THE MOVEMENT FOR DEMOCRATIC CHANGE (TSVANGIRAI)
and OTHERS
versus
THE ZIMBABWE ELECTORAL COMMISSION
and
CHIEF ELECTIONS OFFICER

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 18, 21 & 31 July 2023

Electoral Appeal in Terms of s 46(19) (b) of the Electoral Act [*Chapter 2:13*]

L Madhuku with *T Sengwayi*, for the appellants'
T Kanengoni, for the 1st and 2nd respondents'

KWENDA J:

Introduction

Before me are 88 appellants. The first appellant is the Movement for Democratic Change (Tsvangirai) described in its affidavit of evidence as a political party recognised as such since its formation in 1999. It does not say anything to establish its juristic personality. The affidavit was sworn to by one Douglas Togarasei Mwonzora who averred that he is the first appellant's president and that he is authorised to act for the first appellant by its resolution dated 22 June 2023. He claims that the resolution is attached as annexure 'A' at page 6 filed on 25 July 2023. I did not find the said resolution at page 6. What I found, instead, is an undated extract of a resolution of the standing committee of a political party known as Movement for Democratic Change which is not the entity before me. Annexure 'A" therefore identifies itself with a different organisation named as the Movement for Democratic Change whose standing committee sat on 23 July 2023 and resolved to approach the Electoral Court for redress in view of an alleged refusal by first respondent to accept payment at its head office of nomination fees for organisation's candidates to contest the general election to be held in Zimbabwe on 23 August 2023. As opposed to giving authority to Douglas Togaraseyi Mwonzora to represent the first appellant, the document appoints

one Dr Tapiwa Mashakada or his Deputy Dr Julius Musevenzi as signatories of the Movement for Democratic Change. Annexure 'A' does not, therefore, give Douglas Togaraseyi Mwonzora to act for the first appellant as claimed by him.

Douglas Togarasei Mwonzora describes the other 87 appellants as members of the first appellant and its parliamentary candidates in the forthcoming election. He avers that they were disqualified as a result of the inability by the first respondent to pay nomination fees. The 87 appellants have submitted very brief affidavits confirming that they are the first appellant's parliamentary candidates for the various constituencies named in their respective affidavits and that they were present at their respective nomination courts waiting for their nomination fees to be paid by the first appellant at the first respondent's head office.

The appellants cited two respondents. The first respondent is the Zimbabwe Electoral Commission, which is an independent commission tasked with running electoral processes in Zimbabwe. The second is the first respondent's Chief Elections Officer who is in charge of the first respondent's operations.

The appellants filed a joint notice of appeal on 25 June 2023 in terms of s 46 (19)(b) of the Electoral Act [*Chapter 2:13*] as read with rules 10 and 11 of the *Electoral (Applications, Appeals and Petitions) Rules,* 1995, *Statutory Instrument* 74 A, 1995.

The appeal is opposed by the respondents in terms of r 12 of the *Electoral (Applications, Appeals and Petitions) Rules*. The respondents opposed the appeal in a reply filed on 28 June 2023. They objected to the appeal which they described as fatally and incurably defective on various grounds. These are they. The notice of appeal does not state the place at which the nomination courts sat, the names of the persons who presided and the dates of the decisions appealed against. This is critical especially because the appeal is intended to relate to 81 different potential candidates, each with an individual cause of action and appearing before nomination courts. The appeal is against the alleged decisions to disqualify the '81 different' appellants yet it does not identify the nature and terms of the decision appealed against. I observe that the respondents are actually mistaken about the number of the appellants. That is understandable because one has to physically count the names to ascertain their number since the appellants are not numbered. The respondents also aver that the appeal is objectionable because the chamber application referred to in it is not sufficiently identified. The grounds of appeal said to be contained in an urgent chamber

application which has not been identified. The grounds of appeal should be on the face of the notice of appeal. The pairing of the notice of appeal with an extraneous chamber application means the notice of appeal dos not speak for itself. The notice of appeal is contrary to the provisions of s 46 (19) of the Electoral Court which affords the right to appeal to candidates whose nomination papers are rejected by the person presiding at the nomination court. The first appellant is not a candidate whose nomination papers were rejected. And so has no right of appeal in terms of s 46 (19) of the Electoral Act. The appellants are not designated in that they are just listed and the word 'appellants' appears at the end of the list.

The respondents opposed the appeal on the merits but I will not advert to the merits at this stage since I have to dispose of the respondents' objection to the appeal, first. In the event that I uphold the objection that will result in me striking off the appeal.

This matter came up for hearing on 21 July 2023. Rule 14(d)I of the *Electoral (Applications, Appeals and Petitions) Rules* provides that the appellant, the person who presided at the nomination court concerned, the Registrar General and any other person who filed a reply to the notice of appeal shall be entitled to be heard at the hearing. The parties opted to file written submissions and evidence. The appellants rely on the affidavit filed by Douglas Togaraseyi Mwonzora which I have already referred to. The respondent filed their own affidavits of evidence and submissions.

Findings

Somehow the appellants are not numbered in the heading of the Notice of Appeal and in all subsequent processes filed by them. Only the respondents are numbered. The failure to number the appellants is inconsistent with the practice and procedure in this court.

The Notice of Appeal describes itself as an appeal, against the decision of the respondents on 21 June 2023 to disqualify them as parliamentary (the error is not mine) 'election'. It is possible the appellants wanted to say they were disqualified as parliamentary candidates. There is therefore a patent error in the appeal. It is however not up to me to assume and correct the notice of appeal on the basis of my assumption.

The notice of appeal states that the grounds of appeal are contained in a separate chamber filed separately before this court. The appeal also purports to incorporate the chamber application. The procedure of incorporating the chamber application as part of a notice of appeal is not provided

for in r 11 of the *Electoral (Applications, Appeals and Petitions) Rules*. Such procedure would also mean that the grounds of appeal would not be clear and specific.

The notice of appeal has an inscription, in bold letters, which reads as follows:

> **"(NB this appeal is subsequent and compliments the urgent chamber application filed herein. It is filed to fulfil the requirement that the candidate may need to make an appeal)"**

The appellants have bound, together with this appeal, a chamber application which the first appellant filed in this court on the 23rd of June 2023 separately under Case Number EC 5/23. This is despite that the chamber application is not quoted in the heading or body of the notice of appeal as a reference file. Case Number EC 5/23 is a chamber application filed by the first appellant as the only applicant. The grounds of that application are that the first appellant (the only applicant therein) was unfairly precluded from paying nomination fees for its parliamentary candidates due to administrative blunders of the respondents. It seeks redress within 7 days' failure of which it its candidates' names will not appear on the ballot papers thereby preventing them from being candidates in the forthcoming plebiscite. In the urgent chamber application, the first appellant therefore seeks a provisional order wherein, in the interim, an order directing the respondents to accept the nomination fees for its candidates and on the return date, an order rescinding the disqualification of its candidates, directing the respondents to accept payment of their nomination fees and directing the respondents to include their names on the ballot papers. The respective reliefs sought in the appeal before me and the chamber application which is not before me are different. In addition to that the parties are different. It is therefore irregular to bind the processes together. The appellants do not have leave of this court to attach copies of the chamber application. I have studied Part IV of the *Electoral (Applications, Appeals and Petitions) Rules* and note that it does not make provision for what the appellants have done.

Rule 10 of the *Electoral (Applications, Appeals and Petitions) Rules* provides that in appeals regarding nomination of candidates, the term "appeal" means an appeal by a candidate in a parliamentary election and "appellant" shall be construed accordingly. Rule 11 which governs the content and form of a notice of such appeals provides that such appeal shall be instituted by means of a written notice. The notice must contain the following:-

(a) the date on which, and the place at which, the nomination court concerned sat; and

(b) the date of the decision which is the subject of the appeal; and

(c) the terms or nature of the decision which is the subject of the appeal; and

(d) the grounds of the appeal; and

(e) the exact nature of the relief sought; and

(f) the address for service of the appellant or his legal representative.

It is common cause that the notice of appeal before me does not name the nomination courts where the decisions appealed against were made. It does not cite or name the persons who presided at the nomination courts. The appellants omitted to name and serve the candidates, if any, who were declared to be nominated.

Sub rule (2) of r 11 of the Rules requires the appellant to cause the notice instituting an appeal to, as soon as possible, after the noting of the appeal, to serve the notice on the person presiding at the nomination court concerned, the Registrar General and, where practicable, on every person who was declared to have been duly nominated or elected at the close of the sitting of the nomination court. It is common cause that the appellant did not serve the persons who presided at the nomination courts. They also did not state whether there were any candidates who were successfully nominated or declared elected at the nomination courts. The various omissions constitute irregularities for no compliance with the rules.

Section 46(19) of the Electoral Act provides that if a nomination paper has been rejected or regarded as void by a nomination officer, the nomination officer shall give reasons for his or her decision. The affected candidate shall have the right of appeal from such decision to a judge of the Electoral Court in chambers. Such judge may confirm, vary or reverse the decision of the nomination officer. It is common cause that the first appellant is not a candidate. Secondly the rest of the appellants have not averred that their nominations were rejected by persons presiding at the nomination courts where they claim to have been in attendance.

The appellants seek the following reliefs in this appeal:-

a) That their disqualification from standing as parliamentary candidates be set aside

b) That the rejection of their nomination be set aside

c) That their nominations be accepted subject to the payment of the fees

The reliefs sought are dissimilar to the reliefs sought in the first appellant's urgent chamber application which the appellants have bound together with this appeal. Only the first respondent is a party to the chamber application and the rest of the appellants are not. The decision by the

appellants to unilaterally bind and place the chamber application before me as part of this appeal was, therefore irregular. It is trite that matters may only be consolidated by order of court. In any event an appeal and a court application (petition) are different processes and it is not conceivable that such processes which are governed by different procedures may be consolidated.

The applicant is, at best, a juristic person. As stated above it did not plead its legal capacity to sue. It does not seek to be a candidate in the forthcoming elections to be held in August. It has no reason to appear before the nomination court. It cannot, therefore, be the subject of any decision of the nomination court. It is therefore improperly before me.

The first appellant gave written evidence through Douglas Togaraseyi Mwonzora. He has no authority to represent the rest of the appellants. He would have no personal knowledge of what transpired at the various nomination courts. Actually, none, among the various, 87 appellants attempted to submit nomination papers and none says their nomination papers and payment were rejected at the nomination courts. The respondents are not nomination courts. None, among the 87 appellants, has cited or served the persons presiding at the nomination courts. That is an irregularity because the persons who presided at the nomination courts and the other candidates are required by law to be heard.

The papers before me were prepared by a law firm for which the president of the first appellant is the principal. They appear to have been prepared by a person who has no legal training or knowledge of the law. Other than that, it is difficult to understand the level of incompetence exhibited in preparing the appellants' appeal.

It is advisable for a party who has a real and substantial interest in the outcome of a dispute to outsource the preparation of court papers, even if he or she has the necessary training to do because, more likely than not, his or her emotional involvement is likely to impair his or her skill and the care required in legal drafting. The procedural flaws affecting this matter are such that the respondents' grounds for objecting to this appeal are all undeniable.

This appeal is unprocedural for failure to comply with the rules of practice and procedure. Mr Lovemore *Madhuku* who was briefed to appear for the appellants, tried his best, but he was visibly embarrassed at the level of ineptitude.

In the result I order as follows:

1. The respondents' objection to the appeal is upheld.
2. The appeal is struck off.

KWENDA J:……

Mwonzora & Associates, appellants' legal practitioners
Nyika, Kanengoni & Partners, first & second respondents' legal practitioners