CITIZENS COALITION OF CHANGE

And

KWANELE BHANGO

And

AQUILINA KAYIDZA PAMBERI

And

TINASHE KAMBARAMI

And

MEMORY NDLOVU

And

PROMISE BALUBUHLE MKWANANZI

And

CAROLINE MAPAKO

And

GARIKAYI MUGOVA

And

BRIAN GUMPO

And

GLADY MATHE

And

TAWANDA RUZIVE

Versus

INNOCENT NCUBE N.O.

And

ZIMBABWE ELECTORAL COMMISSION

And

MANALA MOTSI

And

EDDIE DUBE

And

KUNDAI NYIKA

And

GOLDEN NDLOVU

And

MNOTHISI NSINGO

And

MOLINA DUBE

And

MLUNGISI MOYO

And

MABUTHO MOYO

And

THABO THWALA

And

THENJIWE NLEYA

IN THE ELECTORAL COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 15 August 2023

Electoral application

Prof. *W. Ncube,* for the applicants
Mr *T. M. Kanengoni*, for the 1st and 2nd respondents
Mr *N. Ndlovu*, for the 3rd – 12th respondents

DUBE-BANDA J:

[1] I have had the benefit of full and thorough argument by counsel on both sides and I would be failing in my duty if I did not express the court's appreciation to counsel, more so where this matter was heard as one of urgency which inevitably shortened the periods within which papers were required to be filed.

[2] By giving an *ex-tempore* judgment soon after the conclusion of argument, the court intended no disrespect to the cogent and well-reasoned submissions advanced by both counsel, but was motivated by the urgency of the matter. At the time of the hearing elections were just a week and few days away, and the parties needed to know the decision of the court as quickly as possible. I informed counsel that a fully dressed judgment will be made available in due course, this is it.

[3] This is an urgent court application for review. The applicant sought an order couched in the following terms:

i. That 1st respondent's decision to reject the 1st applicant's nomination paper for its party list for the Bulawayo provincial Council be and is hereby reviewed and set aside.
ii. That 1st respondent's declaration that 3rd to 12th respondents are duly elected members of the Bulawayo Provincial Council be and is hereby reviewed and set aside.
iii. That 1st respondent's 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.
iv. Costs of suit shall be borne by any such respondent/s as opposes this application.

[4] The application was opposed by all the respondents. For ease of reference and where the context permits, the applicant shall be referred to as CCC, the first respondent as the nomination officer and the second respondent as ZEC. For reasons that will appear later in this judgment, there is only one applicant in this matter, i.e., the CCC.

The background facts

[5] This application will be better understood against the background that follows. The President of Zimbabwe promulgated 23 August 2023 as the date for harmonized elections. As part of the Proclamation 21 June 2023 was fixed for the sitting of the nomination court across the country for the purpose of the submission of nomination papers for different elective public offices. The applicant contends that the nomination officer received its nomination papers for party-list candidates just before cut-off time i.e., 4 p.m. The nomination papers were received through a police officer who collected such papers on behalf of the nomination officer.

[6] The nomination officer after examining the papers found that they were defective and gave the applicant a chance to rectify the defects. These papers included the nomination paper for the Bulawayo Provincial Council party-list. On resubmission of the papers, the applicant contends that the nomination officer rejected the nomination paper for the Bulawayo Provincial Council party-list alleging that it was not part of the papers initially submitted to him. The nomination paper for the Bulawayo Provincial Council party-list was rejected on the basis that it was submitted after the cut-off time, i.e., 4 p.m. The applicant was aggrieved by this decision made by the nomination officer, and sought that it be reviewed and set aside. It was against this background that the applicant launched this application seeking the relief mentioned above.

Preliminary points

[7] Other than resisting the relief sought on the merits the respondents took a number of preliminary points which were also a subject of argument in this matter. The first and second respondents raised the following preliminary points, *viz* that this matter is not urgent; that this application constitutes a gross abuse of court process in that the applicant was approbating and

reprobating at the same time; and that the non-joinder of a political party called ZANU PF is fatal to this application.

[8] The third to the twelfth respondents raised the following preliminary points, *viz* that the applicant adopted a wrong procedure; that the applicant was out of the time-line permitted to file an appeal against the decision of the nomination officer; that the non-joinder of ZANU PF is fatal; and that the second to the eleventh applicants have no *locus standi* to institute this application.

[9] At the commencement of the hearing, I informed the parties that I shall adopt a holistic approach to avoid a piece-meal treatment of the matter, wherein the preliminary points are argued together with the merits, but when the court considers the matter, it may dispose of the matter solely on the preliminary points despite that they were argued together with the merits. If the court finds that the preliminary points have not been properly taken, it shall then determine the matter on the merits.

Urgency

[10] Mr *Kanengoni* counsel for the first and second respondents contend that the matter is not urgent and must be struck off the roll of urgent matters. Counsel submitted that the decision sought to be reviewed was made on 21 June 2023, and this application was filed on 12 August 2023, a period approximating seven weeks. It was said in the intervening period the applicants pursued an erroneous application before the General Division of the High Court (case HC 1333/23), which was struck off the roll on 27 July 2023. This application was filed sixteen days after HC 1333/23 was struck off the roll. Counsel argued that the urgency was self-created, and that this application could not be served by r 31 of the Electoral Rules, 1995.

[11] Counsel submitted further that if the court were to entertain challenges to decisions of the nomination court this late in the electoral process litigants would come to court on the eve of the election and demand that they be heard as a matter of urgency. It was contended that r 31 of the rules does not divest the court of the discretion to regulate its processes, which include deciding whether a matter is urgent or not.

[12] 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 interests, i.e., it would just be moot. Counsel submitted that this matter could not be allowed to remain in abeyance beyond the election date. Further counsel argued that the applicant acted when the need to act arose, as HC 1333/23 was finalised on 27 July 2023 and this application was filed on 12 August 2023, and that CCC could not have filed this application before the handing down of the judgment in HC 1333/23.

[13] Rule 31 of the Electoral (Applications, Appeals and Petitions) Rules, 1995 regulates the speed with which the electoral matters must be dealt with, it says:

> The Registrar and all parties to any stated case, petition, appeal or application referred to in these rules shall take all steps necessary to ensure that the matter is dealt with as quickly as possible.

[14] The rule in clear and unambiguous language requires that electoral matters *shall* be dealt with as quickly as possible, which means must be dealt with as a matter of urgency. Rule 31 makes electoral matters inherently urgent, and the court must give effect to this rule. Whether a litigant characterises his or her case as urgent is not the test, the test is whether it is an electoral matter, and if so, it is inherently urgent and must be dealt with as quickly as possible. See *Mazadza & Ors v Watson & Ors* HB 159/23.

[15] In general, my view is that as far as it 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. Striking such a matter off the roll of urgent matters means that it proceeds on the ordinary roll, and a matter on such a roll cannot be disposed of within a period of a week. The net effect of it all would be that a litigant aggrieved by the decision of the nomination court, might have to wait until after the elections to access justice in his or her case. This to me would amount to a denial of access to justice which is an essential component to the rule of law.

[16] In this case the elections are scheduled for 23 August 2023, and a finding that the matter was not urgent would have meant that it be struck off the roll and transferred to the roll of ordinary court applications. No doubt in such a case this matter would have to be set down and finalised well after the elections. This would render the rights provided for in the Electoral Act and the rules nugatory.

[17] On one hand, I am quite sceptical of importing the principles of urgency espoused in cases such as *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 188 and others into the adjudication of electoral matters. This to me might defeat the legislative intention as it appears in the Electoral Act and the rules, which is that the electoral disputes must be resolved as quickly as possible. See *Chabvamuperu & Ors* v *Jacobs & Ors* HH 46-08. In my humble view the only interpretation of r 31 of the Electoral Rules that makes sense is the one which says electoral matters are urgent and must be dealt with urgently. In this regard I am guided by what McNALLY JA said in *S v Kachipare* 1998(2) ZLR 271 (S) at 283C –

> "I take the view that one is entitled to look closely at the wording of the section in order to find an interpretation which achieves sense rather than injustice, in the application of the section in a situation almost certainly not contemplated by the legislature. *This must be specially so in a statute which deals with procedure rather than with substantive law.*" (My emphasis).

[18] Furthermore, I am not prepared, as suggested by Mr *Kanengoni* to import the four-day time-line given to a candidate to appeal a decision of the nomination officer to applications referred to in r 31of the Electoral Act.

[19] On the other hand, filing electoral matters challenging the decision of a nomination court a few days before the elections is undesirable. It might well affect the preparations for the elections made by those with the responsibility to manage the electoral processes. The challenges that might be caused by approaching a court a few days before the election challenging the decision of the nomination court were clearly articulated by Mr *Kanengoni*. For example, the preparation and the printing of the ballot paper might be affected by challenges that come a few days before the election date. My view is that such is what a court

seized with such a matter might have to consider in the light of r 31. For example, considering the delay together with the merits and then making an appropriate order. What I do not agree with is to find that this matter is not urgent and strike it off the roll, leaving it pending to be determined after the election date.

[20] Again this is to me something that the law maker may want to reconsider, a cut-off point of some sort. To draw a redline and say beyond this point no more challenges of the decision of the nomination court will be adjudicated upon. Otherwise as the law stands, I do not see how such a matter may be considered anything but urgent. Electoral disputes must be heard and disposed of urgently. It was for these reasons that the attack on the urgency of the matter was without merit and was refused.

Wrong procedure

[21] Mr *Ndlovu* counsel for the third to the twelfth respondents submitted CCC adopted a wrong procedure. It was contended that the applicants should have noted an appeal, instead of filing an application for a review. To answer this question, the court has to look closely at the empowering provisions and juxtapose this with the established jurisprudence as espoused in precedent. In *Kambarami v 1893 Mthwakazi Restoration Movement Trust & Ors* SC 66/21 GUVAVA JA said the Electoral Court "is a creature of statute and its powers are confined to the four corners of the Act." Put differently, it can only do that which the Act permits it to do, and no more. It is not a court imbued with inherent jurisdiction. See *Kasukuwere v Mangwana* SC 78/23.

[22] Section 45E(14) of the Electoral Act prescribes the jurisdictional requirements underpinning an appeal by a political party whose nomination paper has been rejected. It says:

> "If a nomination paper has been rejected in terms of subsection (5), or if any name of a party-list candidate has been deleted from the nomination form by the nomination officer—
> (a) the nomination officer shall forthwith notify the political party concerned, giving reasons for his or her decision; and
> (b) the political party shall have the right of appeal from the decision to a judge of the Electoral Court in chambers, and the judge may confirm, vary or reverse the decision

of the nomination officer and there shall be no appeal from the decision of that judge; and

(c) if no appeal in terms of paragraph (b) is lodged within four days after the political party received notice of the decision, the right of appeal shall lapse and the decision shall be final; and

(d) if an appeal in terms of paragraph (b) is lodged, the judge concerned may direct that any further proceedings under this section shall be suspended, if necessary, pending determination of the appeal."

[23] To appeal in terms of s 45E (14) a nomination paper must have been *rejected in terms of subsection (5), or if any name of a party-list candidate has been deleted from the nomination form by the nomination officer.* It is in such an instance that a political party shall have the right of appeal. Subsection (5) says:

"Subject to subsections (4) and (6), the nomination officer in open court shall—

(a) reject any nomination paper lodged with him or her in terms of this section—

(i) if he or she considers that any symbol or abbreviation specified in it—

(A) is indecent or obscene; or

(B) so closely resembles the recognised symbol or abbreviation of any other political party contesting the election as to be likely to cause confusion; or

(ii) if any symbol specified therein is a prohibited symbol; or

(iii) the nomination fee has not been deposited; or

(iv) if the nomination paper states that the party-list candidate concerned is to stand for or be sponsored by a political party and the nomination officer has reason to believe that that statement is not true; or

(v) if, in his or her opinion, the nomination paper as a whole is for any other reason defective or not in order; or

(b) delete from the nomination paper the name of any party-list candidate —

(i) who is not eligible for election to the party-list seat for which he or she is a candidate; or

(ii) whose furnished particulars are inadequate or inaccurate in any material way; or

(iii) whose name appears on more than one party list contrary to section 45D(1)(b), (c), (d) or (e), whether in that electoral province or elsewhere."

[24] The nomination paper for the Bulawayo Provincial Council party-list was rejected on the basis that it was alleged to have been filed outside the time-line provided in the Act. It was not rejected in terms of any ground specified in s 45E (5). The nomination officer did not receive and examine the paper. On a proper reading of the Act, a party whose nomination paper has been rejected other than in terms of s 45E (5) of the Act cannot appeal in terms of s 45E (14). It is only when the nomination paper has been rejected in terms of subsection (5) that the

procedures in terms of subsection (14) may be engaged. In *Shumba & Another v ZEC & Anor* SC 18/08 the court said:

> "In my view, if the applicants' nomination papers were rejected other than in terms of s 46(10) or s 46(16) of the Act, then the remedy provided for in subs 46(19) was not available to them. Subsection 46(10) clearly states that it is subject to subss 46(8) and 46(9). Put differently, the application of subs (10) is conditional upon the fulfilment of the requirements of subss (8) and (9). Subsections (8) and (9) envisage that nomination papers are submitted to the nomination officer who in turn accepts and examines the nomination papers. It is only after a nomination officer has accepted and examined the nomination papers that he can act or do any of the things provided for in terms of subs (10)."

[25] The *Shumba* case is pertinent and applies with equal force in this case. The remedy of an appeal was not available to the applicant. Therefore, the applicant was well within its rights to seek a review of the decision of the nomination officer. In 2012 the Electoral Act was amended by Act 3 of 2012. Under the amendment the jurisdictional powers of the court were broadened under s 161. Section 161 now reads as follows:

> (*b*) to review any decision of the Commission or any other person made or purporting to have been made under this Act; and shall have power to give such judgments, orders and directions in those matters as might be given by the High Court:
> Provided that the Electoral Court shall have no jurisdiction to try any criminal case.

[26] Therefore, a review is sanctioned by s 161(b) of the Act. It is a remedy that was at law available to the applicant. In the circumstances, this preliminary point had no merit and was refused.

[27] On the same note, the preliminary point that the applicant was out of the time-line permitted to file an appeal against the decision of the nomination officer cannot succeed, in fact it falls off.

Non-joinder of ZANU PF

[28] The respondents attacked the application on the basis that the non-joinder of ZANU PF was fatal to this application. It is the political parties that are at the centre of the submission of

nomination papers for party list candidates. The third to the twelfth respondents are candidates nominated by ZANU PF. Therefore, ZANU PF has a 'direct and substantial interest' in the subject matter of whatever litigation that turns on a party provincial council party-list. However, I do not think that on the facts of this case this non-joinder is fatal to this application. My view is that the issues or questions in dispute may be determined in so far as they affect the rights and interests of the parties that are before court. It is for this reason that this preliminary point could not succeed. It was accordingly refused.

Locus standi

[29] The first respondent has placed the second to the eleventh applicants' *locus standi* in dispute. *Locus standi* relates to whether a particular litigant is entitled to seek redress from the courts in respect of a particular issue. In terms of the common law a litigant must show a "direct and substantial interest" in the subject matter and the outcome of the litigation. See *Matambanadzo v Goven SC-23-04; Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18; In *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H) the court pointed out that *locus standi in judicio* refers to one's right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation. Such interest is a legal interest in the subject matter of the action which would be prejudicially affected by the judgment of the court. See *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07.

[30] The attack on the *locus standi* of the second to the eleventh applicants has merit. It is the political party, i.e., CCC that can litigate in this matter. When it comes to party-list it is the political parties that are the centre of the action, not the individual nominated candidates. It is simple CCC *versus* ZANU PF. Therefore, the second to the to the eleventh applicants has no *locus standi* in this matter, in that none of them submitted a party list in terms of the Electoral Act. However, the fact that the second to the eleventh applicants have no *locus standi* is not dispositive of this matter. The matter must still be answered or determined on the merits by virtue of the *locus standi* of CCC. Therefore, there was one applicant in this matter, i.e., CCC.

Approbating and reprobating

[31] Mr *Kanengoni* argued that this application constitutes a gross abuse of court process in that the applicant was approbating and reprobating at the same time. To approbate and reprobate means to accept and reject at the same time. I agree that a litigant cannot be permitted to approbate and reprobate at the same time. See *S v Marutsi* 1990 (2) ZLR 370 (SC); *United Harvest (Private) Limited v Kewada (In his capacity as the executor testamentary of the estate late John Vigo Naested)* SC 51/23; *Dhliwayo v Warman Zimbabwe (Private) Limited* HB – 12 -22. However, I take the view that this is not a point which is dispositive of the matter without dealing with the merits. It is a point that requires an examination of the merits. Mr *Kanengoni* conceded this point. Therefore, it was not a preliminary point to be considered before dealing with the merits of the matter, it could therefore not stand.

[32] I now turn to the merits of the application.

Merits

[33] The burden of proof rests on the applicant to prove that it has established a case for the relief it seeks. The rule of evidence is "he who avers, must prove." This starts with the rule that the party who brings the case must also adduce evidence to prove the case. Bearing the burden is not merely about bringing an abundance of evidence to court, but rather it is about bringing the most relevant evidence to prove the facts relied on. The standard of proof is on a balance of probabilities, this means that the evidence relied on by the party shows that it is more probable than not that the situation happened as the evidence suggests. See *Millier v Minister of Pensions* [1947] 2 AII ER 372, 374; *Pillay v Krishna & Another* 1946 AD 946 at 952-953; *Lungu & Ors v Reserve Bank of Zimbabwe* SC 26/21. If there is a deadlock, where both parties have brought evidence which presents an equally probable version of the event, then the party bearing the burden of proof has failed to reach the required standard of proof to show that their version is more probable than the other party's evidence. See *Bruce N. O. v Josiah Parkers and Sons Ltd* 1972 (1) SA 68 (R) at 70 C-E).

[34] The facts upon which CCC seeks relief are set out in the founding affidavit. It was averred that the nomination officer refused to accept a nomination paper for the party-list candidates, and thereafter declared the third to the twelfth respondents duly elected as provincial council members for Bulawayo Metropolitan Province. CCC avers that the nomination officer received its nomination papers before the cut-off time through a police officer who he had assigned to collect the papers. This was shortly before 4 p.m. The papers were adjudged to be defective and the nomination officer gave the applicant an opportunity to rectify the defects to all the three Proportional Representation lists papers, including for the Bulawayo Provincial Council party-list.

[35] CCC avers further that after the correction of the nomination papers, on resubmission the nomination officer rejected the Bulawayo Provincial Council party-list alleging that it was not part of the initial nomination papers he had received. CCC further avers that the nomination officer due to his delegation of his duties to a police officer may have lost its Provincial Council party-list, but it was among the papers submitted before 4 p.m.

[36] The nomination officer and ZEC case is that on the nomination day at around 15:55 hours the first respondent announced in court that the nomination court was due to close at 4 p.m. and invited all present to submit their nomination papers. He further instructed a police officer manning the nomination court to go outside the court room and collect all nomination papers from persons waiting to submit their papers. The nomination papers were duly collected and handed over to the nomination officer.

[37] At 4 p.m. the nomination officer closed the nomination court, stopped receiving new nomination papers save for those already inside the court room. He dealt with the nomination papers which were on his desk and the persons who were inside the court room and ready to submit. The office-bearer for CCC had three party-lists for Senatorial, National Assembly and the Youth quota. He did not have one for provincial council party-list. After checking the papers, the nomination officer sent the CCC office-bearer back to make corrections on the anomalies he had observed on the three submitted nomination papers.

[38] At around 8 p.m. the office-bearer came back with the corrected party-list nomination papers. The nomination officer noted that the office-bearer had now added a Provincial Council party-list which was not part of the original papers submitted to him. The nomination officer rejected the Provincial Council party-list on the basis that it was not on the original nomination papers submitted to him. It was sought to be submitted for the first time after the 4 p.m. cut-off time.

[39] The parties are agreed on the applicable law. Section 45E of the Electoral Act says:

> (3) No nomination paper of party-list candidates shall be received by the nomination officer in terms of subsection (1) after four o'clock in the afternoon of nomination day: Provided that, if at that time, an office-bearer is present in the court and ready to submit a nomination paper, the nomination officer shall give him or her an opportunity to do so.
> (9) Where the nomination officer finds a nomination paper lodged in terms of this section to be defective for any reason, he or she shall give the political party concerned an opportunity to rectify the defect and may adjourn the sitting of the court for that purpose to a later time during that day.

[40] The dispute is factual. The question to be answered by the court is whether the nomination paper for the Bulawayo Provincial party-list was among the papers submitted before 4 p.m. and found to have been defective and required a rectification. If it was, on re-submission the nomination officer had a statutory obligation to accept and examine it, and if it was not, he was correct to reject it on the basis that it was submitted after the statutory 4 p.m. cut-off time.

[41] There is an apparent dispute of fact in this matter. Motion proceedings are not best suited for the resolution of factual disputes. However, the courts have come up with aids for the resolution of factual disputes in motion proceedings. The approach to be followed by a court when a dispute of fact arises on the papers, has been stated and re-stated in a plethora of cases. In *Muzanenhamo v Officer in Charge CID Law and Order & Ors* CCZ 3/13, PATEL JA (as he then was) stated as follows:

> "As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party."

See *Eddies Pfugari (Pvt) Ltd v Knowe Residents Association & Anor* SC 37/09; *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132(H) at 136 F-G.

[42] Prof. *Ncube* submitted that the balance of probabilities tilt in favour the applicant's version. Counsel argued that it was common cause that the proceedings at the nomination court were extremely slow, such that by the cut-off time prospective candidates were still queuing waiting to submit their nomination papers. A police officer who collected nomination papers did not record the papers he collected, and the nomination officer did not keep a register of the papers he collected. Therefore, he cannot be heard to say the CCC list for Bulawayo Provincial Council party-list was not among those he originally received and which required rectification. Counsel argued further that in the absence of a record of proceedings which establishes that the CCC papers for Bulawayo Provincial Council party-list were not part of those that were originally submitted, the court has no basis to reject the CCC's version.

[43] Counsel submitted that the Constitution of Zimbabwe forbids the nomination officer and ZEC, through their conduct to benefit one political party to the prejudice of another. And that the approach taken by the nomination officer and ZEC redounds to the benefit of ZANU PF whose candidates have been declared duly elected. The court was urged to take judicial notice of the fact that it was only in Bulawayo where CCC candidates were sought to be barred from contesting in the National Assembly elections. It was only in Bulawayo that it was claimed that the CCC did not have a list for provincial council party list. Counsel submitted further that this clearly is beyond the realms of possibility and shows a clear attempt at disenfranchising a whole province. Counsel asked why CCC would draw up lists in all provinces and forget Bulawayo province?

[44] Mr *Kanengoni* submitted that the applicant's version must be rejected on the grounds that in HC 1333/23 a materially different factual position was presented to court. And that the ZEC and the nomination officer's version has remained unchanged. Mr *Ndlovu* associated himself with the submissions made by Mr *Kanengoni*.

[45] In HC 1333/23 an application for review was filed at the General Division of the High Court seeking to review the nomination officer's decision to reject the CCC nomination papers for the Bulawayo Provincial Council party-list. *Albeit* CCC was not a litigant in HC 1333/23, the application was filed by its office-bearer and candidates. In fact, the same persons that litigants in this matter. HC 1333/23 resulted in the judgment in *Pamberi & Ors v Ncube and Ors* HB 154/23 per NDLOVU J the court upheld the points *in limine* taken by the nomination officer and ZEC and struck the matter off the roll. This application was filed following the failure of HC 1333/23, and the two applications turn on the same event i.e., the rejection of the CCC nomination paper for the Bulawayo Provincial Council party-list.

[46] For completeness I called for the record in HC 1333/23 from the Registrar's Office. A court is entitled to refer to its own records and proceedings and take note of their contents. See *Mhungu v Mtindi* 1986 (2) ZLR (S) at 173A-B. I noted in the founding affidavit and answering affidavit in HC 1333/23 the following:

> Founding affidavit
>
> "Para 33: The process of submission of the nomination papers was unfortunately extremely slow as it involved a lot of people intent on doing so for different public offices.
> Para 37: Before 1st respondent (Innocent Ncube) could make a decision on the nomination papers submitted from the 2nd – 10th applicants and I, there was a sudden pandemonium inside the nomination court.
> Para 38: By the time order was restored, 1st respondent (Innocent Ncube) had apparently lost our nomination papers.
> Para 39: 1st respondent (Innocent Ncube) failed to properly keep our nomination papers secure and as a result lost them.
> Para 40: We asked 1st respondent (Innocent Ncube) to be given an opportunity to prepare and submit a new set of nomination papers for our nomination into the Bulawayo provincial Council as determined by our party.
> Para 41: 1st respondent (Innocent Ncube) refused us an opportunity to do so arguing that this was past 16h00 (*sic*) which is the time set for the end of the sitting of the nomination court.
> Para 42: At that time only 3rd to 9th respondents have filed their nomination papers and owing to our alleged failure to file nomination papers, stood uncontested and 1st respondent (Innocent Ncube) declared them duly elected."

[47] The same version is presented in the answering affidavit.

[48] In *Pamberi & Ors v Ncube and Ors* HB 154/23 the court said:

> "It is the applicants' case that having been nominated by their party as the candidates to fill the 10 proportional representation seats in the Bulawayo Provincial Council they compiled all the required documentation and completed the nomination form for the Bulawayo Provincial Council. They attended the nomination court early in the morning of 21 June 2023. The proceedings were however extremely slow.
>
> When their turn arrived the 7th applicant presented their list to the 1st respondent. It so happened that before the 1st respondent could process and make a decision on their papers there, was sudden pandemonium inside the nomination court. By the time order was rediscovered the 1st respondent had apparently lost their nomination papers. They then asked the 1st respondent to be given an opportunity to prepare and submit a new set of nomination papers and that request was refused by the 1st respondent who argued that it was then past 4 pm [the cut-off time]. Needless to say, the applicants were aggrieved by that, hence this application."

[49] It is clear that HC 1333/23 and this case turn on the same event, i.e., the proceedings at the Nomination Court sitting at Tredgold Magistrates Court, Bulawayo on 21 June 2023. The nomination officer was one Innocent Ncube. Although the deponent to the founding affidavit in HC 1333/23 was Aquilina Kayidza Pamberi and in this matter it is Kwanele Bhango such is inconsequential and of no moment. I say so because in HC 1333/23 Kwanele Bhango deposed to a supporting affidavit wherein he said: "I further verify all the things she (Aquilina Kayidza Pamberi) adverts to have happened at the nomination paper (*sic*) on that day and I seek relief as prayed for." In this case Aquilina Kayidza Pamberi deposed to an answering affidavit and adopted the averments made by Kwanele Bhango. And Kwanele Bhango is the office bearer of CCC.

[50] It is clear that in HC 1333/23 and this case the applicants have presented conflicting versions of the same event. In HC 1333/23 the version was that the nomination papers were submitted and received by the nomination officer. Before he could make a decision, a sudden pandemonium occurred inside the nomination court room. By the time order was restored the nomination officer had lost the CCC nomination paper. The CCC officer bearer asked for an opportunity to prepare and submit a new set of nomination paper for the Bulawayo provincial Council party-list, this request was refused.

[51] In this matter the version is that the nomination papers were submitted and received by the nomination court before the cut-off time. The papers were examined and found to be defective, and the nomination office gave CCC an opportunity to rectify the defects to all the proportional representation party-lists, including the Bulawayo Provincial Council party-list. On resubmission the nomination officer rejected the Bulawayo Provincial Council party-list alleging that it was not part of the nomination papers initially submitted and received. CCC further avers that the nomination officer due to his delegation of his duties to a police officer may have lost the Bulawayo Provincial Council party-lists.

[52] The two versions are irreconcilable. In HC 1333/23 there was a pandemonium in the court room and the papers were lost, and in this case the papers were found to be defective and on re-submission the court rejected the nomination list for the Bulawayo Provincial Council party-list on the basis that it was not part of the papers submitted before the cut-off time. A party bearing the burden of proof cannot afford to present two different and conflicting versions before court, *albeit* in two different matters. CCC cannot be permitted to advance one version of the facts in HC 1333/23 and another version in this case. Such is impermissible.

[53] I juxtapose CCC's conflicting versions with the version of the nomination officer and ZEC. Their version is the same in HC 1333/23 and in this case, and it is this: that CCC presented three party-lists papers for Senatorial, National Assembly and Youth Quota. After the papers were examined, they were found to be defective, and the nomination officer directed that corrections be made. On re-submission CCC included the Bulawayo Provincial Council party-list which was not part of the original papers submitted before the cut-off time. The Bulawayo Provincial Council party-list was then rejected.

[54] Taking a robust and common-sense approach, I resolve the factual dispute on the acceptance of the nomination officer and ZEC's version. This entails the rejection of the version of CCC, which on the facts appears to have been manufactured and concocted. Therefore, CCC cannot benefit from s 45E (9) which permits a nomination officer who finds a nomination paper to be defective to give the political party concerned an opportunity to rectify the defect. The attempt to file the Bulawayo Provincial Council party-list at 8 p.m. on 21 June 2023 was in

clear contravention of s 45E (3) which does not permit a nomination paper of party-list candidates to be received after four o'clock in the afternoon of nomination day, subject to the exceptions which do not apply to the applicant.

[55] I cannot say on the facts of this case that the nomination officer and ZEC acted outside the law by favouring ZANU PF to the prejudice of CCC. Again, the facts of this case do not show any disenfranchisement of the Bulawayo province. CCC did not submit the nomination paper for the Bulawayo Provincial Council party-list ist within the time line allowed by the law. As to why CCC would draw up lists in all provinces and forget Bulawayo province, is not for the court to answer, but for the CCC itself to answer. CC has failed to prove its case on a balance of probabilities. CCC has no case on the merits. It is for these reasons that this application must fail.

[56] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must pay the respondents' costs.

In the result, it is ordered as follows:

The application be and is hereby dismissed with costs of suit on a party and party scale.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Nyika, Kanengoni & Partners, 1st and 2nd respondents' legal practitioners
Cheda & Cheda, 3rd to 12th respondents' legal practitioners