

MOVEMENT FOR DEMOCRATIC CHANGE

And

PRISCILA MISIHAIRAMBWI-MUSHONGA

Versus

PROFESSOR ARTHUR MUTAMBARA

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 16 NOVEMBER & 15 DECEMBER 2011

A.P. De Bourbon for the applicants

A. Muchadehama for the respondent

Opposed Court Application

KAMOCHA J: The applicants sought and were granted a provisional order on 16 February 2011 whose interim relief was to the following effect:

“That pending the determination of this matter, applicant is granted the following relief.

1. That respondent is interdicted from purporting to be the president of the Movement for Democratic Change.
2. That the respondent is interdicted from exercising any function vested in the president of the Movement for Democratic Change.
3. That respondent is interdicted from in any way interfering with structures and organs of the party.”

In their amended final order they sought the following:

Pending the finalization of case number HC 612.11 in Harare:-

- (a) That respondent be and is hereby interdicted from purporting to be the president of the Movement for Democratic Change and from interfering with its structures and organs as well as from exercising any functions or powers vested in the president of the Movement for Democratic Change.
- (b) That respondent be and is hereby interdicted from attending any meeting of whatever description of Principals in the Inclusive Government of Zimbabwe or of

- any regional or international body in the capacity of Principal in the inclusive Government of Zimbabwe.
- (c) That respondent be and is hereby interdicted from performing or exercising any function or power vested in the president of the Movement for Democratic Change and/or principal in the Inclusive Government; and
 - (d) Respondent is declared not to be the president of the Movement for Democratic Change.
 - (e) Respondent is to pay costs.”

As can be seen from the final order being sought, this is an application for an interdict and a declaratur that the respondent Professor Arthur Mutambara is no longer the president of the Movement for Democratic Change – “the MDC”.

The founding affidavit of the applicants was deposed to by the second applicant, Priscila Misihairambwi-Mushonga in her official capacity as the Secretary-General of the MDC, having been duly elected at the party’s third National Congress held at Harare on 8 and 9 January 2011. She had been duly authorized to make the affidavit in terms of a resolution passed by the National Council of the MDC on 10 January 2011.

She stated that the Movement for Democratic Change was a political party and a body corporate in terms of its constitution and was first established in September 1999.

The third congress of the party was held in Harare on 8 January 2011. The congress was attended by 4 428 delegates representing party structures from all the 12 provinces of the party in Zimbabwe. A new leadership for the party was elected. The respondent did not stand for election at the congress but fully participated in the proceedings.

Since the respondent did not avail himself for re-election as the party president Mr Welshman Ncube was elected president of the party with his deputy as Edwin Mushoriwa, Goodrich Chimbaira and Frank Chamunorwa were elected National Chairman and deputy respectively while Priscila Misihairambwi-Mushonga and Moses Mzila Ndlovu were elected Secretary-General and deputy Secretary respectively to name but a few top officials of the party. A total of 80 office bearers of the party were elected.

On 7 January 2011 the MDC National Council held a meeting whereat 10 members of the National Council walked out. The 10 members later that day around 5pm delivered a petition to the then Secretary-General of the party objecting to the holding of the congress, which was due to commence the next day alleging that there were some irregularities. The ten were subsequently joined by three others and filed an application in the High Court in Harare in

case number HC 612/11 wherein they seek an order setting aside the congress and its resolutions. The MDC has opposed the application and has filed its opposing papers.

On 23 January 2011 the party's National Standing Committee, met in Harare and, *inter alia*, resolved to reshuffle its cabinet members including the position of Deputy Prime Minister to the position of Minister of Regional Integration and International Cooperation. The party's new president, Professor Welshman Ncube, was reassigned from the position of Minister of Industry and Commerce to the position of Deputy Prime Minister. The deponent was reassigned to the position of Minister of Industry and Commerce. The decisions were allegedly taken in terms of section 20.1 of the Global Political Agreement as read with the Constitution of Zimbabwe Amendment Act No. 19.

The decisions made by the National Standing Committee were communicated to Professor Arthur Mutambara – "the respondent" on the same day. The respondent allegedly then requested the new president of the MDC to make representations on his behalf to the party's Standing Committee to allow him to remain in the position of Deputy Prime Minister until June 2011 to enable him to complete the programmes such as the branding programme he alleged he was still working on. His request was conveyed to the National Standing Committee which did not accede to it.

Welshman Ncube swore to an affidavit confirming that the respondent had indeed requested him to convey the request on his behalf.

The deponent averred that on 20 January 2011 the respondent approached her at her house and asked her in her new capacity as Secretary-General of the party to convene a meeting with the new president of the party to discuss his (respondent's) role in the Inclusive Government. He allegedly made a variety of suggestions which would enable him to remain as Deputy Primary Minister but which would also enable the new president of the party to play his role as the principal under the Global Political Agreement. She agreed to convey the suggestions to the new president of the party, which she did. She averred that at no time during those discussions did respondent question or dispute the validity of the congress or the elections of the party's leadership. She was in fact surprised why he had suddenly turned round to say he did not recognize the very leadership from which he had frantically sought to be allowed to remain in his position as Deputy Prime Minister until June 2011.

More astounding things were still to come from the respondent. On 7 February 2011 he issued a press statement in which he advised that he was not prepared to be re-assigned, that he would remain in his position as Deputy Prime Minister and that in view of the fact that court proceedings had been launched by others challenging the legality of the congress he would not

be prepared to accept the authority of the new national leadership pending the outcome of the High Court application to which he was not a party.

On 8 February 2011 the vice-President of the party acting on instructions from the national Executive wrote to him, *inter alia*, giving him notice of an urgent meeting of the National Council of the party scheduled for 10 February 2011 at the party's national headquarters in Harare. But the respondent, on 9 February 2011 issued a further press statement in which he purported to dismiss the new party president, Professor Welshman Ncube when in fact he had no power, to do so, in terms of the constitution of the party.

The National Council of the party met at the party's headquarters in Harare as scheduled on 10 February 2011. In attendance at the meeting were 105 members of the new national Council elected at the January congress and accordingly the required quorum by the party's constitution was met. Chief on the agenda of the meeting was the discussion of the respondent's conduct. The vice president of the party presented the letter addressed to the respondent and his two press statements for discussion. After a debate centered on them a resolution was unanimously taken to expel the respondent from the MDC party. A letter addressed to the respondent was written by the deponent on 11 February 2011 advising him of his fate. The letter was delivered to him at his offices on 14 February 2011 in the morning.

The deponent averred that in her view it was clear that from the purported action of the respondent in attempting to dismiss the president of the party and from the wording of his press statement issued on 9 February 2011 he had unilaterally and unlawfully assumed the role of the leader of the MDC party. It was reasonable to assume that he had no intention of changing his stance in that regard and may well attempt to use his purported position as an alleged leader of one of the parties to the global political agreement to exercise considerable powers in terms of the agreement. Furthermore whatever actions he would purport to take would be clearly against the wishes of the members of the MDC party as had been expressed at the congress in January 2011. Whatever actions he intended to take would be without the mandate of the party and could therefore be detrimental to the interests of the party.

The respondent had categorically stated that he was only prepared to respect the leadership of the party elected at the January 2011 congress once the High Court in Harare had made its ruling in the application referred to supra. Yet he is not a party to that application and did not apply to the court seeking a joinder. Neither has he himself challenged the validity of the congress in any court of law, but merely wants to associate himself with an application launched in the High Court by other people. It was concluded that he was estopped from challenging the validity of the congress and from disrespecting the leadership voted by the congress.

He attended the congress and fully participated without demur but still wants to disassociate himself with the very congress by claiming not to recognize it. Not only did he fully participate in the congress but he accepted the outcome of the congress until the party decided to reshuffle him from the position of Deputy Prime Minister.

It was asserted that the mere filing of an application did not in itself invalidate the resolution of the congress and to that extent until this court has issued its order in that matter the leadership of the party as elected at the congress can be the only possible leadership of the party. There is merit in that assertion.

The applicants averred that their application came at a particularly crucial stage of Zimbabwe's history and in the life of the transitional inclusive government formed as a result of the Global Political Agreement. Elected leaders of the MDC National Executive, including its president Professor Welshman Ncube, were key players in the process and played roles nominated by the party as negotiators, Cabinet Ministers and Principals on behalf of the MDC party. Accordingly, the effective and accurate communication of the stance and policies of the party with regard to government policy and the transition itself was dependent on those nominated by the party respecting the decisions taken by the party. The respondent had not been expelled from the party. It was accordingly asserted that very serious and irreparable damage would be done to the interests of the party and its members if the respondent continued to exercise a mandate he had not been given.

His actions clearly demonstrated that he was trying to obtain a position he voluntarily withdrew from in December 2010. What was pertinent to observe was that after a decision was taken by the party on 8 December 2010 to hold its 3rd National Congress in January 2011 he had initially indicated that he would contest the position of president of the party and the applicants in case number HC 612/11 were all part of his campaign team. Indeed prior to the meeting of the Harare Province was called to nominate candidates his name was put forward to the meeting as a nominee for the position of president of the party and the applicants in case number HC 612/11 were all parties of his campaign team. Indeed prior to the meeting of the Harare province was called to nominate candidates his name was put forward to the meeting as a nominee for the position of president of the party. However, in that nomination meeting he was badly beaten and was only able to secure 13 votes out of the 52 eligible voters who attended the meeting. The respondent subsequently, as realization that he did not have sufficient support to sustain a nomination, publicly announced that he was no longer going to contest for the presidency and that he would continue as a simple card-carrying member of the party. His statement in that regard was widely carried by the press in Zimbabwe. For instance the Chronicle Newspaper quoted him saying the following on 20 December 2010 in Victoria Falls when addressing diasporans gathered in the resort town:-

“I am stepping down as the leader of my party MDC. I am not running – it’s done. We are going for a congress in January and I have said that I am not contesting for any party post but I will still be a member of the party.”

Despite having said the above the respondent had turned round and was then telling all those who were prepared to listen to his story, that he would soon be announcing a cabinet reshuffle of the MDC Ministers in the Inclusive Government by replacing the existing team with his nominees. He in fact had, in that regard, approached several party members of parliament offering them ministerial appointments. The simple truth was that he was no longer the party president after the party’s 3rd National Congress of January 8 and 9 of 2011 and no longer had authority to reshuffle the party’s Ministers.

Furthermore, there were at least two forth coming meetings of the presidents of the three (3) political parties in the Global Political Agreement commonly referred to as principals to discuss two important issues referred to them by the cabinet and the National Security Council respectively being the proposed amendments to the electoral laws and inter-party political violence in the country. Respondent was claiming that he would represent the party at those important meetings, when, in fact, he had no mandate to do so.

There was also, at that time, a forthcoming meeting of the SADC Organ Troika on Defence and Security at which the facilitator of the Zimbabwe Dialogue, President J.Z. Zuma would present his report on the outstanding issues in the implementation of the Global Political Agreement. Since the respondent was claiming to be the president of the party and purported to dismiss the legitimate president of the party, the well founded fear was that he would seek to represent the party at the meeting when he had no lawful right to do so.

In conclusion the applicants had this to say:-

“The respondent’s preposterous and bizarre actions and antics are causing irreparable damage to the image of the party and are bringing the party’s name into disrepute. They are also causing immense confusion within the party and the country.”

Two press statements issued by the respondent on 7 February 2011 and 9 February 2011 were filed of record as annexures “E” and “H” respectively. Annexure “I” is a cutting from the Chronicle Newspaper of 20 December 2010 wherein respondent is reported addressing diasporans in Victoria Falls informing them that there would be a congress of the MDC but he was going to stand down as its president and would be not contesting for any party post but would remain a party cadre.

In his opposing affidavit the respondent sought to dispute that the gathering of 4 428 delegates of the MDC party on 8 and 9 January 2011 was a congress of the party. He went

along the lines raised by the 13 applicants in case number HC 612/11 and adopted the averments therein to oppose the confirmation of the provisional order.

In vehemently denying that the meeting was a party congress he averred that the MDC party congress was going to be preceded by the National Council meeting scheduled for 7 January 2011. But, when the meeting commenced, there arose disputes centered on the constitutionality of the party's congress scheduled for 8 to 9 January 2011. Disagreements allegedly arose regarding procedures and other issues relating to the constitution. A sizeable number of the National Council members then walked out in protest disabling the organ from discharging its mandate. In particular, the chairman of the National Council meeting who was the national chairman of the party, Mr Joubert Madzimure walked out, together with the chairperson of the women's wing, chairperson of the youth wing and a number of portfolio secretaries.

It then became necessary for the respondent to chair the National Council meeting. The respondent then claimed to have advised those present to take note of the concerns of those that had walked out and further alleged that he told the remaining members of the national Council meeting that the meeting was no longer a National Council meeting. The meeting then allegedly proceeded as an ordinary meeting. The respondent claimed to have advised the remaining council member of that fact.

In the result, so the averment meant, there was no proper or lawful National Council meeting on 7 January 2011, as the meeting did not satisfy the requirements of the party's constitution. Hence, there was no legal basis for a National Congress on 8 and 9 January 2011.

Respondent stated that on 8 and 9 January 2011 he had attended a gathering of persons who intended to hold an MDC congress. He alleged that his objective was to encourage healing and reconciliation among the party members, and to plead with colleagues to pay attention to the constitutional requirements for holding a National Congress. The chairperson did not attend despite the fact that he was constitutionally mandated to preside over the congress. The meeting ended up being presided over by the National Organising Secretary in violation of the constitutional requirements for a proper and legal congress. In the light of that, he allegedly addressed delegates and stated to them that the gathering was not an MDC congress but an ordinary meeting of the party.

He also allegedly implored delegates to take into account the fact that a sizeable number of leaders (13) had boycotted and that the delegates should address the concerns of those that had walked out of the National Council meeting and had also boycotted the gathering of 8 and 9 January 2011. His aim was to make party leaders to return to constitutionalism and not to destroy the party.

To the respondent's disappointment all his efforts were frustrated. His advice was ignored and certain individuals put themselves in certain positions when the congress of the party on 8 and 9 January 2011 was not proper and lawful. It was, allegedly, not in terms of the MDC constitution and was, *ipso facto*, a nullity and so was what was decided and done thereat since one cannot put something on nothing and expect it to stand, it will fall. There was no election to stand for. In conclusion on the issue of the party's congress the respondent reiterated that he had allegedly told the 4 428 delegates that in light of the concerns raised by the 13 council members on 7 January 2011, the meeting of 8 and 9 January 2011 could not be a congress.

In response to the issue of National Council meeting of 7 January 2011 and the party's congress of 8 and 9 the applicants had the following to say.

The applicants stated that at that time the National Council was made up of 105 members 87 of those members attended the meeting of 7 January 2011. Ten of those members walked out of the meeting leaving a total of 77 members. In terms of the party's constitution a quorum for any National Council meeting is formed by 50% of council members. After the ten had walked out the remaining 77 members formed the required quorum.

The applicants said there was no truth in the suggestion by the respondent that the ten walked out of the meeting because of disputes centered on the constitutionality of the impending party congress. The correct position was that the acting national chairman Mr Joubert Madzimure had allegedly pre-arranged a press conference for 3 pm on that day. When confronted on the matter he denied any knowledge of it. But at about 2.45pm before any item on the agenda was discussed the ten stormed out of the meeting. The acting national chairman complained that he had not been accorded the respect that he deserved by the then Secretary-General and the deponent who had gone out to answer calls on their mobile phones. The truth of the matter was that the ten stormed out of the meeting because it was nearly time for them to go and address a press conference.

Since the acting national chairman had walked out of the National Council meeting, the respondent volunteered to chair the meeting and the council accepted his suggestion to chair the meeting. However, the applicants stated that his averments that he advised the National Council meeting to take note of the concerns of those that had walked out and that the meeting was no longer a National Council meeting were clearly false as he had never said so. They asserted that the meeting proceeded as a National Council meeting and went on to consider and approve the following:-

- (a) The proposed amendments to the party's constitution to be presented to the congress for approval;

- (b) All the petitions on the nominations of persons for elections at the congress;
- (c) The respondent himself formally tabled his withdrawal from contesting the position of president of the party. The National Council meeting which he chaired accepted his withdrawal.

It was the applicants' assertion that the National Council meeting had the requisite quorum and satisfied all the provisions of the party's constitution relating to the holding of National Council meetings contrary to the bald assertions by the respondent that provisions of the party's constitution were not satisfied. He was unable to name the provisions which he claimed to have been violated. Similarly respondent made a bald assertion that there was no legal basis for holding a National Congress on 8 and 9 January 2011 without laying a foundation for such an assertion by naming the provisions of the party's constitution which were contravened.

The applicants concluded that the respondent was just being untruthful when he was suggesting that the National Council meeting had ceased being such when the ten members walked out of it.

The applicants were justified in arriving at that conclusion. This court finds that the meeting made its deliberations as a National Council meeting. The respondent lacked candour and was being untruthful by suggesting otherwise.

The Party's national Congress

The applicants averred that a resolution was made, at the National Council chaired by the respondent, that due to the fact that the National Chairman of the party had walked out of the meeting and would not be attending the National Congress of the party, the national Organising Secretary would chair the congress of the party.

The holding of the party's congress could not be cancelled because the National Chairman and his colleagues were not going to attend. Compare to 4 428 delegates who attended. There was nothing unconstitutional about the national organizing secretary chairing the event in the absence of the national chairman.

The respondent attended the congress and delivered what one would term a key note address, to the delegates. He, however, has sought to disassociate himself from it. He said what he addressed was just a gathering of party members but not a party congress. He claimed to have told to 4 428 delegates that what they were attending was not a party congress but an ordinary gathering of the party.

The applicants responded by saying that the respondent was just being blatantly untruthful. The respondent repeatedly referred to it as the party's congress in his opening address and in his very opening sentences wherein he said the following:-

"Pamusoroi vakuru veparty varipano. Pamusoroi our dignitaries, our distinguished guests to our congress. Pamusoroi varidzi veparty, delegates to the congress of our party. We are very grateful that our guests were able to come and join us today. We are grateful that the delegates found their way to Harare and today we are convening this congress of our party. We are very thankful for the support that has been shown to this congress.

Now, we are holding this congress of co-operation, a dispensation of working together. Zimbabwe is being run by an Inclusive Government of three political parties. This is the environment, the situation under which we are holding our congress.

... saka nhasi uno mauya ku congress of the most important party in the country, mauya ku congress yeparty irikutonga Zimbabwe."

The above utterances by the respondent illustrate beyond any doubt that the respondent was convinced in his own mind at that time that he was attending and addressing the party's 3rd congress. Consequently, he was simply being untruthful when he turned around and suggested he had addressed the delegates and clearly stated to them that the gathering was not an MDC congress but an ordinary meeting of the MDC. He further perjured himself when he averred that his advice was ignored and some individuals put themselves in certain positions as if the gathering was the MDC party congress when it was not.

The correct position is that the gathering was the 3rd congress of the MDC party where the new leadership of the party was elected. The respondent withdrew from the contest.

This court makes the following specific findings:

- (a) The gathering of 4 428 delegates on 8 and 9 January 2011 was the 3rd congress of the MDC party.
- (b) The respondent knew and believed that he was addressing the 4 428 delegates to the 3rd congress of the MDC party.
- (c) The congress elected a new leadership at that congress. Respondent freely and voluntarily withdrew from the contest.
- (d) The respondent took active participation at the congress and fully accepted the outcome of the congress and that outcome remains valid until declared otherwise by a court of law.

- (e) The respondent perjured himself when he averred that what he had repeatedly termed the party's congress in his address to the 4 428 delegates was in fact an ordinary party meeting.

Who then is the present party president?

The respondent averred that he had never officially indicated that he was not contesting the MDC presidency. As matters stood there had been no opportunity for him to contest the MDC presidency as no lawful congress had been held. In the result he remained the MDC president.

The respondent was again being untruthful because not only did he withdraw from the party's presidential contest by personally advising the various provincial chairpersons of his withdrawal on 7 January 2011 he advised the then national working committee and later the National Council of his official and formal withdrawal. He went further and gave a full explanation at the congress on 8 January 2011. The applicants then quoted verbatim what he said as captured in Disc 1. He spoke in the Chishona and English languages. What he said was to the following effect:-

"I as a leader made a personal decision to unite my people so that they can move forward and work well. Also, I decided that others should get an opportunity to lead. That is what I said as Mutambara.

Mutambara made a decision before the provincial councils. The provincial councils of the party met after Mutambara had said we want people to unite, we want the party to move from one leader to another leader. We are building a new culture in our party.

Mutambara made a personal decision before the provincial councils made their choices. No provincial council decided to nominate him thinking that he was still in the contest. Mutambara said he wanted people to unite. Mutambara said he wanted leadership renewal to take place in our party. That is the culture of our party. That is the philosophy of our party ...

Although I will hold no position I will be a soldier in the party. I will be a soldier in Zimbabwe."

The above quotation is found at pages 312 to 3134 of the application.

The above clearly demonstrates that the respondent further perjured himself when he said he did not officially withdraw from the race and was still the party president. This court finds that the respondent freely and voluntarily withdrew from contesting for the presidency of the party or any position in the party. A new leadership of the party was elected with Professor

Welshman Ncube emerging as the president of the party. In the result, Professor Welshman Ncube and the team elected at the congress of 8 and 9 January 2011 remain in control of the party until a court of law declares that the congress was irregularly held.

This court further finds that Professor Welshman Ncube immediately became the principal in the Global Political Agreement upon his election as president of the MDC party. The respondent ceased to be a principal when he freely and voluntarily relinquished the presidency of the party on 8 January 2011.

The respondent initially accepted the outcome of the congress and the leadership elected thereat. He however, suddenly changed his stance after about 4 weeks and began to allege that there was no lawful party congress at which a new leadership could have been elected. He claimed to have re-assumed the party's presidency and even purported to dismiss the legitimate president of the party who was popularly elected at the congress. In his press statement of 9 February 2011 he had this to say:-

"Consequently, as the president of the party, the key authority of the party in between main party meetings such a national council, national executive and standing committee I have had to take drastic remedial action. With immediate effect, Professor Welshman Ncube is summarily dismissed from the MDC party. As a non member he has no authority to organize, participate, or speak on behalf of the party.

We will organize a National Council meeting of the party in accordance with our constitution, at which meeting this decision will be ratified. I took this decision after careful consideration, thorough examination, soul-searching, analysis and consultation.

Although I have been silent in public from 8th January 2011 to 7th February 2011, privately I have been continuously in touch with Prof Ncube, trying to encourage him to heal and reconcile the party. He has been doing the opposite. I have been urging him to respect the rule of law in the country, the party's constitution, and the country's legal system. He has not listened. He has left me with no choice but to take the above measures in order to salvage the image of the party and re-establish its dignity."

The respondent's conduct is difficult to follow and understand in the light of the fact that he had attended the party's congress and addressed it as such. He had participated in full and accepted the outcome for at least 4 weeks and then suddenly issued press statements claiming to have re-assumed the party presidency and thereafter purports to dismiss the legitimate president of the party. Further, the respondent had allocated to himself powers which even the legitimate president of the party does not have in terms of the party's

constitution. The legitimate president of the party does not have powers to dismiss party members.

The applicants were justified in launching this application in order to restrain the respondent from persisting with his strange and dangerous behaviour.

As stated earlier on in this judgment the outcome of the congress remains valid until and unless it has been set aside by a court of law. Until and unless that happens the applicants have a clear right to the leadership elected at the congress and for that leadership alone to run the affairs of the party.

The conduct of the respondent is causing irreparable harm to the party. He purports to still act as its president when he freely and voluntarily relinquished the presidency at the congress on 8 January 2011. Persist to want to act as the principal of the party when he is no longer its president. The applicants have no other satisfactory remedy by which they could secure their rights. Finally, the balance of convenience clearly favours the applicants in this case. See *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Flamelily Investment Company (Pvt) Ltd v Zimbabwe Salvage (Pvt) Ltd and Another* 1980 ZLR 378 for the requirements of an interdict.

The respondent had raised some points *in limine* wherein it was suggested that the matter was not urgent but my brother judge who dealt with the matter felt that it was. I am not here to review what my brother judge did. If the respondent was not happy with any procedural issues he should, with the leave of the court, appealed against them.

It was also raised *in limine* that there were material disputes of fact. For instance it was contended that the gathering of 8 and 9 January 2011 was not the 3rd congress of the party when in fact it was demonstrated that the respondent was being untruthful and perjured himself when he made those averments.

In the light of the foregoing findings this court holds the view that the applicants are entitled to the final order they seek in terms of the amended draft at page 1 and 2 *supra*.

Webb, Low & Barry, applicants' legal practitioners

Mbidzo, Muchadehama & Makoni, respondent's legal practitioners