LOVEDALE MANGWANA
versus
SAVIOUR KASUKUWERE
and
ZIMBABWE ELECTORAL COMMISSION
and
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE; 7 & 12 July 2023

Judgment

Advocate Uriri & E Mubaiwa, for the applicant
Advocate M Ndlovu & Advocate Mutero, for the 1st respondent
Mr *T M Kanengoni*, for the 2nd respondent

MANGOTA J: The applicant, one Lovedale Mangwana ("Mangwana"), filed this application through the urgent chamber book. He filed it in terms of rr 59 (6) and 107 of the High Court Rules, 2021. He is moving me to grant him a declaratur and consequential relief. He premises his application on s 85(1) of the constitution of Zimbabwe as read with s 23 (3) of the Electoral Act [*Chapter 2:13*] ("the Act"). His suit is against one Saviour Kasukuwere ("Kasukuwere") whom he cites as the first respondent and also against Zimbabwe Electoral Commission ("the commission") and the Minister of Justice, Legal and Parliamentary affairs ("the Minister") who are respectively the second and third respondents herein. His bone of contention is that the commission which sat as the nomination court on 21 June, 2023 acted in error when it accepted Kasukuwere's nomination paper for election to the office of the President of Zimbabwe in the election which shall be held on 23 August, 2023. He insists that Kasukuwere whom he claims was out of Zimbawe for more than eighteen (18) consecutive months is, in terms of s 23 (3) of the Act, no longer a registered voter. He claims that, as a person who ceased to be a registered voter, Kasukuwere cannot vote in the forthcoming election and, because he cannot vote,

he cannot be voted into any public office let alone that of the President of Zimbabwe. He, accordingly, seeks a declaration which is to the effect that the decision of the nomination court which accepted Kasukuwere's paper as a candidate for election to the office of the President of Zimbabwe violated s 91 (1) (d) of the constitution of Zimbabwe as read with s 23 (3) of the Act. The decision, he alleges, is a violation of his rights as contained in s 67 (1) (a) and 67 (1) (d) of the country's constitution. He, in short, moves me to grant him an order which is to the effect that Kasukuwere cannot be a candidate for election to the office of the President of Zimbabwe in the 23rd August, 2023 plebiscite. He moves me, in consequence, to direct the commission and the Minister not to include the name of Kasukuwere in their preparation of ballot papers which will be used in the electoral process of 23 August, 2023. He moves me, further, to interdict Kasukuwere from holding himself out to the public and to the electorate in this country as well as abroad, physically or through any form of media, as a Presidential candidate for the forthcoming election.

Kasukuwere opposes the application. The commission and the Minister did not file any notice of opposition. The commission filed what it terms its notice to abide the decision of the court. It filed the notice on 30 June, 2023. My view is that the Minister is also of the same view. The non-attendance of the commission and the Minister leaves Mangwana and Kasukuwere in the question.

Kasukuwere raises five (5) *in limine* matters after which he proceeds to deal with the merits of the application. The preliminary issues which he raises are that:

i) the court does not have the jurisdiction to hear and determine the matter;
ii) the application is one for review which is disguised as a declarataur;
iii) Mangwana does not have what is normally referred to as the locus standi in judicio;
iv) Mangwana approached the court in terms of an incorrect law and in an incompetent forum – and
v) Mangwana violated the principle of subsidiarity.

He denies, on the merits, that he was out of his constituency and, therefore, out of Zimbabwe, for more than eighteen (18) consecutive months. He challenges Mangwana to prove the allegation which he (Mangwana) is making. He avers that he is duly nominated to be a presidential candidate in the forthcoming general election because he meets the legal requirements for nomination. He challenges Mangwana to state the manner in which his candidature would

affect Mangwana's constitutional rights. He insists that he has a local address where he resides and is domiciled. He claims that he left Zimbabwe on a temporary basis on medical grounds. He avers that he is a registered voter and that the commission verified his address in terms of s 23 (3) of the Act. It is his appearance on the voters' roll which makes him compliant with section 91 of the constitution of Zimbabwe, according to him. He alleges that he appears on the voters' roll of Ward 40, Pfura Rural District Council, Mount Darwin South Constituency. He gives Chiunye Primary School A as his polling station. He claims that Mangwana makes bare allegations regarding his absence from Zimbabwe. He contends that Mangwana has not established any right which the court should protect. Mangwana has not, according to him, shown that he is a registered voter in the ward or the constituency he alleges to be registered. He insists that his inclusion on the ballot paper does not interfere with Mangwana's right to vote. Mangwana, he claims, has not set out any substantial interest in the matter nor a factual cause to motivate the relief which he seeks. There is, according to him, no legal basis for the commission's conduct to be set aside and consequently, for his nomination to be quashed. He insists that the application does not meet the requirements of urgency. Mangwana, he avers, should have engaged the processes in terms of the Act well before 21 June, 2023. The conduct of Mangwana, he claims, is self-inflicted urgency. He alleges that the application is no more than Mangwana's attempt to curtail his right as it is provided for in s 67 of the country's constitution. He moves me to dismiss the application with costs which are at attorney and client scale.

The application succeeds.

ELECTION AND THE LAW

An election is, by its nature, a very emotive subject. Once it is at hand, people push and shove each other. They do so with one object in mind. They do so to either get into, or deny others from, entering or participating in the electoral race. More often than not the protagonists fail to find each other. Where such occurs, they take each other to court which will resolve the dispute between them. The court takes no side. All it does is to listen to the respective narratives of those who have approached it, the facts of each in particular, apply the relevant law to the same and render a decision which, in its view, accords with the applicable law.

In this jurisdiction, a judicial officer wears two hats during the period which leads onto, during and after an election. Depending on the facts of the case, the judicial officer can sit as an ordinary

court, or as an electoral court. The position which he/she assumes largely depends on the substance of the suit which the parties place before him/her. Because the case can fall into one law and its rules to the exclusion of the other law and its rules, it more often than not occurs that one litigant-plaintiff or applicant- files his/her case under one law and its rules which, from a prima facie perspective, are divorced from the substance of the case. Where the litigant does so, he/she creates fertile ground for his/her adversary –defendant or respondent- who will be quick to tell the court that the litigant's suit is misplaced. Misplaced in the sense that it should have been lodged in terms of the other law and its rules.

APPLICATION

What I stated in the foregoing paragraphs of this judgment applies to the current application whose substance is that of an electoral matter which has been filed in terms of the High Court Act and its rules and not in terms of the Electoral Act and its rules. Mangwana's adversary, for instance, remains of the view that the same should have been filed under the latter, and not the former, piece of legislation. Whether or not the stated matter reflects the correct position of the law depends, in a large measure, on the substance of the application which, as is evident from Mangwana's founding papers, is one for a declaratur and consequential relief. It is pertinent for me at this stage to deal with Mangwana's application. In doing so, I remain alive to the preliminary issues which Kasukuwere raises. Those technical issues are allowed by law. They are more often than not raised by the parties' legal practitioners who are schooled in substantive law as well as in the law of practice and procedure. The issues colour the case of the parties for better or for worse. Where they are properly raised, they have the effect of stifling the suit of the plaintiff or the applicant to a point where no further debate of it may be entertained by the court. They cannot therefore be wished away. They should be taken account of on the basis of the audi alteram partem rule which, simply considered, enjoins a court to hear both parties before it determines their dispute.

IN LIMINE MATTERS

JURISDICTION

The first matter which Kasukuwere raises on this aspect of the case is that I do not have the jurisdiction to hear and determine this application. Jurisdiction, simply considered, means the power or competence of a court to hear and determine a matter which has been placed before it. Various courts have various jurisdictions to hear a matter. Jurisdiction, in some cases, is conferred

upon a court by law-statute or otherwise. Section 171 (1) (a) and (c) of the constitution of Zimbabwe (No 20) Act of 2013 ("the constitution"), for instance, confers upon me the jurisdiction to hear and determine all civil and criminal matters throughout Zimbabwe as well as to decide constitutional matters except those that only the constitutional court may decide. A near example of where I have no power or competence to hear and determine a matter is, as counsel for Mangwana correctly submits, my competence to hear or determine a Presidential election dispute. That, it stands to reason and logic, remains a preserve of no court in Zimbabwe other than the constitutional court of Zimbabwe. It, in other words, falls into the exceptions category which are stated in the last part of paragraph (c) of subsection (1) of s 171 of the constitution.

It is on the strength of s 171(1) (a) and (c) of the constitution that I hold the view that I have the requisite jurisdiction to hear the application which Mangwana placed before me. Kasukuwere's argument would have held if Mangwana invited me to hear a Presidential election dispute. What he placed before me is not such. It is an ordinary urgent court application for a declaratur and consequential relief. I, accordingly, have the requisite jurisdiction to hear and determine the application both as a civil and a constitutional case. I do have that on the basis that it is filed in terms of the rules of this court. In holding the view which I hold on this aspect of the application, I take comfort in the decision which the Supreme Court made in *Guwa & Anor* v *Willoughby's Investments (Pvt) Limited*, 2009 (1) ZLR 368 (S) in which it is remarked that:

> "In terms of jurisdiction, the distinction between the Supreme Court and the High Court may be summarized as follows: Except where specifically empowered, the Supreme Court has no jurisdiction to hear or determine any matter and may only exercise powers in respect of an appeal in terms of the provisions of the Act and Rules of Court. The High Court on the other hand has the jurisdiction to hear all matters except where limitations are imposed by law. In other words, whilst the Supreme Court may do nothing that the law does not permit, the High Court may do anything that the law does not forbid".

Kasukuwere's assertion on this aspect of the case is opaque. Opaque in the sense that he does not state the actual reason why he denies me the opportunity to hear Mangwana's case. He seems to suggest that, because the application is election-related, I cannot, as a judge of this court, hear it. He also suggests that Mangwana should proceed in terms of provisions of the Act to review the decision of the commission and have it set aside, if such is his intention. His argument is misplaced. The application, though it has a bearing on the events of 21 June 2023 in terms of which he was nominated to stand for the office of president for Zimbabwe, is filed as an ordinary

urgent court application and not as an application which falls under the Act. It states in clear and categorical terms that it is an urgent court application which is filed in terms of r 107 of the High Court Rules, 2021 as read with s 85(1) of the constitution. It, accordingly, falls within my domain to hear and determine it. The in limine matter which he raises on me having, or not having, the jurisdiction to entertain the application is, therefore, without merit. It is dismissed.

APPLICATION IS A REVIEW DISGUISED AS A DECLARATUR

Whilst a review and a declaratur are intertwined, and at times, confusing to a student of law, the same are not synonymous. They are separate and distinct one from the other. A review seeks to impugn a decision which has been made by a court of inferior jurisdiction, a quasi- judicial office or an administrative authority. It has its domain in s 26 of the High Court Act as read with r 62 of the High Court Rules, 2021. In terms of the law of practice and procedure, an application for review states the grounds of review and the relief which the applicant moves the court to grant to him or her. A declaratur, on the other hand, relates to rights of persons qua persons. These may be existing, future or contingent in nature.

The Electoral Court upon which Kasukuwere places reliance is a creature of statute. Its powers are circumscribed in section 161 of the Act. The section reads:

> "(1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record.
>
> (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 persons or purporting to have been made under the 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.
>
> (3)……"

It is on the strength of the above cited subsections of s 161 of the Act that Kasukuwere insists that the application is one for review which is disguised as a declaratur. He submits, erroneously in my view, that the decision which the commission made in the exercise of its powers is judicial in character and therefore reviewable. The catch words, according to him, is that the Electoral Court has exclusive jurisdiction to hear appeals, applications and petitions in terms of the Act. He submits further that, because the dispute which Mangwana placed before me emanates

from the process that was conducted in terms of the Act, it is the Electoral Court and not the High Court that can deal with it.

What Kasukuwere fails to appreciate is that, as a creature of statute, the Electoral Court does not have the capacity to act outside the four corners of its enabling law. The law allows it to hear and determine applications, among other matters. It does not confer upon it the jurisdiction to hear urgent court applications. That matter is not provided for in the Act or in its rules. It is, however, present in the High Court Act and its rules. Hence the view that the argument of Kasukuwere on this aspect of the case is misplaced.

As Mangwana correctly submits, the contention that the application is a disguised review is difficult to comprehend. It is not such. It does not raise any grounds of review. It is filed in terms of r 107 and not r 62 of the rules of court. The fact that a review could have been brought does not detract from the fact that it is an application for a declaratur. It cannot be brought as a review under the Act because the same does not make provision for declaraturs. Further a review under the Act has no remedy for a declaratur. The remedy for such is under the High Court Act and its rules and not under the Electoral Act and its rules. The stated matter is moot. The in limine matter is, therefore, devoid of merit and it is dismissed.

LOCUS STANDI IN JUDICIO

Mangwana, Kasukuwere argues, does not have the locus to bring this application. Locus standi, simply defined, is the right of a person or group of people to bring an action before a court for adjudication. It is used interchangeably with terms like 'Standing to sue' or 'Title to sue.' It is a right to be heard by a court of competent jurisdiction. The right arises when a party to a case shows that he has interest sufficient enough to link him with a court's case and it stands that without showing such an interest, the court would not entertain his claim: Godwin N. Okeke, "Re-examining the Role of Locus Standi, the Nigerian Legal Jurisprudence" (2013) (6)(3) Journal of Politics and Law, 209. *Chijuka* v *Maduewesi*, (2011) 16 NWLR (Pt.1272) at 205 takes the definition of locus further than where Okeke leaves it. It states, on the same, that:

> "A plaintiff must show sufficient interest in the suit in order to have standing to sue. One criterion of sufficient interest is whether the party could be joined as a party to the suit? Another criterion is whether the party seeking the redress or remedy will suffer some injury or hardship arising from the litigation? If the judge is satisfied that he will suffer, then he must be heard".

From the contents of the above-cited case authority, it is evident that sufficient interest in a case is what gives the party locus standi to sue in any court of law. The doctrine of locus gives the court jurisdiction in a case. Where the party lacks the right to sue, the court would have no jurisdiction to hear his case. The locus standi of a plaintiff is therefore a precondition for the court to assume jurisdiction. Where the plaintiff does not satisfy this initial condition in the judicial process, he cannot go to the next stage of litigation-ie leading of evidence on the matter: Lawsan and Policy Review {2018} Volumw 1, p 132.

The above is the restrictive approach to the concept of locus. Under this approach, a person who does not have a sufficient interest, nor has suffered, or is likely to suffer specific or personal injury in respect of a matter has no locus to sue nor can he obtain a remedy in court in respect of a matter. The advantage of the approach is that it assists the court to ward off professional and meddlesome litigants from rushing to court to file frivolous and vexatious suits on matters that do not concern them. Its demerits are that it discourages public interest litigations and it has, more often than not, hindered people's rights of access to court.

On the other side of the scale is the liberal approach to locus. This is a wide, dynamic or less rigorous application of the doctrine of locus. Its aim is to promote as well as protect human rights and effective dispensation of justice. It enhances the protection and promotion of people's fundamental human rights, the rule of law, due process and access to justice by all and sundry. Lord Diplock discusses this approach in Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd, (1981) 2 WLR 723 at 740 in the following words:

> "It would, in my view, be a grave lacuna in our system of public law if a pressure group like the Federation or even a single spirited public tax payer were to be prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped".

The above-cited case authority resonates well with the new constitution of Zimbabwe in terms of which fundamental human rights, the rule of law and access to justice by persons of whatever status are guaranteed. It encourages the court to welcome public interest litigation in the human rights field so that no human rights case may be dismissed or struck off the roll of the court for want of locus standi. Human rights activists, advocates or groups as well as any non-governmental organizations, individual persons included, have a discretion to sue on behalf of himself or herself, or on behalf of any potential applicant. In human rights litigation, therefore, the

applicant may include any of the matters which are stated in section 85 of the constitution which, in extensor, provides as follows:

> "(1) Any of the following persons namely-
>
> a) Any persons acting in their own interests;
> b) Any persons acting on behalf of another person who cannot act for themselves;
> c) Any person acting as a member, or in the interests, of a group or class of persons;
> d) Any person acting in the public interest;
> e) Any association acting in the interests of its members
>
> is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights…."

It follows from the cited section of the constitution that a person such as Mangwana is accorded the right to approach the court on the allegation that his rights as contained in Chapter 4 of the constitution has been, is being or is likely to be infringed. Whether or not he will succeed will depend on the substance of his case and the importance to which the court, in its discretion, attaches to his case. His ability to approach the court is taken as given. The law accords the same to him. He cannot, in terms of s 85 of the constitution, have the door of the court closed against him. The court will be failing in its duty if it does so in the face of *Mawarire* v *Mugamba NO & Others*, CCZ 1/13 in which CHIDYAUSIKU C.J. endorsed the liberal approach to locus. The learned Chief Justice remarked in the same that:

> ",,,,,,,,,Certainly, this court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has engulfed them. This court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements".

The above expose" shows that, whilst Kasukuwere premises his argument on the restrictive approach which is applicable in civil cases which litigants bring to court on a day-by-day basis, Mangwana bases his application on the liberal approach which is more in consonant with the due observance of the rights of people as they are enshrined in Chapter 4 of the constitution. His narrative is simple and straightforward. It is to the effect that s 67 (1) (a) of the constitution confers upon him the right to vote. For him to exercise his right, the process which leads to the election must be within, and not without, the law. His further view is that the acceptance by the commission

of Kasukuwere's nomination paper taints the process with an illegality which, according to him, violates s 91(1)(d) of the constitution as read with s 23 (3) of the Act. It does so, because, he argues, in submitting his paper to the commission when he was/is not in Zimbabwe for a continuous period of eighteen (18) consecutive months, both the commission and Kasukuwere are in violation of s 23 (3) of the Act. Their conduct, it is his view, is inconsistent with s (2) of the constitution making the same to be null and void. He, in short, does not want to associate himself with what he terms an illegal electoral process which is a nullity. He wants an election which resonates well with the law. A process which is inconsistent with the supreme law of the land impinges on his right to vote, according to him. To redress the impingement therefore Kasukuwere's nomination paper should, he insists, be expunged from the voters' register. It should be expunged because, as a non-voter, Kasukuwere, in his view, cannot be voted into any public office let alone that of the President of the country. He cannot, goes the argument, ask the electorate to vote him into a public office when he himself cannot vote in the forthcoming election.

Kasukuwere's reliance on the restrictive approach to locus cannot assist him. The approach is more in sync with the day-to-day application of locus in civil and/or criminal cases than it is in consonant with the human rights discourse upon which Mangwana rests his application. Kasukuwere's averments which are to the effect that Mangwana does not have any direct and substantial interest in his nomination into the Presidential race are therefore of no moment. Equally all case authorities which he cited, amongst them *Ecocash Zimbabwe (Pvt) Ltd* v *RBZ*, HH 333/20; *Zimbabwe Teachers Association* v *Minister of Education & Culture*, 1990 (2) ZLR 48 (HC); *United Diamond Co (Pty Ltd* v *Disa Hotels Ltd & Anor*, 1972 (4) SA 409 (C) and a host of others which I have not mentioned in this part of the judgment, which support his restrictive approach to locus cannot take his case any further than where he has left it.

On a proper conspectus of this application of the correct principles of law to the issue of locus, therefore, Mangwana cannot be said not to have the requisite locus *standi in judicio* to approach me. He has that on the strength of s 85(1) of the constitution upon which he bases his application. He also has locus on the strength of *Mawarire* v *Mugamba* (*supra*) which, as is known, is binding on me. His locus to apply as he did cannot be wished away. It stands undisturbed and it cannot therefore be interfered with. The *in limine* matter on locus is therefore without merit and it is dismissed.

INCORRECT LAW AND INCOMPETENT FORUM

Kasukuwere does not come out clearly on what he intends to convey by this preliminary point. He seems to suggest that Mangwana should have proceeded in terms of the Act and its rules as well as in the Electoral court and not in this court. If my understanding of this in limine matter is on all fours with what I have stated, then I shall not repeat myself on the same. I shall not do so because, I traversed that aspect of the case extensively when I considered the *in limine* matter which he raised on the allegation that the application is one for review which is disguised as a declaratur. I gave reasons as to why the current application cannot fall under a review as well as why it should be considered in the form and substance that Mangwana filed it. I state, for the avoidance of doubt, that the application employed the correct law and is properly placed in the High Court, and not in the Electoral Court. The preliminary point is therefore devoid of merit and it is dismissed as well.

APPLICATION VIOLATES THE PRINCIPLE OF SUBSIDIARITY

Majome v *Zimbabwe Broadcasting Corporation & Ors*, CCZ 14/16 lays down the parameters of the above-mentioned principle. It is in that case more than in any other that the Constitutional Court of Zimbabwe discussed the principle in the following words:

> "According to the principle of subsidiarity, litigants who aver that a right protected by the constitution has been infringed must rely on legislation enacted to protect the right and may not rely on the underlying constitutional provision directly when bringing action to protect the right unless they want to attack the validity or efficacy of the legislation itself."

It is on the basis of the foregoing case authority that Kasukuwere insists that, before Mangwana resorts to the constitution, he should resort to the Electoral Act which provides a remedy to him. Kasukuwere states the principle aptly when he avers that, a litigant who avers that a right which is protected by the constitution has been infringed must rely on the legislation which is enacted to protect that right and may not rely on the underlying constitutional provision directly. Mangwana's remedy, he asserts, lies in the Electoral Act which, according to him, envisages a factual enquiry before his name may be struck off the voters' roll. He refers me to ss 23, 28 and 33 of the Act. Those, he insists, offer a remedy to Mangwana. He argues that it is incompetent for Mangwana to seek a relief which can be granted under some law without invoking a constitutional provision. He, in the mentioned regard, places reliance on *Mazibuko and Ors* v *City of Johansburg and Ors*, (2009) ZACC 28 in which it was stated that:

> "Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the constitution".

What Kasukuwere is saying, in short, is that Mangwana should not have filed this application in terms of s 85 (1) of the constitution. He should, he insists, have filed it under the Electoral Act and its rules. By filing it under the constitution, Mangwana, it is his view, violated the principle of subsidiarity.

Kasukuwere does not, however, identify a provision of any law in terms of which the violation of Mangwana's rights could have been brought. The sections he referred me to do not appear to support his case. Counsel for Mangwana discusses those sections of the Act in a succinct manner. He submits that:

i) Section 23 of the Act does not make reference to any process by which to complain against the decision of the commission.

ii) Section 28 of the same relates to the right of one voter to object to the retention of the name of another voter on the voters roll of the constituency in which the objecting voter is registered and, according to him, the facts of the present application do not make any accommodation for this provision;

iii) Section 33 of the Act deals with the powers of a voter registration officer to remove names from the voters roll and it therefore has no relevance to the decision of the commission or to Mangwana who is not a voter registration officer.

As is evident from the submissions of counsel for Mangwana, there is in the Act no subsidiary provision on the strength of which the point which counsel for Kasukuwere raises can find feet and be applied. In the absence of a provision which supports the case of Kasukuwere on this aspect of the application, Mangwana quite rightly relied on s 67 of the constitution to apply as he did. He cannot, in the circumstances, be said to have violated the principle of subsidiarity. His application was well within the law. The in limine matter is therefore dismissed.

SECTION 23 (3) OF THE ELECTORAL ACT.

Having disposed of the preliminary points which Kasukuwere raised, it is therefore pertinent for me to go into the raison de'etre of this application. The same is premised on the above section of the Act. It reads:

> " A voter who is registered on the voters roll for a constituency, other than a voter who has been registered in that constituency in terms of the proviso to subsection (1), shall not be entitled to have his or her name retained on such roll if, for a continuous period of eighteen months, he or she has ceased to reside in that constituency;
>
> Provided that nothing in this subsection shall prevent his or her name from being struck off such voters roll-
>
> a) On his or being registered in another constituency; or
> b) If he or she becomes disqualified for registration as a voter"

The law as stated in the section of the Act was made by the Legislature. The section does not spell out its purpose. The parties to this case did not address me on the mischief which the Legislature intended to cure when it enacted the law. They left that aspect of the case to conjecture. Yet it is a fact that each law which the law-maker promulgates aims to address a particular mischief which the Legislature would have observed at the time that it makes a law.

It is my considered view that, in providing as it did in s 23 (3) of the Act, the Legislature's intention was/is to allow only persons who are familiar with the issues which are in Zimbabwe the right to vote or to be voted in an election. It considered that the person's knowledge of the issues informs the way in which he or she would, if elected into any public office, define the correct path for the people who are in this country to follow. It, in short, preferred persons who are abreast with the challenges which the country is facing to vote or to be voted into a public office to persons who view Zimbabwe's challenges from the window of their computer or from some newspaper which circulates in the area where they are staying. It considered that a person's absence from his constituency or from Zimbabwe for a continuous period of eighteen months or more to be sufficient for one not to be abreast with issues which obtain in Zimbabwe. It, in its wisdom or lack of it, placed emphasis on the point that such a person as remains outside his or her constituency, or fortiori his or her country, should be disenfranchised. Disenfranchised because his or her vote, let alone his or her occupation of a public office, would not add any value or benefit to the people of Zimbabwe. So strong was its view on this matter that it repeated the same law in paragraph (a) of subsection (2) of s 33 of the Act. This reads:

> ".(2)……, if a voter registration officer is satisfied that a voter registered on a voters roll-
>
> a) Has been absent from his or her constituency for a period of twelve months or longer and is not a voter who was registered with the approval of the Commission in a constituency in which he or she was not resident; or
> b) …….

The voter registration officer shall remove such voter's name therefrom"

Sections 23 and 33 must, in my view, operate in tandem. The only difference between them, as I see it, is that with the former, an application such as the present one can be entertained by the court. It opens an avenue to an applicant, *in casu* Mangwana, to approach the court as well as to object to the retention of Kasukuwere's name on the voters roll or to enter into the political race to be elected into a public office in Zimbabwe on the ground that his election when he allegedly was out of the country for more than eighteen consecutive months impinges on Mangwana's right to vote in a lawful electoral process. The latter provision, s 33 of the Act, confers power on the voter registration officer to *mero motu* remove the name of the voter from the voters roll in circumstance where he is satisfied that the voter was/is absent from his constituency for twelve month or more. He removes it after he has made the necessary inquiry which is stipulated in the section and has satisfied himself that the voter has been absent from his constituency for twelve month or more.

Whether or not Kasukuwere violated s 23 (3) of the Act is a matter of evidence. Mangwana alleges that he did. He, accordingly, bears the onus to prove the allegation which he is making. Onus is the duty which is cast upon the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim, or defence, as the case may be: *Pillay* v *Krishna & Anor*, 1946 AD 946 at 952-3. The cardinal rule on onus is that a person who claims something from another must satisfy the court that he is entitled to it: *ZUPCO Limited* v *Parkhorse Services*, SC 13/17.

Onus is, however, not a static phenomenon. It shifts between the parties depending on what one alleges against the other and the latter's response to the same. *In casu*, Mangwana makes a statement which, in the main, is to the effect that Kasukuwere was not in Zimbabwe, and therefore in his constituency, for a period which is in excess of eighteen continuous months. The assertion which he makes is in the negative. He is, therefore, not required to prove it at law. He, in this regard, takes refuge in the learned words of Van Der Linden who remarked in The Institutes of Holland, (H.Juta Translation) (3rd edition) p 155 that " a negative is generally, on account of its nature, incapable of proof".

Kasukuwere, for some inexplicable reason, snatches the onus from Mangwana to himself. He challenges Mangwana to challenge him to prove that he was not out of Zimbabwe for more

than eighteen consecutive months. He poses the challenge in para 22.3 of his notice of opposition wherein he avers that 'if Mangwana desires further proof, he can provide it'. He confirms, in para 22.6, that he was once out of Zimbabwe on a temporary basis when he went for treatment. He does not, however, show, as he offers to do, the date(s) that he left Zimbabwe and/or the date(s) that he returned to Zimbabwe. Nor does he attach to his notice of opposition a doctor's report which indicates that he was/is indeed receiving medical attention from outside Zimbabwe. All what he does is to depose to his opposing affidavit not from Zimbabwe but from South Africa. The observed matter confirms that, even as the application is being heard, he is not in Zimbabwe and/or in his constituency as well as that he will return to Zimbabwe at some future but unknown date.

The statement which Kasukuwere makes in para 22.6 of his opposing papers throws him at the feet of Mangwana's averments more than it takes him out of the same. He makes an admission that he once left Zimbabwe for medical reasons. He, however, does not place me into his confidence on that aspect of the case. He refuses to disclose matters which relate to his absence from Zimbabwe. He assumes the obligation to prove his own side of the case but does not do so at all. The bare denial which he makes when he took upon himself to prove his own side of the case cannot take his notice of opposition any further than where he leaves it.

Kasukuwere is the holder of his own passport. This was issued to no one else but to him. A passport is a national document which is specific to its holder. It is not accessible to Mangwana or to any person who has no business with it. Nothing, therefore, prevented Kasukuwere, its holder, from availing a certified copy of the same to me as a way of showing the veracity of his assertions. Surely as a person who is aspiring to the highest office on the land, he could easily have dispelled the omnious allegation as a result of which he would have acquitted himself well.

He would, by the stated process, have shown the date(s) that he left Zimbabwe going for treatment as well as the date(s) that he returned to Zimbabwe and, therefore, to his constituency. His failure to produce his passport leaves his case hanging in the balance, so to speak. His non-disclosure of the correct circumstances of his side of the case leaves me with no option but to draw an adverse inference against him. Against him because he has at his disposal what it takes to unravel the truth of what is alleged against him. I, on the basis of the foregoing, therefore, find that Kasukuwere was out of Zimbabwe, and therefore out of his constituency, for a continuous period

of more than eighteen months. The finding is premised on his admission that he once left Zimbabwe for medical grounds as read with the place from which he prepared and deposed to his opposing papers as read together with his statement which is to the effect that he can provide proof of the fact that he did not remain outside the country for more than eighteen consecutive months which he does not prove. This is a fortiori the case because, even where Mangwana challenges him in para 17 of the founding affidavit, to prove that he was not in Zimbabwe for more than eighteen months which precedes his nomination into the presidential race, he offers to prove the same but does not do so, for reasons which he does not advance. He has no difficulty to show papers which prove that he went outside Zimbabwe to be treated. Nor does he have any difficulty to show that he was, indeed, treated and/or that his passport shows that he left and returned to Zimbabwe at some point in time between 31 July, 2018 and the date that he filed his nomination paper with the commission. He has his passport on him and the doctor(s) who attended to his medical condition, if he was, would not have refused to give him the report which relates to his treatment. His bare denial and challenge to Mangwana to prove the negative which he made cannot assist him at all.

URGENCY

What constitutes urgency is not the imminent arrival of the day of reckoning. A matter is urgent if, at the time the need to act arises, the matter cannot wait: *Kuvarega* v *Registrar- General,* 1988 (2) ZLR 189. Where an urgent matter is allowed to wait, when it should not, it would be within the applicant's right to suggest to the court not to bother acting on his application when the harm which he seeks to prevent would have occurred.

It follows, from the foregoing paragraph that when a matter is filed through the urgent chamber book and is placed before a judge for his or her consideration, the judge should quickly assess the case of the applicant as he or she reads through the same and formulate an opinion on it. Where he remains of the view that the same does not meet the requirements of urgency, he or she expresses his or her opinion on the application and does nothing about it unless and until the applicant persists that he or she be heard in which case the judge will accord him or her the opportunity to do so. An application which, in the opinion of the judge, has some urgency enjoins the judge to attend to it with the minimum of delay. The judge, therefore, allows the application to jump the que-ue of all matters which are filed before it so that it is heard earlier than them to

avert the harm which the applicant perceives he or she would suffer if his or her case is allowed to wait its turn in the normal roll of the court.

Mangwana filed this application through the urgent chamber book. He had a certificate of urgency prepared and filed with it. His view is that his case which relates to Kasukuwere's nomination as a presidential candidate in the forthcoming election should be treated with urgency. With urgency because processes which lead to preparation of the ballot paper and other election-related procedures are at hand. Kasukuwere's position should therefore be arrested before it goes further than the permissible point, according to him. His narrative is that he treated his cause of complaint with the urgency that the same deserved. He alleges that he approached the court within three working days of the event which he is impugning. He avers that he did not sit on his laurels but has been diligent in pursuing this matter. He insists that a delay in deciding the case will render the whole process what, in legal parlance, is referred to as a brutum fulmen. This, according to him, occurs where the application is heard and determined after the election has been completed. He, accordingly, moves me to grant him an urgent hearing.

Kasukuwere's position is to the contrary. He argues that the application does not meet the requirements of urgency. He insists that Mangwana was at liberty to activate the necessary processes to have him struck off the roll (sic). He claims that Mangwana knew from the beginning that he (Kasukuwere) was a registered voter. He insists that Mangwana should have engaged the processes in terms of the Act well in advance. He submits that the application is self-inflicted urgency because, according to him, Mangwana had a long time to cause his removal from the list of voters if such was the latter's intention. Mangwana, he insists, has no interest on whether or not he is a registered voter. All what Mangwana wants, he avers, is to scuttle his presidential race and curtail his right under s 67 of the constitution.

Kasukuwere's argument is, in my view, misplaced. He is not having me believe that Mangwana should have acted in a vacuum. Mangwana, it stands to reason and logic, did not know which persons would throw their hats into the ring to request the electorate to vote for them into this or that office. He would therefore have played the role of a person who concerned himself with nothing which is of substance if he was to engage himself in having all the names of all persons whom he suspected would want to enter into the electoral race removed from the roll of voters as Kasukuwere is suggesting. Such an exercise on Mangwana's part would have portrayed

him as a person who embarks on a fishing expedition with no end-in-sight and, therefore, meaningless. It was only the acceptance of Kasukuwere's paper by the commission which placed Mangwana's mental state in focus. It is at that time more than at any other that he made up his mind to complain to the commission. The need to act on the part of Mangwana did not arise prior to 21 June, 2023. It arose on the mentioned date. Mangwana's application is not, therefore, self-created urgency. It, in the circumstances of the same, meets all the requirements of urgency.

GENERAL NOTICE 1128 OF 2023

Kasukuwere's assertion on this aspect is that the current application has been overtaken by events. He submits, in his Heads, that his name has already been gazetted together with the names of others who have entered into the race for the office of the president of Zimbabwe. He insists that the court can neither ignore nor undo his name from the gazette.

Mangwana argues that the government notice is not law. It is, according tom him, a notice which advises the electorate as well as all and sundry that persons whose names appear in the notice filed nomination papers with the commission. He poses the question that, if the notice did, who made that law. He submits that the gazetting of Kasukuwere's name is not what creates law. He argues that the commission which accepted Kasukuwere's paper does not create law. Gazetting, he insists, does not create a legislative act or a judicial act.

The Government Notice which the Chief Elections Officer published in terms of Section 106 of the Act is relevant. It reads:

> "It is hereby notified in terms of section 106 of the Electoral Act (Chapter 2:13) that at the close of sitting of the Nomination Court which sat on Wednesday, 21st June, 2023 the candidates listed in the Schedule were duly nominated for election to the office of President"

I cannot agree more or less with the view which Mangwana holds of the general notice. If such was law, as Kasukuwere would have me believe, then one would be left to wonder what law, properly defined, is. Law, as s 2 of the Interpretation Act [*Chapter 1:01*] provides, emanates from any enactment and/or the common law of Zimbabwe. Judicial decisions also create law. Apart from the mentioned sources of law which are regarded as given, all law-making institutions follow a particularly defined procedure to generate a law. No law comes into place without any process being followed. Gazetting of persons' names in some notice cannot be one of the ways through which a law is made. The appearance of Kasukuwere's name in the gazetted Government Notice cannot be construed to suggest that his name is, by law, sealed in such a manner that it cannot be

undone. Nothing binds me on this aspect of the case at all other than to inform me and the people of Zimbabwe at large of the process which the commission conducted on 21 June 2023. The point which Kasukuwere raises on this aspect of the case is without merit. It is dismissed.

DISPOSITION

On the date that the application was heard, counsel for Mangwana moved me to admit into the record the amended draft order which he attached to the answering affidavit. He advised that the motion was with the consent of Kasukuwere's counsel. The latter confirmed the same to have been the case. The amended draft order was, therefore, made part of the record and it replaced Mangwana's original draft order.

I heard and considered the case of both parties. I am satisfied that the applicant proved his case on a preponderance of probabilities. The application is, accordingly, granted as prayed in the amended draft order.

Nyahuma's Law Golden Stairs Chambers, applicants' legal practitioners
Mhishi Nkomo Legal Practice, first respondents' legal practitioners
Nyika Kanengoni and Partners, second respondents' legal practitioners