

AQUILINA KAYIDZA PAMBERI & ORS.

Versus

INNOCENT NCUBE & ORS.

HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 3 & 27 July 2023.

Application for Review

Adv. P. Dube with Mr. M. Ncube, for the Applicants.

Mr. T.M. Kanengoni, for the 1st & 2nd Respondents.

Mr. N. Ndlovu with Mr. P. Madzivire, for the 3rd to 9th Respondents.

NDLOVU J: The applicants are individual members of a political party known as **the Citizens Coalition for Change [the CCC]**. The 1st respondent is the 2nd respondent's Officer who presided over the nomination court on 21 June 2022 in Bulawayo. The 2nd respondent is a corporate body constitutionally mandated to run elections in this country. The 3rd to the 9th respondents are individual members of a political party known as the **Zimbabwe African National Union-Patriotic Front [ZANU [PF]]**.

What is common between the applicants and 3rd -9th respondents is that they are individuals nominated by their respective political parties for deployment s proportional representation candidates in the *Bulawayo Provincial Council* in the upcoming harmonized elections on 23 August 2023.

NATURE OF THE APPLICATION

This is an urgent chamber application for a review of the actions of the 1st respondent. The relief sought according to the applicants is final for a review, on an urgent basis by seeking a **declaratur** and consequential relief as there is nothing to return on the return date.

RELIEF SOUGHT.

The applicants seek an Order to the following effect.

1. It is declared that 1st respondent acted contrary to the proviso to *section 46 [7]* of the *Electoral Act*, hence unlawfully, when he refused applicants the opportunity to present a nomination paper for the *Bulawayo Provincial Council*.
2. Consequently
 - i) 1st respondent's decision to refuse applicants the opportunity to present a nomination paper for the *Bulawayo Provincial Council* be and is hereby reviewed and set aside.
 - ii) Costs if any party opposes the application.

BACKGROUND

It is common cause that the President of the Republic of Zimbabwe promulgated **23 August 2023** as the date on which the harmonized elections will be held in this country. In discharging that constitutional duty reposed on him, the President also set **21 June 2023** as the date on which the Nomination Court would sit across Zimbabwe for the purposes of filing and acceptance of nomination papers by candidates and their political parties.

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.

The 1st respondent denies the narrative put forward by the applicants. He avers that at around 3.55 pm on the day in question, he sent out a Police officer to collect all nomination papers from people who were still outside the courtroom. That was done. At 4 pm he duly closed the Court and began to attend to the nomination papers that were on his desk and to people in the courtroom and ready to submit their nomination papers.

The CCC had Party Lists for Senatorial, National Assembly, and Youth quotas and did not have one for the *Provincial Council*. Upon checking the papers he picked some anomalies and he sent their representative back to make corrections. At around 8 pm when the representative returned with the corrected Party-List papers, they had added the Provincial Council Party List and that document was heavily painted over with white tipex correction fluid. He rejected that list as it was a new nomination being brought after 4 pm.

POINTS IN LIMINE

The Respondents took and argued 4 points *in limine*, 3 of which dovetail into each other.

1. LOCUS STANDI

It is common cause that the applicants are members of the CCC which is a political party. It is the party that nominated them to fill 10 proportional representation seats in the *Bulawayo Provincial Council*. They were nominated to be on CCC's Party List. Their complaint is against the 1st respondent's alleged refusal to allow them to file their nomination papers on the basis that he claimed they were out of time.

The Respondents have argued that the applicants do not have *locus standi* to bring this application to Court. It is their political party that has such rights. The applicants have argued otherwise.

The election of Party List candidates by proportional representation is provided for in **Part XIA** of the *Electoral Act [Chapter 2:13] [the Act]* That part of the Act is titled “**ELECTION OF PARTY-LIST CANDIDATES BY PROPORTIONAL REPRESENTATION**”. A simple reading of that part of the Act reveals that it is the Office Bearer who must appear before the nomination officer and present the nomination paper containing the names of party list candidates, *See s 45E[1], s 45E[3]* as well as *s 45E[14][b]*. It gives a clear understanding that it is the Party or its Office-Bearer who has a right to litigate matters of this nature and not the individual nominees. The seats are allocated to the Party and not to its individual members, deployed or otherwise.

The point in *limine* is therefore upheld.

On the authority of and the approach adopted by *Kudya JA* in *Nyathi v The Trustees For Time Being of The Apostolic Faith Mission of Africa SC 63/22*, I would have stopped here without considering the other points in *limine* taken. I will however out of an abundance of caution determine them as well.

2. NON-JOINDER OF THE SPONSORING POLITICAL PARTIES

It can be seen from my decision on *locus standi* that it is the Party that has *locus standi* to litigate where a party list is concerned. The least the applicants could have done was to join their Political party the CCC in these proceedings.

The point *in limine* is upheld as well.

3. WRONG SECTION USED TO APPROACH THE COURT

Had it been CCC that brought this application one would have had reason to go deeper into the arguments raised by counsel in this regard, especially by counsel for the applicants in defense of proceeding in terms of s 46 instead of s 45E of the Act. The argument made while mind-engaging, is unfortunately erroneous on a point of law. Section 45E relates to Party Lists. Anything to do with Party List must of necessity be premised on Section 45E and be dealt with in terms of that section unless the statutes express otherwise. Section 46 deals with the nomination of candidates for Election as Members of Parliament.

I uphold the point *in limine* taken.

4. JURISDICTION

The General Division of the High Court of Zimbabwe has no jurisdiction over applications for review or to review any decision of the Zimbabwe Electoral Commission or of any other person made or purporting to have been made under the Electoral Act. Those applications are now the preserve of the Electoral Act in terms of Section 161 (2) of the Electoral Act which provides as follows;

“161

(1) ...

(2) *The Electoral Court shall have exclusive jurisdiction-*

(a) to hear appeals, applications and petitions in terms of this Act; and

(b) to review any decision of the Commission or any other person made or purporting to have been made under this Act... (my underlining)

I uphold the point *in limine* taken.

DISPOSITION

This application is not properly before me and deserves to be struck off the Roll.

IT IS HEREBY ORDERED THAT:-

1. The application be and is hereby struck off the roll.
2. There is no order as to costs.

NDLOVUJ.

27/07/2023.

Ncube Attorneys, applicants' legal practitioners

Nyika, Kanengoni & Partners, 1st & 2nd respondents' legal practitioners

Messrs Cheda & Cheda, 3rd to 9th respondents' legal practitioners