1. MORGAN TSVANGIRAI HC 469/2003
versus
REGISTRAR GENERAL (ELECTIONS)

2. MORGAN TSVANGIRAI HC 470/2003
versus
REGISTRAR GENERAL (ELECTIONS)

3. MORGAN TSVANGIRAI HC 471/2003
versus
MINISTER OF JUSTICE, LEGAL
AND PARLIAMENTARY AFFAIRS

HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE 22 January and 12 February 2003

Adv. *A.P. de Bourbon*, for the applicants
Mrs *Y. Dondo*, for the respondents

GUVAVA J: These three applications were brought before this court, on an urgent basis, in terms of Rule 244 of the High Court Rules. As the applications were inter-related and were all in respect to the petition in the matter of *Morgan Tsvangirai v Robert Gabriel Mugabe and 3 Others* HC 3616/2002 (the Petition), I decided to deal with the three matters at the same time. The parties were agreed that the matters were urgent as the Petition was due to be set down very soon and it was necessary to dispose of these matters before the trial commenced, I therefore proceeded to deal with the matters as urgent applications.

Case No. HC 469/2003

The first matter was that of *Morgan Tsvangirai v The Registrar General of Elections* HC 469/2003. In this matter the applicant sought on order that the respondent makes available for inspection, by the applicant's legal practitioners, the voters roll for the 2002 Presidential

Election and the ballot papers which were used in that election plus costs of suit. The application was opposed by the respondent on the basis that the provisions of the Electoral Act [*Chapter 2:01*] did not allow him to open the requested documents without a court order as they were sealed.

The applicant in making this application relied on rule 165(1) of the High Court Rules which provides as follows:

> "165 **Failure to make discovery or permit inspection**
>
> (1) If a party failed to make discovery under this Order or, having been served with a notice under rule 164, fails to give notice of a time for inspection or fails to permit inspection as required by that rule, the party desiring discovery or inspection may make a chamber application for an order compelling such discovery or inspection, and the judge may grant or refuse the order as he thinks is appropriate."

On 6 January 2003 the respondent was served with a notice in terms of Rule 164 and failed, within the five days allowed by the rules, to give notice to the applicant specifying the time and place where the documents could be inspected. The respondent did not respond in any way to the applicant' request and the applicant decided to compel the respondent to comply with the request.

Mrs *Dondo* on behalf of the respondent submitted that the failure to comply with the notice was not a deliberate disregard for the rules of the court but was an oversight on her part. She submitted that as the notice had been served together with other documents relating to the first respondent in the Petition, she had assumed, wrongly, that all the documents related to the first respondent only. It was her submission that she was totally unaware of the request until the urgent application was served upon them. It was upon this failure to respond that the applicant launched this application.

It was the respondent's submission that he was opposed to the granting of the order sought on the basis that the provisions of section 78(5) of the Electoral Act were not complied with. It was Mrs *Dondo*'s submission that the Voters Roll and the ballot papers could not be made

available for inspection as they had been sealed in accordance with section 78(2) of the Electoral Act which had been in pursuance to an Order by Justice Matika in case No. HC 8657/02. It was her submission that the documents could only be made available for inspection upon an order being granted by this court allowing the respondent to open the sealed packets.

It was conceded by Advocate *de Bourbon* that it would not be appropriate at this stage, to seek an order to open the ballot papers which were sealed. He then amended the draft order so that it would relate only to the inspection of the Voters' Roll. In respect to the Voters Roll it was his submission that the Roll was not one of the documents covered by section 78 of the Electoral Act and should accordingly be made available for inspection.

Section 78(2) of the Electoral Act provides:

"(2) A constituency registrar shall not open any –

(a) sealed packet containing -

i) counterfoils of used and spoilt ballot papers; or

ii) postal ballot papers and declarations of identity;

that has been delivered to him in terms of subsection (2) of section *sixty;* or

(b) sealed packet containing documents referred to in subsection (1) or (2) of section *seventy;* or

(c) packet that has been re-sealed by him after examination in terms of paragraph (d) of subsection (3) of section *seventy-two;* or

d) sealed packet containing counted or rejected ballot papers;

while such packet remains in his custody."

It terms of subsection (5) of the same section such packets may only be opened in accordance an order of this court.

Clearly the section relates only to ballot papers, counterfoils of such ballot papers and documents relating to postal ballots. The provision does require that the Voters Roll be sealed in packets. If the Voters Roll was sealed by the respondent, it can only be presumed that it was merely for the purpose of safeguarding the evidence and it may thus be properly opened and made available for inspection by the applicant without requiring the authority of the Court. It was also apparent from the Order of MATIKA J in the case of the *Registrar General of Elections v Morgan Tsvangirai* HC 8657/02 that there was no order that the Voters Roll should be sealed. In my view there appears to be no legal basis for the respondent's opposition in respect to the Voters Roll and the applicant is therefore entitled to the order that he seeks.

Case Nos. HC 470/2003 and HC 471/2003

FACTS

Turning to case Nos. HC 470/03 and 471/03, it was submitted, for the applicant, that the applicant was seeking further discovery in accordance with rule 162 of the High Court Rules against the Registrar General and the Minister of Justice, Legal and Parliamentary Affairs who are cited as the second and third respondents in the Petition. The background to these matter was that the respondents, in both matters, effected discovery in terms of the rules on 30 October and 22 November 2002. The applicant was not satisfied that the respondents had effected full discovery and on 6 January, 2003 served them with notices to inspect certain documents which had not been discovered. When the respondents failed to respond to the notices in the days specified, the applicant then launched these applications. The applicant listed various documents which he believes to be in the possession of the respondents, and which, in his view, should have been discovered when the respondents effected discovery in October and November 2002. During the course of his submissions Advocate *de Bourbon* amended the draft

order in respect to both matters as it became apparent that the applicant was seeking an order compelling further discovery of the documents and not inspection.

It was the submission of the respondents, in both matters, that the applications were opposed on two grounds. Firstly, that the documents sought by the applicant had not been specified with any particular clarity making it difficult for the respondents to determine what documents were to be discovered. It was the respondent's submission that the applicant was on a fishing expedition and did not really know whether or not such documents do in actual fact exist.

Secondly, in respect to the various internal memoranda between the Minister of Justice, Legal and Parliamentary Affairs, his office and other persons, it was Mrs *Dondo*'s submission that these documents could not be discovered as they were privileged documents.

In respect to the first ground of opposition it was conceded by the applicant that he did not know whether or not the requested documents exist. It was however the applicants contention that, due to the nature of the allegations in the Petition such documents should exist. The applicant also stated that the documents requested to be discovered were relevant and material in relation to the petition. The applicant also argued that it was not necessary for him, for the purposes of discovery, to identify the precise document being sought to be discovered provided he could provide a broad description of the documents. In case No. HC 470/03 the documents which applicant requested to be further discovered were as follows:

"1. All directives by the Second Respondent to Constituency Registrars and other relevant persons and bodies relating to the manner in which the registration of voters was to take place during the President Election in March 2002 including polling officers and/or relevant bodies.

2. All records relating to the registration of voters from 10 January 2002 to 9 March 2002, including:

2.1 All directives issued by the First Respondent to Constituency registrars, polling officers and other relevant persons and bodies relating to the manner in which the registration of voters was to take place during that period;

2.2 The details of the fixed and mobile registration centres set up to register new voters during that period;

2.3 Details of all the registration books used during that period to register new voters, giving the range of serial numbers of the voters registration receipts contained in each of the registration books;

2.4 Al Voters' registration receipts in respect of serial numbers 337689D to 739202C (See items 105.2 and 105.4 of the applicant's Supplementary Discovery Affidavit).

3. All directives issued by the Second Respondent to Constituency registrars, polling officers and other relevant persons and bodies relating to how the polling was to take place during the Presidential Election in March 2002 and relating to polling hours, polling stations and polling dates.

4. All directives issued by the Second Respondent to Constituency Registrars, polling officers and other relevant persons and bodies as to how voting by postal ballot was to be conducted in the presidential Election in March 2002.

5. All memorandae, documents and correspondence received by the Second Respondent in relation to the presidential Election from the First respondent, the Third Respondent and the Fourth Respondent, and from any other person and body.

6. All memorandae, documents and correspondence relating to the manner in which polling stations were allocated in each constituency, including all correspondence with the Zimbabwe Republic Police and other State organs regarding such polling stations.

7. The Voters' Roll for each constituency in Zimbabwe used during the Presidential Election in March 2002 marked off with the names and particulars of those who voted.

8. Counterfoils of all ballot papers used during the Presidential Election in March 2002.

9. All documents relating to the counting of the voters and the announcement of the results at the presidential Election in march 2002.

10. All written communication between the Second Respondent and officials of the National Election Command Centre concerning the Presidential Election in March 2002.

11. All accreditation Certificates issued by the Second respondent to all polling agents in terms of section 17(2) of the Electoral Regulations 1992 (SI 58 of 1992) as amended by SI 41F of 1992.8

12. All reports, information and advice relating to the registration of voters and the conduct of the Presidential Election referred by the Second Respondent to the Fourth Respondent in terms of section 14(1)(b)(a) of the Electoral Act.

13. The full provisional list of results of the Presidential Election in March 2002 as set out on pages 100-110 of the record handed to the Fourth Respondent by the Second Respondent, a copy of which was subsequently given by the Fourth Respondent to representatives of the petitioner on Tuesday 12 March 2002. This list should include a breakdown of the votes cast at each of the policing station in each of the Constituencies."

And in case No. HC 471/03 the applicant requested that the following documents be further discovered:

"1. All memorandae prepared by the Third respondent and his office relating to the use made of the provisions of Section 158 of the Electoral Act [Chapter 2:01] in relation to the Presidential Electoral in March 2002;

2. All memorandae prepared by the Third Respondent and his office relating to the use made of the provisions of Section 157 of the Electoral Act in relation to the Presidential Election in March 2002;

3. All memorandae prepared by the Third Respondent and his office with regard to the amendments made to the Electoral Act in the General Laws Amendment Act (No. 2 of 2002) relating to the presidential Election in March 2002;

4. All memorandae and other documents relating to the contents of the amendments made to the Electoral Act by the General Laws Amendment Act (No. 2 of 2002).

5. All memorandae prepared by the Third Respondent and his office with regard to the nullification of the General Laws Amendment Act by the Supreme Court and the re-introduction by way of Statutory Instruments of much of the provisions previously contained in the said Act.

6. All memorandae prepared by the Third Respondent and his office in relation to the use made of the following Statutory Instruments published concerning the Presidential Election in March 2002:

   a) Electoral (Amendment) (Regulations 2002 (No. 10) (SI 8A of 2002);
   b) Electoral (Amendment)Regulations 2002 (No. 11) (SI 17A of 2002);
   c) Electoral (Amendment) Regulations 2002 (No. 12 12) (SI 34 of 2002);
   d) Electoral (Amendment) Regulations 2002 (No. 13) (SI 41B of 2002);
   e) Electoral (Amendment) Regulations 2002 (No. 14) (SI 41F of 2002).

7. All memorandae prepared by the Third Respondent and his office with regard to the failure to allow polling to take place on Monday 11 March 2002 throughout the country.

8. All written communications between the Third respondent and his office and the First Respondent and his office in relation to the Presidential Election in March 2002.

9. All written communications between the Third Respondent and his office and the Second Respondent and his office in relation to the Presidential Election in March 2002.

10. All written communications between the Third Respondent and his office and the Second Respondent and his office in relation to the Presidential Election in March 2002.

11. All written communications between the Third respondent and his office and the Zimbabwe Republic Police concerning the Presidential Election in March 2002 including documents

setting out the provisional and final results of the said Presidential Election.

12. All memorandae and documents made by the Third Respondent and his office concerning the work of the local observers and monitors who observed and monitored the Presidential Election in March 2002.

13. All memorandae and documents by the Third Respondent and his office concerning the work of the international observers and monitors who observed and monitored the Presidential Election in March 2002.

14. All memorandae and documents between the Third Respondent and his office and the Second and Fourth Respondent's offices concerning the manner in which voting by postal ballot was to be conducted in the Presidential Election in March 2002."

The Law Relating to Discovery of Documents

(a) What must be discovered

In order to determine whether or not the applicant is entitled to an order compelling the respondents to discover the above documents it is necessary to examine the law relating to discovery. Order 24 of High Court Rules deals with discovery of documents. It sets out in some detail what should be discovered, the effect of non-disclosure of documents further discovery of documents, inspection of documents and other related matters.

The purpose of discovery is defined in Herbstein and Van Winsen in "*The Civil Practice of the Supreme Court of South Africa*" 4th ed. at p 582 as follows:

> "Discovery is a procedure whereby a party to an action may discover what documents relating to the matters in issue between them are in the possession of his opponent. Generally speaking he is entitled to have disclosed to him the nature of these documents and to inspect them and take copies of them." (underlining is my own)

I am in total agreement with the learned authors that the purpose of discovery is to ensure that no party to any proceedings is taken by surprise at trial as all documents relating to the matter between them would have been disclosed. It is also clear from the passage quoted above that a party is entitled to request that the other party disclose the nature of documents in their possession as long as they are relevant to the dispute between them. The requesting party need not know the form of the documentation or the content of such documents. It is for the party who has been asked to effect discovery to swear on oath in an affidavit whether or not he does have such documents, whether he had them but no longer has them and whether they are protected in any way. The importance of discovery affidavits has been repeatedly stressed in the courts and particularly the need to discover all documents which are relevant to any matter between the parties. In the case of *Durban City Council v Minister of Justice* 1966 (3) SA 529 at 531 it was held that discovery affidavits were very important documents in any trial and the party requesting discovery was entitled, in terms of the rules, to have full and complete discovery on oath.

According to the authors Herbstein and Van Winsen (*supra*) at p 592 all documents relating to any matter in question in an action must be discovered if at any time they were in the possession or control of that party (emphasis is my own).

(b) The test to be applied to determine the relevance of documents to be discovered

The above paragraph from the authors Herbstein and Van Winsen require in my view, that all the documents being sought be relevant to the case being dealt with. The test for relevance was laid dowen by BRETT LJ in the case of *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.* (1882) 11 QBD 55 as follows:

> "It seems to me that every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences."

This principle has been accepted and followed in a number of cases in South Africa. See *Rellams (Pty) :Ltd v Jones Brown & Hamer Ltd* 1983 (1) SA 556 at 564; *Swissborough Diamond Mine v Government of RSA* 1992 (2) SA 279. The test for relevance from the above quotation appears to be extremely wide and includes not only documents which are directly relevant but also those that may indirectly assist the party seeking discovery. This test in my view appears to be in conformity with the wording of Rule 160 of the High Court Rules which is crafted as follows:

> "A party to a cause or matter may require any other party thereto, by notice in writing, to make discovery on oath within twenty-four days of <u>all documents relating to any matter in question in such cause or matter which are or have</u> at any time been in the possession or control of such other party …." (emphasis is my own)

It is clear therefore from the authorities cited that the applicant is entitled to request full and complete discovery by the respondents and the respondents are obliged to make full discovery.

(c) <u>Circumstances where further discovery may be sought</u>

The applicant in making this application proceeded in terms of Rule 162 of the High Court Rules which relates to a request for further discovery where a party is not satisfied that there has been full disclosure by the other party.

The question which arises in this case however, is in what

circumstances can a court compel further discovery of documents. In the case of *Federal Wine and Brandy Co. Ltd v Kentor* 1958 (4) SA 735 at 749 it was held that a discovery affidavit is considered conclusive unless it can be shown from the discovery affidavit itself or from documents referred to in the discovery affidavit or from pleadings or admissions made by the party making the discovery affidavit or from the nature of the case and documents in issue that there are reasonable grounds for believing that the party has other relevant documents in their possession or power. (See *Swissborough Diamond Mines v Government of the RSA supra* at 320)

In the two matters before me most of the documents being sought are documents which would reasonably have been expected to exist when conducting an election. The Registrar-General in this matter has also admitted being in possession of some documents which are being requested. In his opposing affidavit the Registrar General stated that he would discover the training manual for constituency registrars which had hitherto not been discovered but obviously should have been. Based on these factors, this court may properly conclude that the respondents may very well have other documents in their possession which had not been discovered. These documents, in my view, would have to be discovered. It cannot therefore be said, in the circumstances of this case that the applicant is on a fishing expedition as had been submitted by the respondents. In any event if indeed the respondents do not have any of the documents being sought, all that they must do is to state, in the affidavit, that such documents do not exist and were never in their possession. In doing so they would thus have complied with the order to effect further discovery.

(d) <u>The need for Identification of documents sought by the applicant</u>

The respondent has argued that it is difficult to ascertain what documents are being sought by the applicant from the schedule which

was attached to the draft order in case No. HC 470/03. It appears to me that there is some merit in this assertion as, in some instances, the request is vague and it would be impossible for the respondent to comply with. For instance in paragraph 1, 2.1, 3 and 4 of the schedule which was filed by the applicant, the applicant seeks discovery of all directives issued by the second respondent to various persons. The request does not specify whether the directives were verbal or in writing. Where any directives were given verbally it would be difficult to effect discovery as discovery relates only to documents, tapes and correspondence . In the case of *Rellams (Pty) Ltd v Jones Brown & Hanner Ltd (supra)* at 560 the South African courts in interpreting Rule 35(3), which is similar to Rule 162 of the High Court Rules, held that although there was no basis for limiting the production of documents in terms of this rule to documents of a specified nature there was need for documents which are being sought to be properly identified. This is particularly important in view of the import of Rule 165(2) which allows a party to apply for dismissal of his opponent's case where an order compelling discovery has not been complied with. In my view the request should therefore be for the sake of clarity, "any written directives" rather than for "all directives issued". I will thus amend those paragraphs accordingly.

In respect to paragraph 5 of the schedule the request is crafted too widely as it requires discovery of memorandae, documents and correspondence received from specified persons and also from "any other person and body". This in my view is too vague. There must be some identification with respect to the persons to whom the communication was made. Documents requested must be described in such a manner that they are identifiable otherwise it will be impossible for the respondent to comply with the order. The court too would not be able to determine whether there has been compliance with its order, in the event that an application is thereafter made in terms of rule 165.

In respect to paragraph 7 and 8 it is clear that these documents are

the same items which were discovered by the respondent in his discovery affidavit and to which an order will be made in case No. HC 469/2003. They should accordingly not be subject to further discovery.

In paragraph 13 the applicant seeks the full provisional list of results of the Presidential Election in March, 2002. It is difficult to ascertain the basis upon which the applicant seek further discovery of this document when it is conceded in the paragraph that the document is already in the possession of the applicant. The applicant further seeks that the respondent provides a break down of the votes cast at each of the polling stations in each of the constituencies. The respondent objected to this request and in my view the objection was properly made. It is not the purpose of discovery to provide information to a party which has been synthesized. As already stated the purpose of discovery is to make available documents in the possession of the party so that the requesting party can deal with the information as it deems fit, including doing a break down of the information once it is in its possession. There is therefore no basis for compelling further discovery of a document which has already been made available and is in the possession of the applicant.

(e) Whether the Respondent is obliged to discover privileged documents

The respondents' second ground of opposition was in regard to the order sought in case No. HC 471/2003. The respondent submitted that all the documents being sought to be discovered being memorandae between the respondent and his office to specified persons were privileged and therefore could not be discovered.

In my view the position taken by the respondent in this matter does not comply with the rules. In terms of rule 161 a party in effecting discovery must state separately –

"(a) such documents in his possession or that of his agent other than the documents mentioned in paragraph (b);

(b) such document in respect of which he has a valid objection to produce;

(c) such documents which he or his agent had but has not in his possession at the date of the affidavit."

Thus where the respondent is claiming that documents are privileged, he must disclose such documents in terms of paragraph (b) of rule 161 and specify the basis of his objection. According to the authors Herbstein and Van Winsen (*supra*) the grounds of the claim to privilege must be clearly stated in the affidavit unless they appear from the nature of the documents themselves.
In this case therefore the respondent must state, on affidavit, that such documents, which the respondent does not wish to avail for inspection are privileged and specify the ground upon which the claim for privilege is based.

<u>Costs</u>

In relation to costs the respondents argued that the applicant had filed three applications which was totally unnecessary as all three applications could have been dealt with in one application. The respondents therefore submitted that the applicant should be awarded costs for only one application in the event that they succeeded. The respondents argued further that litigation could have been averted had the applicant followed up the Notices served on the respondents with a letter or a phone call particularly in view of the oversight by the respondents' legal practitioner. It was the respondents' view that the parties could have possibly discussed and resolved the matters without resorting to litigation.

The applicant submitted that the first matter filed under case No. HC 469/03 was completely different from the other two matters and that it would not have been possible to deal with all three matters as one application. It was however conceded in respect to case No. HC 470/03 and HC 471/03 that they were substantively similar and that the only difference were the orders being sought, as one was against the Registrar General and the other against the Minister for Justice, Legal and Parliamentary Affairs and the content of the schedules to the orders were different. Advocate *de Bourbon* was however adamant that as the notices requesting further discovery had been properly served there was no basis for penalizing the applicants as there was no requirement in the Rules that the applicant follows up on a matter first before resorting to litigation. In my view the submissions by the respondents have some merit.

Litigation could have been averted particularly in relation to the first matter where the documents had already been discovered and the applicant was merely exercising his right to inspect such documents. However I am in agreement with the applicant that he was under no legal obligation to follow up the Notice with a phone call before resorting to litigation. The applicant has succeeded and is entitled to his costs. In relation to the matters in case No. 470/03 and 471/03, I am of the view that they could have been married together to form one application instead of two. Indeed even in his submissions, counsel for applicant dealt with both matters together as the legal argument was the same. In my view, it is only appropriate that this court allows the applicant's costs only in relation to one case and not to both.

Accordingly I make the following orders:

<u>Case No. HC 469/03</u>

It is ordered that:

1. The respondent shall make available for inspection, by the applicant's legal practitioners in terms of Order 24 of the High Court Rules, the Voters Roll for the 2002 Presidential Election, within five days of the date of service of this order upon the respondent.

2. The respondent shall pay the applicant's costs of suit.

<u>Case No. HC 470/2003</u>

It is ordered that:

1. The respondent shall effect further discovery in terms of Order 24 of the High Court Rules the documents set out in the schedule annexed hereto within five (5) days of the date of service of this order upon the respondent.

2. The respondent pay the applicant's costs of suit.

<u>Case No. HC 471/2003</u>

It is ordered that:

1. The respondent shall effect further discovery in terms of Order 24 of the High Court Rules the documents set out in the schedule annexed hereto within five (5) days of the date of service of this order on the respondent.

2. That there be no order as to costs.

Messrs Gill, Godlonton & Gerrans, applicant's legal practitioners.
Civil Division, Attorney-General's Office, respondents' legal practitioners.