TENDAI SAIMONI
and
KNOWLEDGE BURANDA
versus
ZIMBABWE ELECTORAL COMMISSION
and
MINISTER OF JUSTICE N.O.
and
THE PRESIDING OFFICER NOMINATION COURT- CHITUNGWIZA- MACHONA N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 22 and 27 June 2018

Urgent Chamber Application

B Mushamira with *M Mandevere*, for 1st and 2nd applicants
LB Madiro, for 2nd respondent
TM Kanengoni, for 1st and 3rd respondents

TAGU J: The first applicant Tendai Saimoni is a member of the MDC-Alliance a political grouping of opposition parties. He is desirous to contest as a candidate in the local government elections in respect of Ward 3 in ST Mary's in Chitungwiza. On or about the 14th of June 2018, the date on which the Nomination Court convened, he duly prepared his nomination papers and gave them to his chief election agent one Knowledge Buranda who is the second applicant so that he could submit the same to the Nomination Court on behalf of the first applicant at the Chitungwiza Municipality Hall. As fate would have it, Knowledge Buranda was accosted and attacked by two thugs one Alexio Ngwengwe and Devine Kanyama who subsequently confiscated first applicant's Nomination papers and tore them before he could submit them. A police report was made and the thugs were arrested. The first applicant had to start preparing fresh set of nomination papers from scratch. Time defeated him and got the better of the day. When he later attempted to file fresh set of nomination papers at 1630 hours the Nomination Court refused to

accept his papers as it had already closed at 1600hrs though it was still processing and vetting papers for those who had filed theirs timeously.

The applicants proceeded to this Honourable Court six days later on 20 June 2018 and submitted an urgent chamber application seeking an order compelling the first respondent to accept his nomination papers arguing that the delay to file his papers was not as a result of his fault. They submitted that if the relief they were seeking is not granted the applicant will be left without any relief and his constitutional right enshrined in s 67 of the Constitution of Zimbabwe to stand as a candidate in elections will be infringed. They submitted further that the remedies provided for in terms of the Electoral Act [*Chapter 2.13*] are purely criminal remedies against criminals who snatched his papers and do not facilitate the standing of the first applicant as a candidate for the local government elections to be held on the 30th July 2018 effectively meaning that there will be no candidate standing on the MDC- Alliance ticket for the local government elections in ward 3 St Marys Chitungwiza.

The applicants are now seeking the following relief-

> **"TERMS OF FINAL ORDER SOUGHT**
>
> That you show cause to the Honourable Court why a final order should not be made in the following terms-
>
> 1. 3rd Respondent be and is hereby ordered to receive, consider and adjudicate on 1st Applicant's nomination as an aspiring candidate for Ward 3 ST Mary's Chitungwiza.
> 2. Each party to bear its own costs.
>
> **INTERIM RELIEF GRANTED**
>
> Pending the determination of this matter, the Applicant is granted the following relief:-
>
> 1. 1st Respondent be and is hereby directed to facilitate the lodging and filing of the 1st Applicant's nomination papers as an aspiring candidate for Ward 3 ST Mary's Chitungwiza.
> 2. Each party to bear its own costs.
>
> **SERVICE OF PROVISIONAL ORDER**
>
> This provisional order may be served on the Respondents by the Deputy Sheriff or the Applicant's legal practitioners."

The first and third respondents opposed the application. The second respondent who is the Minister of Justice, who was represented by LB Madiro, indicated that he had no issues and would abide by the court's decision. While opposing the application on one hand, on the other hand the

first respondent wrote a letter to the applicants advising the applicants to petition the court on the issue. The letter read as follows:

> "We regret to advise that the nomination courts have already sat and the Commission is unable to intervene.
>
> Kindly petition the courts for redress."

AD URGENCY

The applicants urgent the court to treat this matter as extremely urgent more so because the first respondent is in the process of compiling a final list for the duly nominated candidates who will be allowed to stand for election and once the list has been published soon the first applicant will be effectively deprived of any conceivable remedy. For this proposition the applicants referred the court to the case of *Kuvarega* v *Registrar -General & Anor* 1998 (1) ZLR 188 (H) where CHATIKOBO J had this to say:

> "What constitutes urgency is not only 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. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules…."

The counsel for the applicants further outlined the requirements for the mandamus as stated in the cases of *Makoni* v *Makoni; Timoth Sean White* v *Zenzo Ntuliki & Ors* HB-147/15 such as:

(1) *Prima facie* right;
(2) An injury actually committed or reasonably apprehended, and
(3) The absence of similar protection by an ordinary remedy.

***PRIMA FACIE* RIGHT**

It was submitted that the first applicant's right is provided for in terms of ss 67 (3) (b) and 67 (2) (b) and (c) of the Constitution of Zimbabwe. The first applicant has a right to participate and to be elected, and if elected to hold such office. The court being the custodian of the Constitution was urged to guard that right lest the society would be thrown into oblivion. In this case the first applicant's rights were interfered with in a criminal way. For that reason the applicant reported to the police.

PREJUDICE

It was submitted that if the relief being sought is not granted the first applicant will not stand for elections. The political party he is representing MDC- ALLIANCE will go without a candidate for the ward in question. If this is allowed to happen the two prejudices would be irreversible. It was submitted that the first respondent has since responded to the applicants and what it means is that the applicants can approach the court for redress since the first respondent has no way under the Electoral Act to assist the first applicant. In their view the Electoral Act itself has a clear lacuna in providing redress under circumstances faced by the applicant hence the court has to act to assist the applicant.

ABSENCE OF SIMILAR PROTECTION OR REMEDY

It was submitted that there is no other remedy available to the first applicant to ensure he stands for election except coming to this court for redress. The first applicant said he is aware that s 133B of the Electoral Act speaks to intimidations which were faced by the first and second applicants on the day the Nomination Court sat. This section provides criminal sanctions which are not adequate, satisfactory or sufficient remedies. Since this court has full original jurisdiction and where there is no clear Statute that oust the jurisdiction of the High Court, the High Court can act anyhow. See *Moyo* v *Windingi* HH-168-11.

In opposing the application the first and third respondents submitted among other things that the relief sought by the applicants is not competent at law as it offends the peremptory provisions of the Electoral Act [*Chapter 2.13*] and the principle of separation of judicial and executive powers as enshrined in the Constitution of Zimbabwe. In their opposing affidavit they submitted as follows:

> "3.2. In terms of s 46 (7) of the Electoral Act, [*Chapter 2.13*], provision is made thus:
>
> **"No nomination papers shall be received by the nomination officer in terms of subsection (6) after four o'clock in the afternoon of nomination day or, where there is more than one nomination day for the election concerned, the last such nomination day:**
>
> **Provided that, if at that time a candidate or his or her chief election agent is present in the court and ready to submit a nomination paper in respect of the candidate, the nomination officer shall give him or her an opportunity to do so."**

They averred that the applicants arrived at the nomination court and firstly attempted to submit their papers at 1430hours. The first applicant's nomination papers could not thus be accepted by the third respondent at the time they were presented, and the applicants were not saved

by the proviso to s 46 (7). The persons that were still being entertained after 16:00 were those persons as are covered by the proviso to s 46 (7). They went on to say:

> "3.5 The cut off time for filing nomination papers being peremptorily stipulated in terms of statute, it is not within the purview of this Honourable Court to sanction a departure from such statutory stipulation as would be the effect of the relief that is sought by the applicant herein.
>
> …….
>
> 3.7 By praying for the 1st respondent to be compelled to receive the 1st applicant's nomination papers on a day other than the day set in the Proclamation made by the President of the Republic, the applicants effectively ask the Honourable Court to arrogate to itself the constitutional mandate of the President of the Republic viz, the setting of nomination dates. This contrary to the principle of separation of powers set out in s 3(2) (e) of the Constitution and would amount to directing the 1st respondent to breach the law."

In support of their submissions that the relief being sought by the applicants is unlawful the respondents quoted extensively the remarks of MALABA CJ in the recent case of (1) *Zimbabwe Development Party (2) Voice of the People* v (1) *President of the Republic of Zimbabwe (2) Speaker of Parliament (3) Chairperson – Zimbabwe Electoral Commission CCZ*-3-18 where the Chief Justice said:

> In *Minister of Lands* v *Paliouras; Minister of Lands* v *Wiggill* 2001 (2) ZLR 22 (S), CHIDYAUSIKU ACJ (as he then was) at 28 G-29A stated as follows:
>
> > "The respondents' contention that the appellant is prohibited from exercising any of the above powers which he is expressly authorized by Parliament to exercise raises the fundamental issue of jurisdictional competence. Can a court interdict the appellant from acquiring land for redistribution in accordance with explicity provision of an Act of Parliament? Not only is this a debatable point, but the wisdom of such an interdict is questionable. The interdiction of patently lawful conduct can hardly further the rule of law. That issue however is not before the court and will have to wait determination another day."

The determination of the issue came in *Airfield Investments (Pvt) Ltd* v *Minister of Lands, Agriculture and Rural Resettlement and Others* 2004 (1) ZLR 511 (S). The Court said at 518B-E:

> "When the appellant lodged the application for the interim relief before the court *a quo* the acquisition of the land by the State was a fait accompli, all rights of ownership having been extinguished on its part. The acquiring authority having done everything it was obliged by law to do to acquire the land for resettlement purposes, there was no outstanding act against the performance of which the acquiring authority could be temporarily interdicted. An interim interdict is not a remedy for prohibiting lawful conduct. At the time the first respondent made the

> order by which the appellant was deprived of ownership of the land, he acted lawfully in the exercise of the power conferred upon him. In the exercise of the
>
> power conferred upon him. Subsection (1) of s 8 of the Act gave him the power to make the order and its effect reflected the legal consequences of that lawful act.
>
> To suspend the effects of the order of acquisition lawfully made and intended by the legislature would amount to striking down the Act of Parliament or rendering it completely ineffective, thereby creating a vacuum pending determination of the constitutionality of the impugned sections of the Act. That would be improper for the court to do because the clear intention of the legislature was that the an order of acquisition, properly made in terms of subs (1) of s 8 of the Act, should have effect of depriving the owner or occupier of the of the rights of ownership in the land and vesting them in the acquiring authority."

GOWORA JA weighed in on this principle in *Zimbabwe Revenue Authority* v *Packers International (Private) Limited* SC 28/16 where, at pp16-17 of the cyclostyled judgment, she held:

> "An interdict serves to protect a right not an obligation. The papers filed on behalf of Packers did not identify any right that ZIMRA had threatened. The court *a quo* found as a matter of fact that ZIMRA had acted in terms of the law in assessing VAT which remained unpaid. Once this finding was made including the further Finding that the agent had been appointed lawfully, there was no lawful Justification at law for suspending payment for a week."

I am fortified in this view by the remarks of the learned DEPUTY CHIEF JUSTICE MALABA in the Mayor Logistics case supra to the following effect

> 'The subject of the application is not the kind of subject matter an interdict, as a Remedy, was designed to deal with. An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a prima facie right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right. It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a prima facie right. It is also axiomatic that the prima facie right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an Interdict against lawful conduct. *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511 (S); *Stauffer Chemicals* v *Monsato Company* 1988 (1) SA 89 *Rudolph & Another* v *Commissioner for Inland Revenue & Others 1994 (3) SA 771."*
>
> The applicant accepted in the founding affidavit that the respondent acted lawfully in enforcing the obligation to pay the tax notwithstanding the noting by it of the appeal to the Fiscal Appeal Court against the correctness of the assessment. It did not allege any unlawful conduct on the part of the respondent which would justify the granting of an interdict. It also accepted that at the time the respondent put in place measures to collect the tax, the provisions of ss 36 of the VAT Act and 69 (1) of the Income Tax Act were binding on it. That means that the applicant had no prima facie

> right in existence at the time not to pay the amount of tax it was liable to pay to the fiscus. Sections 36 of the VAT Act and 69 (1) of the Income Tax Act protect a duty, not a right."

As correctly submitted by Mr *Kanengoni*, the decision by the third respondent to refuse to accept the applicant's nomination papers outside the time limit was lawfully made. The counsel for the applicant conceded that the President made a proclamation and the sitting of the nomination court was lawfully done, and the first respondent fulfilled its obligations in that regard, hence what is before the court is not a request to interfere with lawful duties of anybody, but the issue as it is, is that the law as it has been narrated by both applicants and first respondent, seems not to lay or provide for a clear relief other than the insufficient relief in s 133B of the Electoral Act, hence the court is motivated to act in favour of the first applicant.

ANALYSIS

The application before me is one for interdictory relief to compel first and third respondents to accept the applicants' nomination papers outside the sitting of the nomination court as prescribed in the Proclamation issued by the President. It is therefore a case that raises the jurisdictional competency of this court to make such an order. The question to be asked is whether or not there is jurisdictional competency vested in this court to grant the relief that is being sought?

In order to answer the above question it is important to trace the legal origin of the nomination day set by the President in his proclamation. It arises from provisions of s 144 (1) of the Constitution of Zimbabwe, which enjoins that the President must proclaim an election. Section 157 (1) (f) of the Constitution provides that there must be an electoral law that makes provision for the conduct of elections for provincial and council elections. The electoral law is the Electoral Act [*Chapter 2.13*] in terms of s 38 of the Electoral Act, it is provided that a proclamation made under the Constitution shall provide a day for the sitting of the Nomination Court. All these functions are by the Constitutional dictate placed with the sole preserve of the Executive branch of our Government through the President. No other branch of Government, judicial or legislative is given power to make a proclamation in terms of our law.

It is common cause the proclamation came and set the 14th of June 2018 as the nomination day. Electoral Act s 46 (7) then prescribed in peremptory terms that no nomination papers shall be received by the nomination officer after 400hrs of the nomination day. The law does not give a discretion except in terms of the proviso to that subsection which does not apply to this matter.

The first applicant avers that his first presentation of nomination papers to the Nomination Officer was at 430hrs on the nomination day. It was therefore in contravention of clear statutory stipulations and a refusal to accept those nomination papers was a lawful act by the Nomination Officer. The question then becomes, can this Honourable Court by way of an interdict mandate that that lawful refusal be altered so that applicant can file his nomination papers on a day other than a day set in the proclamation?

With respect, it is the order the Chief Justice said it was incapable of being granted by the court outside jurisdiction of our courts including the High Court. To illustrate this point we need to look at the effect of the order sought before me. Its effect is simply this- this Honourable Court if it grants the relief will have set an additional sitting of the Nomination Court outside what is presented in s 144 of the Constitution, and therefore in contravention of the principle of separation of powers which is clearly set out in s 3 (2) (e) of the Constitution. That would be an unlawful order. While this court enjoys inherent jurisdiction it enjoys that inherent jurisdiction in furtherance of the Rule of law. This finds expression in s 165 (1) (c) of the Constitution.

Inherent jurisdiction is not power to make orders against a statute. See Airfielf case *supra*. To make orders against a statute would be to subvert that statute, and this court is not given inherent jurisdiction to do so.

The applicant accepts this position if one looks at para 24 of the founding affidavit which clearly reads as follows:

> "By this I understand that the High Court is the temple of justice which can adjudicate on any matter as long as there is no statute stipulating to the contrary."

Coming back to the requirements of the relief being sought, these must exist contemporaneously and the absence of one means the relief cannot be granted. The applicant characterizes his right under s 67 of the Constitution. This is not the right at play. The question is whether applicant in pursuing his 67 right has a core relative right to file his nomination papers outside the proclamation. That is the relief he is seeking. As I demonstrated there is no such right and the matter must therefore fail. This is a matter completely legislated, and not an instance where judicial intervention is called for. What is needed is interpretation of s 46 of the Electoral Act.

As for the letter written by the first respondent and placed before this court, that letter is not inconsistence with the position the Electoral Act takes, it advises the applicant of the law that once

the nomination is done, it is done. The fact that the letter says one may approach the court does not endorse it with jurisdiction. It is simply saying if you are not satisfied with our answer, you can hear it from the court. In this case there are civil and criminal allegations that arise and it cannot be the basis for saying the court has jurisdiction. The law simply says there is no jurisdictional competency in this matter.

The legislature in its wisdom enacted s 133B of the Electoral Act which deals specifically with remedies available to a person prevented from submitting the papers on the basis of violence or intimidation. In enacting that was cognizant of s 46 (7) of the Act. The expression of one thing means exclusion of the other applies. The legislature intended s 46 (7) to be the final word on the issue of filling nomination papers and there is no prejudice to speak of when one asks for an unlawful relief. Even urgency cannot attach to that relief. For these reasons the application must be dismissed.

IT IS ORDERED THAT

1. The application is dismissed.
2. Each party to bear its own costs.

Kadzere, Hungwe & Mandevere, applicants' legal practitioners
Nyika, Kanengoni & Partners, 1st and 3rd respondents' legal practitioners
Civil Division of the Attorney- General's Office, 2nd respondent's legal practitioners