose of holding elections. The third respondent is the Minister of Justice, Legal and Parliamentary Affairs who is responsible for legal and parliamentary affairs.

On 24 January 2008 the first respondent published a proclamation in an Extra Ordinary Gazette being SI 7A of 2008 dissolving Parliament with effect from midnight on 28 March 2008, fixing Saturday 29 March 2008 as the day for the general elections and setting Friday 8 February 2008 as the date for the sitting of the nomination court in relation to the election of President, 60 Senators, 210 Members of the House of Assembly and 2000 ward councilors. On 1 February 2008 the first respondent published Proclamation 3 of 2008, being SI 11 of 2008 setting out the boundaries for the constituencies in accordance with s 61A (11) of the Constitution. On 6 February 2008 the first respondent published SI 13A of 2008 being Proclamation 4 of 2008 which postponed the date for the sitting of the nomination court from 8 February 2008 to 15 February 2008.

Mr *Mhike* for the applicants submitted that Proclamation 2 of 2008 was defective in that it did not comply with the requirements of s 61A (11) of the Constitution of Zimbabwe as the first respondent failed to publish in the Gazette a proclamation declaring the boundaries of the wards and constituencies before publishing the nomination day. It was also submitted that Proclamation 3 of 2008 was defective as it did not set out the boundaries of the wards as required by s 61A (11) of the Constitution. The applicants further submitted that they were prejudiced by this and they will not be able to prepare adequately for the nominations.

The respondents opposed the application although only the second respondent filed opposing papers. It was submitted by Mrs *Mabiza* that the first and the third respondents had not been served and the only service that had been made was to the Civil Division of the Attorney General's Office. She stated that because of this she had not filed opposing papers. She however stated that she was mandated to make submissions on behalf of the respondents. Mr *Chikumbirike* for the second respondent opposed the application on two grounds. He submitted firstly that the matter was not urgent as the relief being sought had been overtaken

by events and therefore the application should be dismissed on this point. On the merits it was submitted that the respondents had complied fully with the requirements of the law and there was no basis for granting the order sought.

Mr *Chikumbirike*, further argued that by the time the application was heard the first respondent had postponed the date of the sitting of the nomination court and as such there was no need to pursue the matter. He stated that this was particularly in view of the fact that the new date for the sitting of the nomination court was a period which was said to be proper by the applicants in their application i.e fourteen days from the date of publication of the constituency boundaries. He urged the court to dismiss the application on this basis.

Mr *Mhike* however insisted that the matter was still urgent. He submitted that the applicants had withdrawn the first application which they had filed on 1 February 2008 but had resubmitted the application as they were of the view that their concerns had not been addressed in Proclamation 3 of 2008. It was his submission that as the March 2008 elections are ward based, if a party does not know the description of the wards it would make it difficult for them to prepare for elections.

It is trite that no litigant is entitled as of right to have his or her matter heard urgently. Applications filed on a certificate of urgency as set out in Rule 244 of the High Court Rules, 1971 as amended must relate to matters that are so urgent that the matter cannot wait. The Rules require that a legal practitioner files a certificate specifying the urgency of the matter. In other words the legal practitioner, as an officer of the court, should satisfy himself or herself that the matter is indeed urgent and warrants to be heard in terms of this Rule. In the case of *Aston Musunga* v *Ephias Utete & Anor* HH 90-03 MAKARAU J stated as follows at p 23 of the cyclostyled judgment:

> "The granting of urgent relief by this court is a matter of the court's discretion, and only in deserving cases. Thus, the question of urgency is not tested subjectively. The test for urgency as provided for under the rules is that the matter must be so urgent and the risk of irreparable damage to the applicant so great that the matter cannot proceed within the normal time frame provided for in the rules. In my view, it is not easy nor necessary to catalogue or classify what matters are so urgent and the risk of irreparable harm to the applicant so great that they can only be brought to court by way of urgent application. Each case must depend on its merits".

What constitutes urgency was described by CHATIKOBO J in the case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 at 193 F as follows:

> "A matter is urgent, if at the time the need to act arises, the matter cannot wait" (as the urgency must be such that if the applicant does not obtain the relief being sought he would suffer irreparable harm).

See also *Dilwin Investments* (*Pvt*) *Ltd* t/a *Formscaff* v *Jopa Engineering Company* (*Pvt*) *Ltd* HH 116-98.

An examination of this matter indicates that the relief which was sought by the applicants was no longer in issue at the time that the application was heard. The date for the sitting of the nomination court had been postponed to 15 February 2008 thus complying with paragraph 1 and 2 of the relief sought. The relief that the applicants were seeking under paragraph 3 in relation to Proclamation 3 of 2008 was not in my view urgent. There was nothing on the papers to suggest that they had gone to the Zimbabwe Electoral Commission offices and failed to access the boundaries for the wards after 1 February 2008. The evidence on record shows that the applicants went to look for the information before the Proclamation had been published and thus before the delimitation report became a public document. There was no evidence that the information provided in the Proclamation was not accurate, reliable or accessible to the applicants. Clearly on the papers before me there was nothing to warrant the bringing of this application on an urgent basis and for these reasons I would dismiss the application.

In the event that I am wrong in coming to the conclusion that this matter is not urgent and dismissing it on that basis I will deal with the merits of the application.

The issues for determination were narrowed considerably during argument as it was conceded by Mr *Mhike* for the applicant that their argument to the effect that the publication of the proclamations did not follow a logical sequence had fallen away due to the publication of Proclamation 4 of 2008 on 6 February 2008. The publication of the new date for the sitting of the nomination court meant that it now followed after the publication of the boundaries on 1 February, 2008. He however persisted in the argument that Proclamation 3 of 2008 is defective as it does not describe the wards as required by the Constitution. This then was the sole issue for determination by this court.

Section 61A (11) of the Constitution provides:

> "Within fourteen days after receiving the Zimbabwe Electoral Commission's final (delimitation) report the President shall publish a proclamation in the gazette declaring the names and boundaries of the wards and the House of Assembly and Senatorial

> constituencies of Zimbabwe and those boundaries shall have effect for the purpose of the next and any subsequent general election".

In pursuit of this mandate the first respondent published Proclamation 3 of 2008 ("the Proclamation") on 1 February 2008. It is not in dispute that the first respondent had received the final report on 23 January 2008 and caused the publication of the required proclamation within the fourteen days prescribed by law on 1 February 2008. The complaint of the applicants however related to the fact that the proclamation did not describe the wards as set out in the Delimination Report Part 1 of the proclamation provides as follows:

> "In the following Part the names and descriptions of the boundaries of the House of Assembly constituencies are given, followed by the number of the wards of the local government area or areas included in the constituency. The descriptions of the boundaries of these wards are contained in the Zimbabwe Electoral Commission's final delimitation report, which descriptions (together with figures representing Universal Transverse Mercator (UTM) Zone 36 South (S) co-ordinates, based on the modified Clarke 1880 Spheroid (SA) for both the constituencies and the wards) are hereby incorporated by reference. The report may be inspected free of charge during normal working hours at the following provincial offices of the Zimbabwe Electoral Commission…"

It was the applicants argument that mere reference to the Delimitation Report for the description of the wards was insufficient and did not comply with s 61A (11) of the Constitution. Mr *Mhike* submitted that the wards must be described in full in the proclamation in the same manner as the constituencies for it to comply with the Constitution.

I was however not persuaded by this argument. The proclamation did describe the boundaries of the wards as it specifically incorporated the Delimitation Report by reference. "Incorporate" is defined in the Oxford English Dictionary as "include as a part or ingredient, unite (in one body)". It seems to me that once the Proclamation incorporated the Delimitation Report it become part of the Proclamation. The Proclamation further advised where interested persons can access the Delimitation Report free of charge for perusal. In my view the intention of the legislature in enacting s 61A (11), was to avail to the public the description and boundaries as set out in the Delimitation Report. Incorporating the Delimitation Report as part of the Proclamation complies with the requirements of the legislature. There can therefore be no prejudice to persons, in the position of the applicants, who want to make use of it for election purposes.

I did not understand the applicants to complain that after the publication of the Proclamation that they went to the designated places and failed to access the Delimitation Report. In fact the first applicant states that he only went to Tsholotsho Constituency offices on 26 January 2008. This was clearly before the publication of Proclamation 3 of 2008. It was also not to the Zimbabwe Electoral Commission offices specified in the Proclamation.

At the hearing the second respondent applied for costs *de bonis propris* against the applicants legal practitioners. It was submitted by Mr *Chikumbirike* that the second respondent is a public body wholly funded by tax payers' money. He argued that it was wrong for such funds to be used in defending matters where there was clearly no merit. He argued that once the applicants realized that their case had been overtaken by events they should have withdrawn it instead of insisting on a date of set down by filing a confirmation of Urgency Notice.

Mr *Mhike* submitted that he was justified in bringing the application because of the importance of the forthcoming elections. He argued that the applicants should not be punished for bringing matters to court by being made to pay punitive costs.

It seems to me that the intention of the legislature in establishing an Electoral Court to deal with matters arising from elections was to enable every person who has a grievance in the manner in which the elections are conducted to approach the court for relief. Whilst the court frowns on frivolous applications and would indeed punish an applicant with an award of punitive costs in deserving cases, case authorities from this court have shown that an order for costs *de bonis propris* is not lightly given by a court but is used where there has been an abject dereliction of duty on the part of a legal practitioner. (See *Washaya* v *Washaya* 1989 (2) ZLR 195). I am of the view that the case before me was a borderline case. The issue to be resolved related to the interpretation of new provisions which have just been enacted. As such the court should err on the side of leniency. The Zimbabwe Electoral Commission being a public body involved in the running of elections will invariably be called upon to explain its actions to affected persons. I will therefore award costs to the successful parties on the ordinary scale.

It was for these reasons that I dismissed the application with costs.

Atherstone & Cook, applicants' legal practitioners
Civil Division of the Attorney General's Office, first and third respondents' legal practitioners
Chikumbirike & Associates, second respondent's legal practitioner