

DISTRIBUTABLE (10)

ZIMBABWE DEVELOPMENT PARTY

v

- (1) MINISTER OF JUSTICE AND LEGAL AFFAIRS
(2) MINISTER OF CONSTITUTIONAL AND PARLIAMANTARY AFFAIRS
(3) CHAIRPERSON – ZIMBABWE ELECTORAL COMMISSION
(4) MINISTER OF FINANCE**

**SUPREME COURT OF ZIMBABWE
HARARE, JUNE 20, 2013**

Before: CHIDYAUSIKU, CJ, In Chambers

K Mukwazhe, for the applicant

F Kuipa, with him, *Mr Bhuwu*, for the first and fourth respondents

No appearance for the second respondent

T M Kanengoni, with him, *C Nyika*, for the third respondent

When I heard this matter, I gave the following order:

“IT IS ORDERED THAT:

1. The matter will be set down on an urgent basis.
2. The Registrar is directed to set this matter on the continuous roll of the Constitutional Court commencing on Wednesday 26 June 2013.
3. The parties are directed to file all their papers by 12:00 noon Monday 24 June 2013”.

I indicated that reasons would follow in due course. These are they.

This is an urgent application for the urgent set down of the cause under CCZ 25/13 between the same parties. The applicant's case is as follows.

The applicant is a political party registered in terms of the laws of Zimbabwe. It sought to participate in the 2013 harmonised elections. The Constitutional Court had, in *Mawarire v Mugabe N.O. and Others* CCZ 1/13, held that elections must be held before 31 July 2013. The Constitutional Court, by a majority, made the following order:

“In the result, the Court makes the following order -

1. It is declared that the harmonised general elections in terms of s 58(1) of the Constitution of Zimbabwe are due upon the dissolution of Parliament on 29 June 2013. However, due to the first respondent's failure to issue a proclamation fixing the date for the harmonised elections timeously it is no longer legally possible to hold the harmonised elections on that date.
2. It is declared that the failure by the first respondent to fix and proclaim date(s) for harmonised general elections to take place by 29 June 2013 is a violation of the first respondent's constitutional duty towards the applicant to exercise his functions as a public officer in accordance with the law and to observe and uphold the rule of law in terms of s 18(1a) of the Constitution.
3. It is further declared that by failing to act as stated in para 2 above, the first respondent has violated the applicant's rights as a voter and his legitimate expectation of protection of the law entrenched in s 18(1) of the Constitution.
4. **Accordingly, the first respondent be and is hereby ordered and directed to proclaim as soon as possible a date(s) for the holding of Presidential election, general election and elections for members of governing bodies of local authorities in terms of s 58(1) of the Constitution of Zimbabwe, which elections should take place by no later than 31 July 2013.**
5. The first respondent shall bear the costs of the applicant.” (The emphasis is mine)

The Court delivered this judgment on 31 May 2013. On 6 June 2013 the applicant filed a constitutional application in the Constitutional Court under case no. CCZ 25/13. In that application, the applicant claims that it is not receiving funding in terms of s 67(4) of the Constitution of Zimbabwe (“the Constitution”) and that it requires the same, as provided for in terms of s 155(2)(c) of the Constitution. After filing that application, the applicant filed this urgent chamber application for the urgent set down of the cause in CCZ 25/13.

The applicant avers that, in the wake of this Court’s judgment in the *Mawarire* case *supra*, the President is due to announce election dates anytime soon. The applicant feels that there are other parties which are benefiting from finances, possibly in terms of the Political Parties (Finance) Act [*Chapter 2:11*] (“the Act”) while it is not benefitting the same. In short, it is the applicant’s case that should the case not be heard before the President declares elections, the other political parties will have an unfair advantage in the polls. This, according to the applicant, is infringing its constitutional rights.

In other words, this case is about whether or not the cause under CCZ 25/13 may be defeated if it is not heard on an urgent basis.

The test for urgency is well settled and one can do no better than to quote the *locus classicus* on the point, *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 (H) wherein CHATIKOBO J said at p 193F:

“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 dead-line draws near is not the type of urgency contemplated by the rules.”

I have no doubt in my mind that when the need to act arose, the applicant did act by filing the cause under CCZ 25/13. Immediately after the judgment in the *Mawarire* case *supra*, the applicant filed the application. It is correct that, in the wake of that judgment, the President is due to announce election dates any time soon. This matter, accordingly, is urgent.

The urgency is also fortified by the nature of the relief that the application seeks. The applicant, in the main application, seeks an order directing the respondents to avail to it money in order that it finances its election processes. I am not sure whether the application will be able to succeed considering the provisions of s 3 of the Act, which provides as follows:

“3 Financing of political parties

(1) Subject to this Act, every political party shall be entitled in each Parliamentary year to receive from the State the sums of money that are payable to it in terms of this Act.

(2) The Minister shall, as soon as is practicable, and in any case no later than thirty days after the beginning of the financial year, publish, with the approval of the Minister responsible for finance, a notice in the *Gazette* specifying the total amount of moneys appropriated for all political parties and the amount that shall be paid to each individual political party in terms of this Act.

(3) For the purpose of subsection (2), each political party whose candidates received at least five *per centum* of the total number of votes cast in the most recent general election shall be entitled to the same proportion of the total moneys appropriated as the total number of votes cast for its candidates in the election bears to the aggregate of votes cast for all political parties that qualify to be paid moneys in terms of this subsection:

Provided that, where a candidate is declared elected in terms of section 46 or 49 of the Electoral Act [*Chapter 2:01*] without a poll having taken place, he shall be deemed to have received the votes of all the voters registered in the constituency concerned.”

The applicant has not challenged the provisions of that section in its main application. Be that as it may, in an application of this kind, where the applicant does not seek any other relief

apart from the urgent set down of the main cause, I am not required to determine whether the applicant in the main application has prospects of success but only whether the applicant may suffer irreparable harm if the cause under CCZ 25/13 is not heard and determined as a matter of urgency. The fact of the matter is that the cause under CCZ 25/13 will be heard by the Court anyway, whether as a matter of urgency or otherwise. The question therefore is whether the applicant would obtain any meaningful relief from the matter if it is heard after the election. Certainly not. This, coupled with the fact that the applicant has not delayed in acting, makes a compelling cause to order the urgent set down of the cause under CCZ 25/13.

I am also fortified in my conviction by the fact that the cause under CCZ 25/13 is a fresh cause and will be determined by the Constitutional Court in the first instance. In this regard, I have no doubt in my mind that should the main application not be heard on an urgent basis, it may, if the applicant's contentions are correct, result in other political parties gaining an unfair advantage in the run up to the polls and the polls themselves. Once the polls are done, the applicant would have no other remedy.

I am of the view that the set down of the cause under CCZ 25/13 ought to be treated as a matter of urgency. This is so because should the cause under CCZ 25/13 not be heard as a matter of urgency, the applicant will have no other remedy available to it, as the dates of the elections may be announced and other parties get into full campaign swing, which, not surprisingly, needs funding of some sort in one way or the other. Worse still, the elections may be held and the applicant would not have been allowed the best possible chance to fight for the various political offices it wants to run for.

On the basis of the foregoing, I made the order detailed above.

The applicant in person

Civil Division of the Attorney-General's Office, for the first respondent and fourth respondents

Nyika Kanengoni & Partners, for the third respondent