

THE UNITED AFRICAN NATIONAL COUNCIL
and
GWINYAI MUZOREWA
versus
NESBERT MUTENGEZANWA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 12 June 2018 & 13 June 2018

Urgent chamber application

E Dondo, for the applicants
T Tembani, for the respondent

DUBE J: The applicants seek an order interdicting the respondent from using the name of the first applicant in his campaigns and masquerading as the president of the first applicant.

The first applicant is a political party known as the United African National Council (hereinafter referred to as UANC). The second applicant is a brother to the founding member of the UANC, Bishop Abel Muzorewa who passed away sometime in 2010. The applicants submitted that following the demise of the late founder, the respondent was appointed the interim president of the party. A substantive president was to be elected at a congress. The second applicant was elected substantive president of the UANC at a congress held at Courtney Hotel, Harare on the 5th of August 2017 and is the legitimate president of the party. The second applicant claims that he is the UANC's presidential candidate in the upcoming general elections set to be held on 30 July 2018. Despite knowledge of the congress, the respondent has not challenged the decision made at congress. The respondent has been campaigning and making public claims that he is the president of the UANC and its presidential candidate and hence is masquerading as the president. On the 30th of May 2018, he appeared on national television in his capacity as the president of the party making representations on behalf of the party. Two days later, the respondent also appeared on television castigating him and claimed that he is rightful president of the party and will contest the upcoming national elections as the UANC's presidential candidate. The nomination court is due to sit on the 14th of June 2018. If the respondent also fields his name as a presidential candidate for the UANC, both of them will be disqualified from contesting in the elections. He claims that he is the rightful candidate and that

the respondent has no right to represent the party as its president. It is for these reasons that he seeks an order to interdict the respondent from campaigning and masquerading as the presidential candidate for the UANC.

The respondent defends the application. He submitted as follows. He is not aware that any congress was ever held which culminated in the second applicant being elected as the president of the party. In fact on the 7th of August 2017 he expelled the second applicant from the party for building parallel party structures. He was not aware then of the congress and its outcome. He only became aware of the said congress when this application was served on him. There was no notice given of the congress. He did not call the meeting. The congress was not held in accordance with the provisions constitution of the party. The people who endorsed the second applicant as the president of the party are not in his books and are not known to him party constitution provides that voting shall be by secret ballot.

The applicant seeks a prohibitory interdict. A litigant seeking relief of a temporary interdict is required to satisfy the following requirements,

- a) *A prima facie*
- b) A well-grounded apprehension of irreparable harm.
- c) The balance of convenience must favour the granting of the interdict.
- d) Absence of any other satisfactory remedy.

See *Setlogelo v Setlogelo* 1914 AD 221.

A political party is not a family dynasty. Succession to leadership positions in a political party is governed by the party constitution. A member of a party who claims that he has duly ascended or been elected to a party leadership position is required to show that he holds that position in accordance with laid down procedures in the party constitution. He must show that the procedures laid out in the constitution were duly followed.

The constitution of the party provides a procedure for the calling of an extra ordinary congress in s 13. Section 13 reads as follows:

“(Section 13) **Conditions:**

- (a) Notice of the Congress shall be made to all provinces and External Executives who are supposed to attend by the national Executive at least 90 days before the date. The Provincial Executive will send to members who are supposed to attend within 60 days before the date of the congress.
- (b) Notice of the congress shall be published in a local paper three times a month before the date of the meeting.
- (c) An Extra-Ordinary congress meeting may be called:
 - (1) by the President when he/she sees it necessary
 - (2) by a simple two thirds majority of the National Executive Committee.
This shall be done by secret ballot.

- (3) When two thirds of the provincial committees write to the Secretary requesting it.”

Section 13 of the constitution requires that notice of the congress be formally given and lays out the procedure to be followed. Notice of the congress was required to be given to all the provinces and to external executives who are supposed to attend by the national executive. The provincial executive is then supposed to send the notice to members who are supposed to attend the congress. The notice was supposed to be published in a local paper three times a month before the date of the meeting. The notices were required to be given to named people and the manner in which this should be done is prescribed. The circumstances in which congress may be called are laid out in s 13 (c).

The applicant was required to show that a congress was called and held and that he was duly elected as the president of the party. It does not appear to me that the purported congress was called in accordance with the provisions of the constitution. There is no evidence to show that the notices for the congress were ever issued or that they were issued in the manner prescribed. There is no proof that notice of the meeting was published in a local newspaper a month before the date of the meeting. The sitting president was not notified of the meeting. There are no minutes of the said congress. I find it unbelievable that a meeting of such a magnitude would be held with no minutes of the meeting being required to be taken.

Section 46.2 provides for election of the National Executive Committee which includes election of the president of the party into office. Section 42 (g) provides that all elections including that of the president shall be conducted by way of secret ballot. It does not appear that the party followed such a course. The applicant has produced a list of the people who supposedly endorsed him as the president. It is surprising that the applicants would actually be having a list of the people who supposedly voted when it was supposed to be a vote by secret ballot. Where a constitution provides that an election should be conducted by secret ballot, production of a list of people who voted for a candidate is contrary to the spirit of such a provision. The indications are that the election was not held in accordance with the constitution. The court was not given the number of contestants at this election. One would expect there to be proof of the ballot papers showing those who voted Yes and No or the ballot papers where the names of the candidates were endorsed.

An extra-ordinary congress may be called when two – thirds of the provincial committees write to the Secretary requesting the congress. The court was told that the congress was called by the Secretary General, a Mr Geoffrey Gumiro. The secretary’s

appointment to that office was challenged by the respondent. The court was told that somebody else held that post. That aside, the court was not told that two thirds of the provincial committees wrote to the Secretary requesting the congress. It appears from the applicant's version that the Secretary just called the congress on his own volition. He had no power to call a congress on his own in terms of the constitution. The congress was not called in the manner provided for in the constitution.

The court was asked to find that there was an election and disregard use of the word "endorse" as this was just about semantics. There is no question of semantics here. There is no evidence which suggests the holding of an election and hence the court cannot give the word any other meaning. The evidence available does not suggest that the applicant was voted into office as the president of the party. An endorsement of a candidate to a post is not an election of that candidate. The fact that the second respondent was endorsed as the party president suggests that such a course was taken because he was the late founder's brother and that no election was held. If the applicant was endorsed into office then he was not voted into office. There is actually nothing for the respondent to challenge.

I am unable to conclude that the said congress was held in terms of the constitution of the party. I am not satisfied that the applicants have shown a *prima facie* entitlement to the relief sought. It will not be necessary for the court to explore the other requirements of a temporary interdict. In the result I must find against the applicants. The application is dismissed with costs.

Saunyama, Dondo, applicants' legal practitioners
Bothwell Ndhlovu attorneys at law, respondent's legal practitioners