TEMBA MLISWA
versus
THE CHAIRPERSON (ZEC)
and
ZIMBABWE ELECTORAL COMMISSION
and
ZANU (PF)
IGNATIOUS CHOMBO
and
KEITH GUZHA
and
CHIEF NYAMHUNGA
and
CHIEF DANDAWA
and
CHIEF NEMATOMBO
and
CHIEF DENDERA
and
HEADMAN MATAU
and
THE PRESIDENT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 8, and 9 June 2015

**Electoral Application**

*T Zhuwarara*, for the applicant
*T Kanengoni*, for the 1st and 2nd respondents
*I. Ndudzo*, for the 3rd and 5th respondents
Mrs *V.Munyoro*, for the4 and 6th to 11th respondents

UCHENA J: The applicant is an independent candidate for the Hurungwe West By-Election scheduled for the 10 June 2015. He by ordinary application applied for an order suspending the holding of elections in Hurungwe West on 10 June 2015 due to alleged violence and intimidation. In the alternative he seeks orders compelling the first, second, fourth, and sixth to tenth respondents to make statements through fliers and radio correcting the impression created by the third to tenth respondents about how voters in the constituency shall go to the polls and vote on 10 June 2015.

The first respondent is the Chairperson of the Zimbabwe Electoral Commission to whom the applicant complained by letters dated 12 and 14 May 2015 about the violence and intimidation which was being unleashed in Hurungwe West by the third to tenth respondents.

The second respondent is the Zimbabwe Electoral Commission.

The third respondent is Zimbabwe African National Union (Patriotic Front) ZANU PF, a political party which fielded the fifth respondent for the Hurungwe West By-election.

The forth respondent is the Secretary for Administration for the third respondent who is being sued in his personal capacity for inciting violence and intimidation in Hurungwe West Constituency.

The fifth respondent is a contestant fielded by the third respondent for election as a member of Parliament for Hurungwe West in the 10 June by-elections.

The sixth to tenth respondents are traditional leaders who the applicant alleges have been tasked with the roll of systematically heading their subjects to polling stations and monitoring how they will vote to identify those who will vote for the applicant.

The eleventh respondent is the President of Zimbabwe cited in his official capacity as the official responsible for proclaiming dates for elections.

As already said, the applicant applied by ordinary application, for the above mentioned orders. He in that application sought to have the application set down for the fifth June 2015 even though he only served the application on the sixth to tenth respondents on 6 June 2015. It was served on the first, second, third and fourth respondents on 2 June 2015. The registrar set it down for 8 June 2015. Most of the respondents were served with notices of set down on 8 June 2015.

On 8 June the respondents' counsel raised three preliminary issues. Mr *Ndudzo* for the third and fifth respondents raised a preliminary issue on his clients being entitled to the *dies induciae* permitted in terms of the rule the applicant used to file his application. Mr *Kanengoni,* for the first and second respondents raised a preliminary issue on whether or not this court has jurisdiction to hear the applicant's application. Mrs *Munyoro* for the fourth and sixth to eleventh respondents raised a preliminary issue alleging that the fourth respondent had been incorrectly cited in his personal capacity.

I after hearing submissions from the parties postponed the case to 9 June 2015, when I ruled in favour of the third and fifth respondents' preliminary issue and dismissed the first, second and fourth respondents' preliminary issues. I indicated that my reasons for judgment would follow, these are they.

***Dies Induciae.***

In his submission Mr *Ndudzo* argued that the applicant consciously chose the procedure through which he brought his application to this Court. That procedure determines the time frames within which the respondents are expected to file their responses. He submitted that where an applicant files an ordinary application in terms of r 231 (3) of the High Court rules 1971, which the applicant used a respondent is in terms of r 232 entitled to file his response within not less than 10 days, exclusive of the day of service, plus one day for every additional 200 kilometres or part thereof where the place of service is more than 200 kilometres from the court where the application is to be heard. He submitted that the application has been prematurely set down as the *dies induciae* has not yet lapsed and the third and fifth respondents are entitled to file their responses within the time permitted by the rules.

Mr *Zhuwarara* for the applicant, instead of relying on the procedure in the High Court rules which the applicant used in filing the application, and invoking corrective measures, sought to expedite the hearing of the application by invoking the provisions of r 31 of the Electoral Court's Rules S.I 74A of 1995. Rule 31 provides as follows;

> "The Registrar and all parties to any stated case, petition, appeal or application referred to in these rules shall take all steps necessary to ensure that the matter is dealt with as quickly as possible"

He submitted that the applicant gave the respondents three days to respond in view of the provisions of r 31. This submission is not consistent with what the applicant said in his founding affidavit on p 10 para 12, where he said;

> "I have given the respondents three days to respond. This is a modification of the rules of the High Court as contemplated in section 164 (4)"

Mr *Ndudzo* in response submitted that r 31 is not applicable to the present application as it is not one of the applications mentioned in those rules. He analysed the applications covered by the 1995 Electoral Court rules and demonstrated how those rules do not apply to the applicant's application. He further submitted that the applicant cannot unilaterally decide on the *dies induciae* especially after choosing the ordinary application procedure instead of using the urgent application procedure in terms of which an applicant can in terms of the proviso to rule 232 specify a shorter *dies induciae* " if the court "on good cause shown agrees

to such shorter period". He further submitted that the applicant should have applied by urgent chamber application accompanied by a certificate of urgency in terms of r 244.

The need to hear electoral cases urgently is not in dispute. I accept that such cases should be heard as soon as possible, but an applicant has to follow the correct procedures to achieve that objective. It does not assist the smooth and efficient administration of justice, for an applicant to apply for remedies on the 11th hour, and for his legal practitioners to choose a wrong procedure and thereafter expect the court to extricate them from their chosen timing and procedure, without their doing what the law of procedure requires them to do, to achieve that objective. Section 165 (4) provides for the use of High Court rules as follows;

> "(4) Until rules of court for the Electoral Court are made in terms of this section, the rules of the High Court shall apply, with such modifications as appear to the Electoral Court to be necessary, with respect to election petitions and other matters over which the Electoral Court has jurisdiction."

Section 165 (4), makes it clear that modifications of the High Court rules must "appear to the Electoral Court" to "be necessary". This means an applicant can -not unilaterally decide that issue, but has to first convince the court of the necessity of the modification. The applicant did not do so. He while using the procedure which gives the respondents the longest *dies induciae*, unilaterally modified the rule to reduce that period. In my view the applicant should have simply applied by urgent application which in terms of rule 244 allows a judge to call parties to make submissions on the issue of urgency. Rule 244 reads;

> ***"244.*** Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (*b*) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.
>
> **Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent."** (emphasis added)

Rule 244 makes it clear that urgency has to be determined by a judge after hearing the parties' submissions on it. In this case it was not possible to determine that issue within an ordinary application in terms of r 232, to which r 244 does not apply. It is for these reasons why the third and fifth respondents' insistence on the *dies induciae* provided for in r 232 cannot be interfered with, unless the applicant invokes remedial remedies to enable the

hearing of its application without having to wait for the expiry of the *dies induciae* he trapped himself into. The applicant's application must, therefore be removed from the roll.

**Jurisdiction.**

Mr *Kanengoni* for the first and second respondents raised a preliminary issue on whether or not this court has jurisdiction to hear an application for which the Electoral Act does not specifically confer jurisdiction on it. He relying on the case of *Makone & Another* v *Chairperson (ZEC) & Anor* 2008 (1) ZLR 230 (H) submitted that this court can only exercise jurisdiction over cases where the Legislature specifically conferred jurisdiction on it.

Mr *Zhuwarara* in response submitted that s 161 (2) as currently worded confers jurisdiction on the Electoral Court in respect of all applications arising from the Electoral Act. He submitted that s 161 must be read as a whole to get its full meaning. I agree, that provisions of a statute must be construed within the context in which they are found.

The Electoral Act has been extensively amended since my decision in Makone (*supra*). The wording of the current s 161 is totally different from the earlier version. In the 2004 version which applied in 2008 s 161 (1) provided as follows:

> "161 (1) There is hereby established a court, to be known as the Electoral Court, for the purpose of hearing and determining election petitions and other matters in terms of this Act.
>
> (2) The Electoral Court shall have no jurisdiction to try any criminal case.
>
> (3) The Electoral Court shall be a court of record."

Section 161 of the Electoral Act as amended by Act 3 of 2012 reads as follows:

> **"161** (1) There is hereby established a court, to be known as the Electoral Court, which shall be a court of record.
> (2) The Electoral Court shall have exclusive jurisdiction—
> (*a*) to hear appeals, applications and petitions in terms of this Act; and
> (*b*) to review any decision of the Commission or any other person made or purporting to have been made under this Act; and shall have power to give such judgments, orders and directions in those matters as might be given by the High Court:
> Provided that the Electoral Court shall have no jurisdiction to try any criminal case.
> (3) Judgments, orders and directions of the Electoral Court shall be enforceable in the same way as judgments, orders and directions of the High Court."

Subsection (2) brought in changes which makes the decision, in Makone (*supra*) inapplicable. The Electoral Court now has exclusive jurisdiction, which it did not have in 2008. The word "exclusive", means this court, now has a domain over which, it does not share its jurisdiction with any other court. That domain is marked by s 161 (2) (a) and (b),

which caps it all by adding that this court now has powers similar to those exercised by the High Court, when, it determines electoral issues. The combination of exclusive jurisdiction and the addition of powers similar to those exercised by the High Court means this court now enjoys unlimited jurisdiction over all electoral cases, except criminal cases and cases, which have been specifically, allocated to other courts. Applications are now specifically mentioned as falling within the Electoral Court's jurisdiction. In 2008 they fell under "other matters". The Electoral Court now has "power to give such judgments, orders and directions in those matters as might be given by the High Court". The granting to the Electoral Court of exclusive jurisdiction, and power to give such judgments, orders and directions in those matters as might be given by the High Court, is a clear enhancement of the Electoral Court's jurisdiction after the Makone case (*supra*). The fact that the Legislature which is deemed to know the law made these deliberate changes, means it intended to alter case law by giving this court jurisdiction the Makone case (*supra*) said it did not have. Exclusive jurisdiction means this court does not share concurrent jurisdiction with any other court, on matters it has jurisdiction on. The granting of power to give judgments and orders the High Court might give enables this court to exercise jurisdiction over cases in which it used to decline jurisdiction and such cases would be heard by the High Court. It has simply been given exclusive jurisdiction with unlimited power to hear and determine cases under the Electoral Act just as the High Court had jurisdiction to hear such cases during the era when the Electoral Court did not have exclusive jurisdiction.

I therefore find that this court has jurisdiction to hear and determine the applicant's application.

**Citation of the 4th Respondent**

Mrs *Munyoro* submitted that the fourth respondent should have been cited in his Ministerial capacity, in view of the alternative order sought by the applicant. In para 4 of his draft order the applicant sought the following order:

> "That the 4th Respondent be and is hereby ordered to issue and cause to be circulated in Hurungwe West, the following statement in both Shona and English;
> "Each voter has a right to go to the polling station at a time convenient to her/him and need not be accompanied by their village head".

She submitted that the applicant can only make the statement sought in his capacity as the Minister of Local Government.

Mr *Zhuwarara* in response submitted that the fourth respondent was correctly cited in his personal capacity, because of what he is alleged to have said and done in Hurungwe West constituency. He referred to the applicant's allegations against the fourth respondent as the basis on which he was cited in his personal capacity. On p11 para 16 of his application the applicant, said:

> "16. The 4th respondent, in the presence of the 5th respondent and in the name of the 3rd respondent, has addressed several campaign meetings at which he has issued threats against any person who intends to vote for me. There is video evidence of these meetings and the 4th respondent's utterances. If the 4th respondent denies ever making these statements, I will seek leave of the court to submit the video evidence."

Mr *Zhuwarara* further submitted that the fourth respondent can issue the statement sought in the alternative order in his personal capacity.

In response Mrs *Munyoro* submitted that if the statement is issued by the fourth respondent in his personal capacity it will not have the weight it would have if he made it in his ministerial capacity.

On p 9 para 5 the applicant clearly states that he is aware of the fourth respondent's Ministerial office but was suing him in his personal capacity. The cumulative effect of para(s) 4 and 9 of the applicant's founding affidavit indicates that the fourth respondent is being deliberately sued in his personal capacity for the threats and utterances he made at campaign meetings in his capacity as one of the leaders of the third respondent. It is clear why the applicant sued the fourth respondent in his personal capacity. It was a deliberate choice the applicant made well aware of the fourth respondent's official capacity. I am satisfied that the fourth respondent's official capacity has nothing to do with the alleged threats and utterances. The applicant seems to be merely seeking a retraction of the utterances made by the fourth respondent at campaign meetings as opposed to a weighty Ministerial statement. A litigant has a right to sue an official in his personal capacity if the alleged conduct has nothing to do with his office. I am satisfied that the applicant correctly cited the fourth respondent in his personal capacity.

I therefore uphold the first preliminary issue and dismiss the second and third preliminary issues. In the result I granted the following order;

1. The 3rd and 5th Respondents are entitled to the *dies induciae* provided for by the rules in terms of the type of application the applicant filed.
2. The 1st and 2nd respondents' preliminary issue is dismissed with costs.
3. The 4th respondent's preliminary issue is dismissed with costs

4. The applicant shall pay the 3rd and 5th respondents' costs.

5. The applicant's application is removed from the roll.

*Kadzere, Hungwe & Mandevere*, applicant's legal practitioners
*Nyika, Kanengoni & Partners*, 1st and 2nd respondents' legal practitioners
*Ndudzo & Partners*, 3rd and 5th respondents' legal practitioners
*Attorney General's Civil Division*, 4th and 6th to 11th respondents' legal practitioners