HB 98-16
HC 573-16
XREF HC 2371-14
XREF HC 2377-14

MATSON HLALO
versus
MOVEMENT FOR DEMOCRATIC CHANGE- TSVANGIRAI
and
MORGAN RICHARD TSVANGIRAI –PRESIDENT
OF MOVEMENT FOR DEMOCRATIC CHANGE- TSVANGIRAI
AND
PRESIDENT OF THE SENATE, PARLIAMENT OF ZIMBABWE
and
CLERK OF THE PARLIAMENT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 18 MARCH AND 31 MARCH 2016

Urgent Chamber Application

G. Nyoni for the applicants
K. Ngwenya for the 1st and 2nd respondents
S. J. Chihambakwe for the 3rd and 4th respondents

MOYO J: The applicant in this matter was a member of the senate in the Zimbabwean Parliament having been so elected by the MDC- T political party.

Following differences with the political party, he was subsequently expelled from same and such expulsion was communicated to parliament, specifically the president of the senate. The president of the senate accordingly, upon receipt of the communication that applicant had ceased to be a member of MDC-T, invoked provisions of the Constitution of Zimbabwe, particularly section 129 (1) K which provides as follows:

> "The seat of a member of Parliament becomes vacant inter alia) if the member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned, by written notice to the speaker in the President of the senate, as the case may be, has declared that the member has ceased to belong to it."

Third and fourth respondents raised a point *in limine* that the failure to join the Parliament of Zimbabwe as well as the Zimbabwe Electoral Commission should be held to be fatal to applicant's case. Whilst, it could be argued that the Parliament of Zimbabwe should have been cited, I find that its non-joinder is not fatal since the Clerk of Parliament and the President of Senate were cited and thus Parliament is in a practical sense represented in these proceedings. It is the non-joinder of ZEC that I find to be fatal. Section 159 of the constitution provides that

> "wherever a vacancy occurs in any elective public office, established in terms of this Constitution other than an office to which section 158 applies, the authority charged with organizing elections to that body must cause an election to be held within 90 days to fill the vacancy."

Section 39 (3) of the Electoral Act [Chapter 2:13] also provides for the notification of the Commission (referring to ZEC) of the vacancy.

It follows that ZEC is an integral part of the issues as raised by the applicant and clearly it should have been cited. Its non-citation is fatal to applicant's case in my view. I would accordingly uphold this point *in limine* and the application should on this basis alone fail.

However, for the benefit of all the parties concerned and to show that the applicant's case would still be found wanting on the merits. I have gone further to deal with same. Applicant contends that, proper procedures were not followed in his expulsion in that his case was not properly dealt with and that an appeal is actually pending before the internal structures of the MDC- T in terms of their constitution:

It is my considered view that what is happening within the MDC-T is not the business of the President of the Senate who should at all times act in accordance with the constitution. It is by operation of law that applicant's seat is now vacant. The President of Senate is not enjoined to assess any issues, or make a decision as to the propriety or otherwise of the expulsion, all the President of the Senate has to do is to act in accordance with the provisions of the constitution once communication has been received from the party on the cessation of the membership of a party representative in Parliament.

Neither does the constitution provide for measures that should be taken once it is found that the member is at qualms with the decision to expel him from the party and consequently from Parliament.

Applicant seeks temporary relief to the effect that:

> "2) 3rd and 4th respondents be and are hereby interdicted, pending the finalization of this matter, from accepting any person seconded to them by 1st and 2nd respondents to fill in the vacancy left after the expulsion of applicant from the senate."

I hold the view that this relief is impracticable in that, the seat that was held by applicant in the senate has already been declared vacant, there are constitutional and electoral provisions that necessarily ensue after such has occurred.

Section 159 of the Constitution provides that:

> "Wherever a vacancy occurs in any elective public office established in terms of the constitution, other than an office to which section 158 applies, the authority charged with elections to that body must cause an election to be held within 90 days to fill the vacancy."

This clause by implication, would apply to a proportional representation seat. It is my considered view that it should also be filled within 90 days in terms of the Constitution. Now if applicants want this honourable court to stop the selection of a candidate pending this court action, it means the court order would fly in the face of section 159 of the Constitution.

Again, section 39 (3) of the Electoral Act [Chapter 2:13] provides for notification of the Zimbabwe Electoral Commission of a vacancy in Parliament as soon as the Senator becomes aware of it.

It is my considered view that the operation of law started by the provisions of section 129 (1) K of the constitution cannot be interfered with by this court as it is impracticable to do so as it would result in an undesirable situation that is not supported by the provisions of a constitution. The undesirable situation would be that of a vacant seat in Parliament which is left as such until a

determination has been made on the internal squabbles of the MDC-T. Refer to the case of *Abednico Bhebhe and others* v *The Chairman National Disciplinary Committee and others* HB 85/2009.

It is my finding that applicant should have acted whilst the matter was still an internal one, he should have either sought an interdict against his party from acting in the manner that it did or communicating the detrimental information to Parliament. Otherwise at this juncture what the applicant seeks to do is a little too late. The horse has bolted in my view and the remedy that applicant seeks cannot be granted. It is for these reasons that the application should fail.

I accordingly dismiss the application with costs.

Moyo and Nyoni, applicant's legal practitioners
T. J. Mabhikwa & Partners, 1st & 2nd respondents' legal practitioners
Chihambakwe Mutizwa and Partners, 3rd & 4th respondents, legal practitioners