TATENDA MADZIRASHE & OTHERS

Versus

INNOCENT NCUBE N.O. & OTHERS

HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO, 19, 20 & 27 JULY
2023

Urgent Court Application For Declaratory Order.

Adv. T. Magwaliba with Mr. N. Ndlovu & Mr. P. Madzivire , for the Applicants.
Mr. T. M. Kanengoni, for the 1st Respondent, ZEC & Chairperson of ZEC.
Adv. T. Mpofu with Mr. T. Runganga, for the 1st 6 CCC aligned Respondents.
Prof. W. Ncube, for the last 6 CCC aligned Respondents.
Mr. B. Robi, for the 5th Respondent, *HC 1360/23.*
Mr. M. Mahlangu, for the 4th Respondent, *HC 1365/23*.
Mr. J. Bamu with Mr. T. Chimusaru for the 4th Respondent, *HC 1368/23.*
Mr. Z. I Mbano, 4th Respondent, HC 1362/23**, In Person** .
No Appearance for the 5th Respondents in, *HC 1359/23, HC 1361/23 & HC 1365/23*.

NDLOVU J: The applicants, filed 12 individual applications as Urgent Chamber Applications in terms of Rule 59 (6) of the High Court Rules 202l. The 12 applications were consolidated by consent in a Case Management Meeting held on 11 July 2023. At the commencement of the hearing on 19 July 2023 the applicants withdrew applications against the following respondents;

ADMORE GOMBA - 4TH RESPONDENT In HC 1357/23.

NIGEL NDLOVU – 3RD RESPONDENT In HC 1359/23.

SONENI MOYO – 4TH RESPONDENT In HC 1360/23.

DINGILIZWE TSHUMA – 3RD RESPONDENT In HC 1361/23.

STRIKE MKANDLA – 5TH RESPONDENT In HC 1362/23.

ALBERT MHLANGA – 3RD RESPONDENT In HC 1364/23.

The applicants are moving me to grant them a declaratur and consequential relief. The premise of this application on the provisions of the Electoral Act *[Chapter 2:13] ("the Act").* Their bone of contention is that the commission which sat as the nomination court at the Bulawayo Magistrates Court, Tredgold Building on 21 June 2023 violated the law, in particular, *s 46[7] & [8]* of the Act when it accepted the Respondents' nomination papers for election to members of the National House of Assembly of Zimbabwe in the election which are to be held on 23 August 2023 after 1600 Hours and proceeded to sit to the early hours of 22 June 2023. They, accordingly: seek a declaration to the effect that the decision of the nomination court is null and void and consequently, be set aside and that the names of the affected Respondents be excluded, from the ballot papers which will be used in the elections to be held on 23 August 2023 of their respective constituencies.

The affected Respondents together with the Electoral Body [ZEC] and its functionaries oppose the application.

The Respondents jointly and severally raised nine [9] but actively argued eight [8] points in *limine.* The preliminary issues they raised are that:

1. This court does not have the jurisdiction to hear and determine the matter;
2. The application is one for review which is disguised as a declaratur;
3. The Applicants do not have the locus *standi* in *judicio*/legal interest in this matter;
4. The application is pivoted on inadmissible hearsay evidence.
5. Fatal non-joinder of the sponsoring political party in respect of some of the Respondents.
6. Invalid application.
7. Material disputes of fact.
8. Abuse of Court processes.
9. Urgency.

On the merits, they challenge the Applicants to prove the allegations they are making. They all aver, with the support of ZEC that they were duly nominated to be candidates in the forthcoming general election because no law was violated either by them or ZEC functionaries during the nomination process on 21 June 2023.

On 20 July 2023, I directed that the parties address me on the merits of this matter before I determined the preliminary points raised by the Respondents a day before. I had been moved by Adv. Mpofu and Prof. Ncube in particular that I pronounce myself first on the points in *limine* particularly that of Jurisdiction. I was directed to the authority of *Chinhoyi Municipality v Mangwana & Partners Legal Practitioners & Anor HH 403/16*, by my Brother Chitapi J. I undertook to give my reasons, in this judgment, for not following the approach recommended by the Court in that matter. I proceed to give those reasons hereunder. The *Chinhoyi Municipality* case *[supra]* emanated from arbitration proceedings and in that judgment, the Court had the following to say;

> ***"…the second respondent was required to rule that he had dismissed the challenge to his jurisdiction before proceeding further with the matter… It was a plea whose determination would decide whether the proceedings should continue or be terminated or aborted for want of jurisdiction on the part of the second respondent.***"

The Court went on to cite and place reliance on the following authorities; *Heywood Investments [Pvt] Ltd v Zakeyo 2013 [2] ZLR [S]* @ p 20 E-G per Gowora JA *[as she then was]*

In that matter, the Court had not determined the preliminary point raised, at all, prompting the Supreme Court to comment as follows;

> ***"It is incumbent upon a court before which an application is made to determine it. A court before which an interlocutory application has been made should not proceed to***

determine a matter on the merits without first determining the interlocutory application."

In *Grain Marketing Board v Muchero 2008 [1] ZLR 216 [S]* Garwe JA *[as he then was]* stated as follows at 221 D-E

"Once the application to uplift the bar has been made, the court became seized the matter. The court was enjoined to make a determination on that application. It did not do so…. In this regard, the court erred."

First and foremost I understand the approach suggested by the Court in the Chinhoyi Municipality case. In my view it, [a] fits in perfectly well with, an action case where jurisdiction would have been raised as a special plea, and [b] it would be an approach of first choice in application proceedings where there are no other competing factors, like availability of counsel and time as was the case in this matter, not only where jurisdiction has been challenged, but for any point *in limine* taken, for that matter. That is more so because, in application proceedings, the court is already seized with all the pleadings up front, and a party is not obliged to argue orally. In that regard, it is, in my view, immaterial whether or not the court hears the parties on the merits before determining the issue of jurisdiction. What matters is that the court determines that point in *limine* with or like any other point in *limine* ***before*** it ***determines*** the merits of the application as neither party is threatened by prejudice. Each hearing/case must be managed on its facts and circumstances.

In both the Heywood Investments and the Grain Marketing Board cases [supra], the Supreme Court talks of the need to determine the interlocutories before determining the merits. The authorities do not, in my understanding, bar hearing the parties on the merits before determining the preliminaries. It is for those reasons that I managed the hearing in the manner I did.

PRELIMINARY ISSUES/POINTS In Limine

I now proceed to determine the preliminary issues raised by the Respondents. Because of the commonality of these issues to the Respondents and because of the collaboration amongst counsel for the Respondents in arguing those issues it suffices, in my view that I do away with apportioning the points to specific Respondents.

1. ***URGENCY.***

This point although raised by some Respondents in their papers was not orally argued. In any case, even if it would have been argued, it would not have stuck because the parties from the day of the Case Management Meeting on 11 July 2023 seemed *ad idem* that the application be heard and done with. For the avoidance of doubt, the point *in limine* is dismissed.

2. ***ABUSE OF COURT PROCESS***.

It has been said that an abuse of process occurs when the judiciary is employed for a purpose for which it was not intended to serve. See *Dominion Trading FZ-LLC v Victoria Foods [Pvt] Ltd HH 324/13.*

It has been argued that there is a political outfit that threatened litigation of this nature and is therefore suspected or believed to be behind this application. It was further argued that on the eve of hearing this matter a similar application was filed in the Electoral Court in Bulawayo. It was argued that the Court is being dragged into a political dog fight, a fight that is better confined to the combat at the arena of the ballot box.

It goes without saying that the judiciary will frown at any attempt to be abused by anyone. The judiciary should equally be careful that it does not close its access doors to the Zimbabweans in the exercise of their political rights and freedoms that they derive from Section 67 of the Constitution. A balance must be struck. Once elections are nigh, pushing and shoving for the political space becomes commonplace. Courts can therefore not afford to shy away from playing referee and lightly refer the belligerents to the ballot box, lest we degenerate to anarchy. I am not satisfied that I can strike this application off the roll or worse still dismiss it merely on the basis that this kind of litigation was threatened by a political organization and that a similar application has been filed at the Electoral Court. This application is the first one. It follows none. It was not filed concurrently with any other that has been brought to my attention. The point *in limine* is therefore dismissed.

3. NON-JOINDER.

It has been argued by those Respondents aligned to, and sponsored by a political party known as the Citizens Coalition for Change [CCC] that the fact that CCC is not a party to these proceedings is fatal to this application against those particular Respondents. The basis for that argument is that as a sponsor of these candidates, the CCC will be directly affected by the outcome of this application, especially in respect of its proportional representation seats. The failure to join it, therefore, breaches its right to be heard.

It is obvious that CCC is an interested entity in this matter. It is obvious that the outcome of this application will visit CCC with either a positive or negative risk. However, in my view, while citing CCC would have meant that no one is left behind, surely its non-joinder is not fatal. This point *in limine* is incapable of disposing of this application. I, therefore, dismiss the preliminary point taken.

4. **INTEREST/ *LOCUS STANDI IN JUDICIO* OF THE APPLICANTS**.

In oral arguments, the Respondents made very forceful arguments in this regard. What is generally known and referred to as want of locus standi in the subject matter was rechristened want of legal interest on the part of the Applicants in this matter by Counsel. The thrust of the Respondents' argument is simply that being non-contestants in the forthcoming elections and not having taken part in the Nomination Court proceedings in issue, the applicants are non-suited to be heard. While it is healthy and natural for them as voters to have an interest in the identity of the candidates on the ballot paper, they however have no legal interest to launch an application of this nature and seek the kind of relief herein sought. They are entitled and free to vote for candidates of their respective choice on election day.

> *Zimbabwe Teachers Association & Ors v Minister of Education and Culture 1990 [2] ZLR 48 [HC]*.

> *Grandwell Holdings [Private] Limited v Minister of Mines & Mining Development & Ors HH 193/16*.

The Applicants have counter-argued and stated that they derive their locus standi from Section 67 of the Constitution, Section 46[18] of the Electoral Act, and the common law rules on locus standi. S 67 of the Constitution provides for individual Political rights. S 46[18] of the Act provides for the right of an individual registered voter to inspect any nomination paper that would have been filed. They have a direct and substantial interest in the processes and outcome of the forthcoming elections.

It admits to no reasonable argument that since the advent of the 2013 national Constitution in this country particularly s 85 therein our Courts have adopted a liberal as opposed to the restrictive approach to locus *standi* of an individual registered voter in electoral matters. The

doors to the Courts have been widened significantly. The cases of *Mawarire v Mugabe N.O & Otrs CCZ 1/13* and *Mangwana v Kasukuwere & Otrs HH 418/23* bear testimony to that. *Mawarire v Mugabe N.O [supra]* is binding on this Court.

The Applicants in this matter, therefore, have locus *standi* [legal interest]. The point *in limine* taken is duly dismissed.

5. ***DISGUISED APPLICATION FOR REVIEW***.

It has been argued that this in essence is an application for review that has been brought before me in the General Division of the High Court as an application for a declaratur. I must say, this point deserves to be vacated as quickly as can be possible for the reasons that should soon appear.

> ***"The cardinal principle in deciding whether a matter is for a declaratory order or review is not so much of the relief sought but rather the grounds upon which the application is based."*** *Johnson v AFC 1995 [1] ZLR 65 [S]*.

Clearly, in my view,

[a] To make that determination, the Court has to engage the merits of the case intensely and that exercise cannot be done at this stage.

[b] Even if one were to determine that the grounds upon which the application is based cry out for a review process, that finding will not dispose of the matter at this stage.

[c] This point *in limine* is a defence to the merits and should therefore not be mistaken for a technical issue that if upheld will or can dispose of the matter.

The point *in limine* taken is therefore rested with a dismissal.

*6. **MATERIAL DISPUTE OF FACT**.*

Some respondents argued that there are in this matter material disputes of facts. I agree with Adv. Magwaliba that in every matter there will be a dispute of facts. The critical questions are; [a] Are those disputes incapable of resolution on the papers? and [b] Are those disputes material to the resolution of the controversy between the parties, It must be noted that even if there is a material dispute of fact in an application matter, that fact alone is incapable of causing the disposal of the matter when taken as a point *in limine*, because the Court is empowered to call for evidence or convert the proceedings into a trial. This point is therefore in my view prematurely raised, on the facts of this matter.

Due to that incapacity on the part of the point taken, I will dismiss for want of merit.

7. HEARSAY.

It is trite law that hearsay evidence is in general inadmissible in a Court of law. *Khumalo v Mandishona 1996 [1] ZLR 434 [HC]*. The South African Law of Evidence- 4th Edition- Hoffman & Zeffert @ p125 paragraph 3. The law applies to hearsay evidence in an affidavit as well. It is equally trite law that there are however exceptions to that general rule.

Sight must not be lost of the trite position of the law that in application proceedings, an affidavit constitutes both the pleadings as well as the evidence. *Jackson v Rothmans of Pall Mall [Zimbabwe] [Pvt] Ltd 1993 [2] ZLR 156 [SC]*.

The Respondents have argued vigorously in pointing out that the Applicants have based their applications on inadmissible hearsay evidence of purported social media reports and that the affidavits are as a result, a nullity and should accordingly be expunged and the application struck off the roll or worse still dismissed.

The Applicants have argued back and told the Court that, it is not true that the application is based on hearsay evidence. It is their argument that they rely on the official documents in the possession of ZEC and its officials and that they also rely on the results of their inspection of the nomination papers as set out in *s 46[18]* of the Electoral Act. They further argue that the presumption of regularity covers the principal evidence they are relying upon which is the Submission Form for Bulawayo Province.

The issue of hearsay evidence is central to the resolution of this case if one has a close consideration of the facts of this matter. I find it to be going to the heart of the controversy between the parties and is better left to the merits of the matter. It is a defence by the Respondents to the application and I duly dismiss it.

8. JURISDICTION.

This has been the most popular and contentious point *in limine* taken by invariably all the Respondents. The argument has been whether or not the Applicants have approached the appropriate division of the High Court. I have dealt with the point *in limine* regarding the question of whether or not this is an application for review disguised as an application for a declaratur. This application according to the Applicants is one for a Declaratory Order. The authority of *Tinashe Kambarami v 1893 Mthwakazi Restoration Movement Trust & Ors SC 66/21* long answered the question of which Division of the High Court should entertain the matter.

In the *Kambarami [supra]* matter the issue before the Supreme Court, ***"… was whether or not the Electoral Court had the jurisdiction to grant the declaratory order…"?*** *par- 8* of the cyclostyled judgment.

The controversy between the parties related to the electoral process just like in casu. The Court went on to state in *par- 16;*

> ***"The Act however does not specifically state whether or not the court has the power to grant declaratory orders….***
>
> ***Applications which may be entertained by the Electoral Court, have a marked difference from those that may be heard by the High Court….The High Court is a court with inherent jurisdiction. It has the power to hear all types of applications brought to it in terms of Order 32 of the High Court Rules, 1971. The types of applications that the High Court can hear are not stipulated in the Act as is the position in the Electoral Act. That the High Court has inherent jurisdiction is a common law principle that has been specifically codified by s 176 of the Constitution. The Electoral Act does not have such a provision. Thus, the High Court can grant any order as it may deem fit. This is in complete variance with the applications envisaged under the Electoral Act, where there is a set remedy which the court must apply for every application before it."***

The court went on to say that the nature of the jurisdiction granted in the Electoral Act is that the court cannot stray from the provisions of the Act and that the provision that the Electoral Court can exercise the same powers as the High Court in making judgments, orders and directions in appeals, applications, and petitions must be interpreted to mean that such power is limited to the confines of the Act.

To clear any doubt, the Supreme Court went on to say;

> ***"The Electoral Act does not provide nor purport to give the court the jurisdiction to grant declaratory orders….***
>
> ***The remedy of a declaration of rights is a remedy which the High Court grants within its discretion. That is not a remedy which may be shared by a Court which has limited jurisdiction…***
>
> ***The Electoral Court like the Labour Court does not have jurisdiction to grant declaratory orders."***

The decisions of the Supreme Court are binding on me sitting as a Judge of the High Court. I accordingly dismiss the point *in limine* taken and rule that this court has jurisdiction to hear and determine this matter.

9. *INVALID APPLICATION*.

Some Respondents argued that there is no valid application before this Court. They based their argument on the fact that the Applicants truncated the *dies inducie* provided for in Rule 59[6] of the Rules of this Court. It was their argument that the power to attenuate timelines is a preserve of the Court and a litigant who is desirous to have the dies inducie altered must move the Court in that direction at a Case Management Meeting. They placed reliance on*; Nyathi v The Trustees For The Time Being of The Apostolic Faith Mission of Africa SC 63/22* ***[longer dies inducie given]*** and *Veritas v ZEC &Ors SC 103/20* ***[No dies inducie given]*** to make their argument.

Adv. Magwaliba for the Applicants contended to the contrary and drew the attention of the Court to the proviso to Rule 59[6] which reads as follows;

"59.[6]….

Provided that in urgent cases a court application may specify a shorter period for the filing of opposing affidavits if the court on good cause shown agrees to such shorter period."

In *casu* the Applicants truncated the dies inducie to 48 hours instead of ten [10] days. The proviso is clear that a court may shorten the timeline on good cause shown. This implies that the Applicant[s] must move the court to give a shorter period for the filing of opposition affidavits. The Applicants did not move the court in that direction at the Case Management Meeting on 11 July 2023 in this case.

I do not know why they did not. No clear reason for their omission to do so has been given. However, a few aspects of this matter cannot be ignored, lest the interests of justice become the proverbial baby that gets to be thrown away with the bath water, and they are that;

[a]. By the day of the Case Management Meeting, 11 July 2023, the Respondents who took this point in limine had already filed their opposing affidavits on 10 July 2023.

[b] Moving the Court to shorten the *dies inducie* would, in all probability, have been an academic exercise.

[c] A court has the power to condone non-compliance with its own Rules in the interests of justice.

For those reasons, I dismiss the point in *limine* taken.

I now turn to consider and determine the merits of this case.

ELECTIONS IN A DEMOCRACY

In a democracy, the assumption of public political office is based on the ballot. The law provides for procedures and institutions that manage electoral matters. Elections are

therefore the medium by which the general public chooses from those that present themselves as candidates for election into public political office. Election management institutions and systems must be fair, transparent, and of impeccable standards.

THE FACTS OF THIS MATTER.

The facts of this case are broadly speaking common cause and they are that;

COMMON CAUSE FACTS

The Nomination Court sat on 21 June 2023 in Court Room Number 5 at Tredgold Building. The Court opened at 1000 Hours and sat beyond 12 Midnight that day. There were many candidates applying to file their Nomination Papers for different political offices within the State of Zimbabwe. The Respondents were filing to contest for the National Assembly Seats. The 1st Respondent was the Nomination Officer on the day. By 1600 Hours, on 21 June 2023, the Respondents had not filed their Nomination Papers. The controversy is about where the Respondents were at 1600 Hours on 21 June 2023.

THE APPLICANTS' CASE.

The Applicants are registered voters in their respective constituencies in the Bulawayo Province. While they are deposed to individual affidavits, once you read one of those affidavits, the need to read the other evaporates. They state in their respective affidavits that the facts they depose to are within their individual knowledge. They also state that where they have no personal knowledge of the fact[s], they have verified the correctness of what they state. They proceed to capture the nub of their case in ***paragraph 21.4 [iii]*** as read with ***paragraphs 9.9 & 9.10*** of their affidavits wherein they state as follows hereunder;

"As at 16;00 pm [sic] on 21 June 2023, the … Respondents were not ready to submit their nomination papers but were busy trying to rectify the fatal defects pointed out earlier by the First Respondent in respect of their nomination papers, outside of the nomination court."

They proceed to say that there was therefore no factual or legal basis for the respondents to be permitted to submit their nomination papers after 1600 hours on the nomination date when the cut-off time had undeniably lapsed and for their continued consideration and acceptance by the 1st Respondent after the adjournment and during a non-nomination day in violation of the provisions of *s 46[7]* and *[8]* of the Act. It is their contention that a **"ZEC NOMINATION COURT 2023 NATIONAL ASSEMBLY SUBMISSION FORM FOR BULAWAYO PROVINCE 21 JUNE 2023"** bears testimony of what they are alleging.

RESPONDENTS' CASE.

A. CCC Sponsored Candidates

Like the Applicants, these Respondents deposed to a ***read one you have read all kinds of affidavits,*** the only difference being in the style of their layout. In their affidavits, they contend that the individual applicants are founding their cases on hearsay. In response to *paragraphs 9.9, 9;10,* and *21.4. [iii]* of the Applicants' Affidavits they stated as follows in part in their *paragraphs 35, 36 & 49;*

"35. I point out that my papers were not in disarray and I presented them in the nomination court at a time when that court was in session. I was in court.
36. I particularly point out that I submitted my papers well before 16;00hrs. When the nomination officer raised issues those were attended to and the papers presented [sic] for acceptance. They were duly and properly accepted.
….
49. I submit that my papers were presented before 16;00hrs. I was there and presented them. Any queries could by law be attended to even after 16;00hrs…."

THE SELF ACTORS' [Douglas Ncube HC 1359/23, Nqobizitha Ndlovu HC 1361/23, Zvikwete Innocent Mbano HC 1362/23 & Nompilo Bhebhe HC 1365/23] CASE.

Three out of four of them did not attend the hearings. They however had filed affidavits in opposition to this application. Once more it is in essence one affidavit adopted by different deponents. In the affidavit they individually in part state that;

On 21 June 2023, the Respondent submitted his/her nomination papers at the nomination court sitting at Bulawayo Magistrates Court and the presiding officer accepted them. He/she disputes that he/she did not submit his/her nomination papers in time. He/she was at the nomination court at 10 am on the day in question and is opposed to this application.

Mr. Zvikwete Innocent Mbano was the exception out of the four, in that he attended the hearing and elaborated on his affidavit, and gave flesh to his case. He told the court orally that he initially submitted his forms before 4 pm but his papers were short by one signatory/nominator. This then caused him to resubmit after 4 pm after rectifying the anomaly.

SAN POULUS MAPLANKA' CASE, 5TH RESPONDENT HC 1360/23

It is only this Respondent together with the self-actors that did not take any point in limine in these proceedings. He is also the only known aspiring Member of the Legislature who had the misfortune of being arrested at the nomination court.

His case is that he was never turned away by the nomination court. He submitted his nomination papers around 1530 Hours and were placed on the 1st Respondent's desk for processing. At 1600 Hrs he was present in the Courtroom and he remained in the courtroom until around 1640 Hours when the 1st Respondent caused his arrest by the Police for the reason that his phone rang inside the courtroom He included as part of his pleadings proof of his arrest. After concluding the business of his arrest, he returned to the Nomination Court room. He cannot explain how and why 2000 hrs is indicated on the Submission Form as being the time he submitted his nomination papers and would rather defer to ZEC and its officials in that regard.

ADELAIDE MHLANGA'S CASE, 4TH RESPONDENT HC 1365/23.

Her case is that she arrived at the Nomination Court at 0845 Hrs and remained there at all material times. She was never turned away. She was among the first persons to enter the Courtroom when the Court opened its doors at 10 am. The nomination officers confirmed that her papers were in order and she successfully made a payment of US$1000 and only left the Nomination Courtroom at 3 am when the results had been posted.

FRANK MLANGA'S CASE 4TH RESPONDENT HC 1368/23.

He filed probably the longest of the Affidavits filed in this case.

His case is that; He and others arrived at 0930 Hrs and camped outside the Nomination Court premises. The Courtroom was small and could only accommodate 10 people at a time. He left around 3 am the next day. He was never turned away to rectify anything. Minister Mthuli found him there in the afternoon and was served ahead of them who had been queuing by the Nomination Court from morning. By 4 pm he was in a queue in the Nomination Court waiting for his turn to submit his papers and the 1st Respondent could not shut the door for him. He was called in and sat for an hour inside the courtroom before he was served. The first Respondent took 5 minutes to check his papers and everything was in order. He used his Bank Card to Swipe and pay the nomination fee and the payment successfully.

ZEC'S RESPONSE & VERSION OF EVENTS

ZEC filed its response through the affidavit of the 1st Respondent and affidavits of ZEC staffers who were on duty with the 1st Respondent on the day in question. ZEC denies the allegations, by the Applicants. The 1st Respondent stated that he did not receive any nomination papers other than in terms of the law i.e. between 10 am and 4 pm on the nomination day and did not adjourn the nomination court beyond the prescribed nomination day. The nomination courtroom was very small and could accommodate between 12 and 15 people at a time. 12 people were allowed into the Courtroom at a time to present their nomination papers. The balance would queue outside and wait for their turn. At 1555 Hours he instructed a Police Officer deployed at the Nomination court to collect nomination papers from any person with nomination papers outside and bring them to him. The Police Officer complied and collected between 40 and 50 nomination papers and handed them to him. At 4 pm he declared the Court closed. He adjourned court at 2352Hrs to seek guidance from the Chief Elections Officer on how to deal with 4 nomination papers that were yet to be processed. He was advised to process them. According to the 1st Respondent, he had no interaction with any of the Respondents save when they came to submit their nomination papers and that was before 1600hrs. *Annexure B* is a register that records the times when the nomination forms were captured in the system by the Secretary and not the time when they were submitted by the candidates.

According to him, he acted lawfully at all times.

The affidavits of the staffers are broadly in support of the averments of the 1st Respondent.

ANALYSIS

This matter presents challenges regarding what exactly happened on 21 June 2023 at the Nomination Court for Bulawayo Province. That is so because one has to deal with bold allegations against bare denials and the affidavits of some of the parties contain uniform information, which in itself defies the usual and ordinary human experience While the respondents have challenged the applicants to prove their allegations, most of the respondents themselves have not taken the court into their confidence, they have not put forward a comprehensive version of what exactly happened. They have tended to be satisfied with denying the allegations. It would have made the court's work less difficult if the parties had given a blow-by-blow account of their allegations and defences.

It is a hallowed principle of our law that he who alleges must prove. A trier of fact must never lose sight of that, in his not-easy mandate to reconstruct the events and order to determine the dispute between the parties. It should not be lost to anything that a trier of fact does not and should not consider evidence in compartments. The evidence must be considered in totality.

As I indicated earlier in this judgment, the factual question is what happened or did not happen at 4 pm on the day in question in respect of each Respondent.

In summary and paraphrase, the law is that:

A candidate can file in terms of *Section 46 (3)* and *(4)* his or her nomination papers before the day proclaimed for the sitting of the Nomination Court. That filing is done with the Constituency elections officer.

A candidate can choose to file his or her papers with the Nomination Court on the day set specifically for that purpose per the Presidential Proclamation. That is what happened in this case. The filing must be done between 10 am and 4 pm on the date published. This is in terms of *Section 46(5)* to *(7)* of the Act.

If at 4 pm the candidate or his or her client election agent is present in the court and ready to submit his or her nomination papers the nomination officer is obliged to give him or her the opportunity to do so and consider his papers after 4 pm.

We revert to the facts.

I have been moved by the Respondents, invariably all of them save for the self-actor, that I accept the facts as pleaded by the 1st Respondent.

The 1st Respondent stated in his affidavit that he only interacted with the individual Respondents when they submitted their nomination papers. *Annexure B* shows when each Respondent submitted his or her nomination papers. *Annexure B* is a document compiled by public officials during the course of their duty in service of the State. Long after 4 pm the majority of the Respondents filed their nomination papers. The 1st Respondent and his staffers have said the times indicated in *Annexure B* are not what they purport to be. I find this explanation to be strange and improbable to the extent of being false. *Annexure B* speaks for itself. It does not need to be explained away by anyone including the 1st Respondent and his staffers. In all probability, the 1st Respondent comes up with this explanation upon realizing that this application has put him and ZEC on trial.

From the evidence available which is the 1st Respondent's affidavit where he says that he only interacted with the Respondents when they submitted their papers, *Annexure B*, the allegations, and the denials all taken together I come to the conclusion that the Respondents except one, submitted their nomination papers in violation of the law.

We now know that a Police Officer collected the nomination papers from the candidates. The Applicants' case is that the 1st Respondent violated the law. I have also been moved by both sides of the bar, to give *Section 46 (7)* and *(8)* of the Act the golden rule of interpretation.

The Nomination Court closed at 4 pm. Once it closed it was no longer sitting in open court and by the time the respondents sat before him they were not doing so in open Court. The separation of the papers from the Respondents through the medium of the Police Officer was unlawful. The statute says the candidate or his/her agent must be in court and ready to submit at 4 pm. It does not say that the candidate's papers alone must be in the courtroom.

The 1st Respondent, therefore, violated the provisions of the electoral Act in that regard as he also did close to midnight when he adjourned to 22 June 2022.

The case of Mr. Zvikewete Innocent Mbano is different from the rest. Mr. Mbano told the Court that he submitted his papers earlier than 4 pm. His papers had anomalies. He was told to go and rectify the anomalies. He did and returned after 4 pm. He was clearly covered by the proviso.

DISPOSITION

The application succeeds against all the nominated candidates who are still respondents in this matter except Mr. Zvikwete Innocent Mbano HC 1362/23.

IT IS DECLARED THAT;

1. That the decision of the 1st Respondent, sitting as a nomination court at Bulawayo on 21 and/or 22 June 2023 to accept the following Respondents' nomination papers and candidature in the elections scheduled to be conducted on 23 August 2023 was in contravention of Section 46(7) & (8) of the Electoral Act [Chapter 2;13].
2. That the decision of the 1st Respondent sitting as a Nomination Court at Bulawayo on 21 and/or 22 June 2023 to accept the following Respondents' nomination papers and candidature in the elections scheduled to be conducted on 23 August 2023 is declared null and void and is hereby set aside.

ACCORDINGLY, IT IS ORDERED THAT;

3. 1st Respondent is prohibited from including the names of the following Respondents in the preparation of ballot papers to be used in the general elections scheduled to be conducted on 23 August 2023.

WATSON NICOLA JANE

OBERT MANDUNA

ERECK GONO

DOUGLAS NCUBE

GIFT SIZIVA

SANPOULUS MAPLANKA

PRINCE DUBE

NQOBIZITHA NDLOVU

DESMOND MAKAZA

BAJILA COLLINS DESCENT

SICHELESILE MAHLANGU

DESIRE MOYO

ALELAIDE MHLANGA

NOMPILO BHEBHE

SURRENDER KAPOIKILU

RAPHAEL PASHOR SIBANDA

NTANDOYENKOSI MINENHLE GUMEDE

FRANK MHLANGA.

4. Respondents shall jointly and severally, pay the costs of suit.

5. The application against Zvikwete Innocent Mbano be and is hereby dismissed with costs.

6. The application against ADMORE GOMBA, NIGEL NDLOVU, SONENI MOYO, DINGILIZWE TSHUMA, STRIKE MKANDLA & ALBERT MHLANGA be and is hereby withdrawn.

NDLOVU J

27/07/2023

Messrs Cheda & Cheda Associates, applicants' legal practitioners.

Nyika, Kanengoni & Partners ,1st 2nd & 5th respondents' legal practitioners.

Messrs Tanaka Law Chambers, Respondents' legal practitioners.

Mathonsi Ncube Law Chambers, 4th respondent HC 1365/23's legal practitioners

Dube Legal Practice, 5th respondent HC 1360/23's legal practitioners

Mbidzo, Muchadehama & Makoni, 4th respondent HC 1368/23's legal practitioners