HB 111/18
HC 1051/18

MOVEMENT FOR DEMOCRATIC CHANGE

Versus

THOKOZANI KHUPE

And

OBERT GUTU

And

ABEDNICO BHEBHE

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 17 & 24 APRIL 2018

Urgent Chamber application

Advocate L. Nkomo & J. Tshuma for the applicant
Professor L. Madhuku & K. Ngwenya for the respondents

BERE J: From the papers filed in this urgent chamber application there is unmistakable savage internecine conflict within the Movement for Democratic Change political party. The conflict has hugely been brought about by the leadership vacuum that followed the death of the party's founding President Richard Morgan Tsvangirai on 14 February 2018.

The conflict has manifested itself in the emergence of two rival factions, one led by Mr Nelson Chamisa who is represented by Mr Morgan Komichi who has deposed to the founding affidavit in this application. Mr Nelson Chamisa has assumed the position of party President. The other faction is led by one Dr Thokozani Khupe who claims that by operation of law deriving from the MDC constitution, the death of the founding President of their party thrust her to the position of the Acting President of the MDC-T.

Ironically each of the two factions claim to derive their entitlement or legitimacy to the leadership of their party from provisions of their party's constitution. A reading of the filed

papers suggests that each of the two factions is claiming supremacy over the other. The factional narrative projects a sorry state of affairs.

On 9 April 2018 the applicant under the name of Movement for Democratic Change represented by Mr Morgan Komichi filed an urgent chamber application seeking an interim interdict seeking to bar the respondents from:

> "1.1 Unauthorised use or exploitation of the registered trademarks of the applicant being its name "Movement for Democratic Change" or its derivatives – "MDC or MDC-T, and the applicant's political logo.
> 1.2 Passing off themselves or any organisation or entity which they belong to as the applicant."

The basis of this application was basically that, the respondents being former members of the applicant, whose membership had been terminated through due process if regard is had to the party's constitution, had no lawful right to continue using the party name, logo and symbols. The second point raised in the application was that the respondent had stubbornly refused to recognize the decisions of the applicant's National Council to appoint Mr Nelson Chamisa as initially the Acting President of the party following the death of the late Morgan Tsvangirai, and his ultimate elevation to be the substantive President of the applicant.

The respondent were alleged to have exhibited unaccepted defiance to the decisions of the MDC's National Council by settling up parallel party structures of their own entity and in the process continued to use and exploit the applicant's registered trademarks, *viz,* the applicant's name, logo, symbols and any derivatives thereof without the applicant's authority.

Upon being served with the application the respondents strenuously opposed it and raised four points *in limine* which in the course of this application I asked both counsel to deal with before the matter could be argued on merits, if at all.

The first point raised *in limine* was that the applicant was not properly before the court because those who brought it lacked legitimacy to do so as the first respondent was the duly recognized Acting President of MDC, having assumed the position by operation of law upon the

death of the late Morgan Richard Tsvangirai on 14 February 2018. The 1st respondent cited Article 9.21.1 of the MDC Constitution, which constitution the respondents attached to their notices of opposition.

All the three respondents challenged the applicant for deliberately failing to attach the applicant's constitution and argued that such failure was fatal to their application.

The 1st respondent supported by the two other respondents argued that it was only herself who had the legitimate authority to represent the MDC and not the applicant who had chosen to subvert the MDC Constitution.

The second point *in limine* was that this application lacked urgency as contemplated by the rules of this court and that therefore it should not be allowed to jump the queue and be given preferential treatment over other matters pending determination in this court.

It was also contended by the respondents that the application brought by the applicant was exclusively about an alleged infringement of a trade mark and that section 72 of the Trade Marks Act (Chapter 26:04) had not been complied with, and that the application was therefore not competent under the law.

The other point which was raised *in limine* by *Professor Madhuku,* for the respondents was that the rules on urgency do not provide for the filing of an answering affidavit, and that if the court finds to the contrary, then the court must specifically make a finding that the answering affidavit had introduced completely new evidence which rendered its acceptability incompetent. Alternatively respondents argued that the court allows the respondents to file responses to the new issues raised by the answering affidavit.

Finally it was stated as a point *in limine* that the interim relief and the final relief sought in this application are substantially the same and that it was not allowed at law to do so.

I propose to deal with the points *in limine* in greater detail.

Is the MDC, as the applicant properly before the court?

As already highlighted the MDC, as a political organisation is currently torn apart by the two factions which have adopted two diametrically opposed positions with regard to the interpretation of their party's constitution. Each of the factions alleges that it is in power because the party constitution as perceived by it supports the actions that it has taken. Dr Thokozani Khupe alleges (and I must say in passing that she appears to be on very firm ground) that by operation of the party's constitution she is the legitimate Acting party President and that she is the one driving the MDC processes for the time being until a substantive leader is appointed in terms of the party's constitution.

Mr Nelson Chamisa, on the other hand, alleges that he is in power because he has been so mandated by the MDC National Council. It could be argued that this is equally a compelling argument. I take no firm position on the arguments raised for reasons that I will explain later.

But in their opposition to the urgent application Dr Khupe makes the following enlightening observations:

> "21. The point is this, in the absence of a determination of who between the Movement for Democratic Change that I am leading and the group represented by the deponent to the founding affidavit is the lawful Movement for Democratic Change, this application cannot be determined (*sic*).
> 22. This application is a back-door attempt to hoodwink the court into declaring the group represented by the deponent to the founding affidavit to be the lawful Movement for Democratic Change. That cannot be because that issue requires separate and specific proceedings that have to resolve the complex issue."[1]

Nothing in my view could be further from the truth. There is a constitutional crisis in the MDC party and that constitutional crisis must be urgently resolved. That resolution is the only one that can confer legitimacy to one of the competing parties to the leadership of the MDC.

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[1] Page 8 paras 20 – 21 of record.

Until legitimacy to the leadership of the MDC is confirmed through a court process or some other competent means, like arbitration, none of the MDC factions can claim to be the lawful authority of the movement. This is my simple sense of dispute resolution. If parties are in disagreement it makes sense to put that dispute before an impartial body to give guidance or lasting resolution to the conflict.

Issues of legitimacy in the MDC cannot be resolved on the altar of popularity or lack of it. Those who desire to get the legitimacy to the leadership of the MDC must demonstrate an insatiable appetite for constitutionalism. The framers of the MDC constitution had in mind to have the party's affairs regulated by that constitution. There should never be any room for the subversion of that constitution by any of the factions or any member of that party. Were that to happen, it would be a serious violation of the rule of law.

Sadly, none of the factions seem to be eager to bring this MDC leadership crisis for adjudication before an impartial body. The issue that has haunted the MDC is not about which constitution is applicable – incidentally the applicant in this case placed before me for consideration the constitutional application filed by the 1st respondent with a view to demonstrating that the parties are agreed on which constitution is applicable. I was requested to consider further submissions in this regard. I did not consider it necessary because the really borne of contention between the parties is not centered on which constitution is applicable, but on how the constitution has to be interpreted since the parties are not in agreement on interpretation.

This brings me to another allied point. Has this court been requested to intervene in determining this issue of legitimacy in this application? Sadly no. I am being asked to determine the narrow issue of the alleged infringement of a trade mark. That is not the issue that is haunting the MDC as a political organisation. As correctly observed by Professor Madhuku this application has been prematurely brought. I entirely agree.

The issue of a trade mark is a peripheral one that should resolve itself once the substantive issue of legitimacy to the MDC leadership is resolved. Whichever faction is

determined to be the legitimate leader to the MDC throne will automatically lay claim to the party's trade mark. For these reasons I will not waste time delving into the implications of section 72 of the Trade Marks Act (Chapter 26:04). Suffice it to say that there is persuasion in the argument that any application for a trade mark recognition must fully comply with the peremptory requirements of the Trade Marks Act (Chapter 26:04).

Let me deal with this other fundamental issue that has been thrown into this application. Has Dr Khupe violated the MDC Constitution by choosing not to have anything to do with the leadership of Mr Nelson Chamisa whom she regards as having violated the MDC Constitution? Throughout her papers filed in this case, and even in both the electronic and print media Dr Khupe has made it clear that the MDC faction led by Mr Nelson Chamisa has subverted the MDC Constitution and that she and the other respondents regard him and his sympathizes as rebels to the MDC and that their acts as far as she is concerned are null and void. If this is her attitude and conviction can she be condemned for refusing to associate with the applicant's faction. Is this not one of the situations that LORD DENNING had in mind in the celebrated case of *Macfoy* v *United Africa Co. Ltd*[2] where the learned Judge remarked as follows:

> "If an act is void, then it is in law a nullity, it is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Although it is sometimes convenient to have the court declare it to be so. And every proceeding founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Dr Khupe's insistence on adherence to constitutionalism, if her reading of their constitution is correct, must be hailed by all fair minded persons, and spare her the condemnation. The dispute must simply be put to adjudication in a proper forum.

There is sufficient persuasion in the argument that the applicant may not be properly before the court.

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[2] (1961) 3 ALL ER 1169 (PC)

Is this case urgent?

The issue of urgency has been long settled in our jurisdiction. As correctly noted by *Advocate Nkomo,* in the case of *Gwarada* v *Johnson & Ors*[3].

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The existence of circumstances which may, in their very nature, be prejudicial to the applicant is not the only factor that a court has to take into account, time being of the essence in the sense that the applicant must exhibit urgency in the manner in which he has reacted to the event or the threats, whatever it may be."

I entirely agree with this characterization of an urgent chamber application. The circumstances must demonstrate that the case cannot wait and that the urgency as not been self created. See *Kuvarega* vs *The Registrar General & Another*[4] and a host of other similarly decided cases.

The view that I take is that we can only talk of urgency in this case if the legitimacy to the leadership of the MDC has been confirmed in favour of any one of the competing factions. If that has not been done the issue of urgency remains illusory.

In any event, I think it is not compelling enough for anyone to argue that the emergence of the two factions in the MDC has been an overnight development. The court will take judiciary notice of the fact that simmering conflict became public knowledge from the time the late MDC leader appointed two male vice Presidents despite the existence of Dr Khupe who had been elected the Deputy President of the MDC at the party's congress in 2006, 2011 and 2014 (as stated and uncontroverted in the opposing affidavit).

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[3] 2009 (2) ZLR 159 (H) at p 160D-E

[4] 1998 (1) ZLR 168 (H)

It cannot be the position that the appointment of Mr Nelson Chamisa as substantive President of the MDC by the MDC National Council triggered urgency. It can also not be said with a convincing tongue that the decision by Dr Khupe not to associate herself with those she believes are assaulting the party's Constitution brought about the filing of this urgent application.

The long and short of it is that there is absolutely no urgency in this matter as the applicant has not been confirmed by an impartial body to be the rightful heir to the MDC throne and its *locus standi* in even bringing this application is therefore questionable. Like I have said the applicant and the respondents are in equal standing until a proper determination as regards their status in MDC is made by an independent and competent body.

The issue that has created these two factions in the MDC is of fundamental importance and it must be resolved urgently. I am not in any way suggesting that the urgent resolution requires an urgent chamber application. Given the serious factual disputes between the two factions (apparent in their papers) it is doubtful if this dispute can be resolved by way of an application. The detailed filed answering affidavit suggests to me that the parties might wish to consider action procedure as opposed to application procedure given its natural limitations. Whichever way the two factions choose, they must bear in mind that the solution to their conflict requires sober minds and not sharp tongues.

Is there similarity between the interim relief sought and the final relief desired?

Even if this matter had been properly placed before me for determination especially on the proper interpretation of the MDC constitution, the applicant was going to encounter serious challenges with the clear similarities in wording of both the interim remedy sought and the final remedy desired.

The issue of providing a remedy which is not a replica of the interim relief sought has been exhaustively dealt with in this court and I did not think it required the reopening of further debate.

In dealing with this issue, *Advocate Nkomo* for the applicant sought to urge the court to adopt the relaxed approach commented upon in passing by my brother MATHONSI J in the recent case of *Mabhena* v *Mbangani*[5] where he made the following observation.

> "… I must hasten to state that an application cannot be defeated merely on the basis of a defective draft order. The draft order is, after all, the wishful thinking of the applicant. It is for the judge or the court to grant the order and therefore he, she or it should be able to grant whatever order would have been proved in the application".

It is true that at the end of it all it is the court that grants an appropriate order and that order for all intents and purposes becomes the court's order.

Be that as it may, I do not believe that counsel is reading into the didactic remarks made by my learned brother to mean a passport to poor draughtsmanship on the part of legal practitioners or that the court must take over this function from the legal practitioners.

The issue of provisional orders that are different from final remedies is a practice built on rich precedent in this jurisdiction and it ought to be respected for it makes great sense in that the applicant must not be placed on perpetual leave once he/she gets the interim relief. An applicant who gets interim relief must feel compelled to obtain a final remedy/order. See the *Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Pvt) Ltd & Another*[6], per GARWE JA.

Is it competent to file an answering affidavit in an urgent chamber application?

Given my conviction in this case, I do not think it is necessary to consider in detail the appropriateness or otherwise of filing an answering affidavit in an urgent chamber application. I must however make the observation in passing that an urgent chamber application by its very nature represents a departure from strict adherence to court rules. It might be necessary to give all the parties involved adequate platform to express their respective positions before the court

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[5] HB-57-18 at p 4

[6] 2013 (2) ZLR 309

makes a determination. I say this with great respect to the position taken by my brother Judge, MANGOTA J in the case of *Imperial Refrigeration* v *Willard Mabvuwu*[7] where he took the view that the filing of an answering affidavit was not appropriate in an urgent chamber application. What is probably pertinent in this case is for me to reaffirm the position of the law as observed by my sister Judge MAKONI J in the case of *Patson Murindagomo and Ors* vs *The National Chairperson of Movement for Democratic Change*[8] when she noted, by borrowing a leaf from Hebstein and Van Winsen, *The Civil Practice of the High Courts of South Africa*, 5th Ed at page 440 where the authors state that:

> "The general rule which has to be laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or to deny."

The respondents in this case were called upon to respond to the allegations as contained in the founding papers which for some reason had the party's constitution conspicuously excluded. When served with the respondents' opposing papers which had a constitution attached, they then sought to belatedly attach the party's constitution yet their case was supposed to be founded upon the constitution. An answering affidavit can never be mistaken for a founding affidavit. There is sense in the argument raised by *Professor Madhuku* that the non-filing of the party's constitution in the founding papers was fatal to the applicant's application. Fortunately for the applicant this case is not going to be determined on this technicality.

Taking into account all the issues that I have highlighted, this case cannot go beyond the preliminary points raised by the respondents. I uphold the points *in limine*.

The application is dismissed with costs.

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[7] HH 697/2016

[8] HH 635/17

Atherstone & Cook c/o Webb, Low & Barry incorporating Ben Baron & Partners, applicant's legal practitioners
T.J. Mabhikwa & Partners, respondents' legal practitioner