

THE ZIMBABWE NURSES ASSOCIATION
and
IRENE RUGARE SAMBO
and
PEGGY DUBE
and
ENOCK DONGO
and
MUGOVE CHIPFURUTSE
and
ANGELINE MATINHURE
versus
NURSES COUNCIL OF ZIMBABWE
MURIEL NOTHANDO MOTHOB I N.O in her capacity as
REGISTRAR OF THE NURSES COUNCIL OF ZIMBABWE
and
LILIAN DODZO
and
PEDRINAH THISTLE
and
FARAI MARUFU
and
VIRGINIA MAWEREWERE
and
CHRISTOPHER NZVENGA
and
ALOIS MANDIZVIDZA
and
MIRIAM MANGEYA
and
PATRICIA TAVAZIVA
and
WILLIAM MUTURE
and
HERBERT TARUVINGA
and
THE MINISTER OF HEALTH AND CHILD CARE
and
THE HEALTH PROFESSIONS AUTHORITY OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 15 February 2016 and 1 June 2016

Opposed Matter

O Matizanadzo, for the applicants

S J Chihambakwe assisted by *R Kunze*, for the respondents

MATANDA-MOYO J: The applicant seeks a declaratory order in terms of Order 32 of the High Court Rules, 1971 as read with s 14 of the High Court Act [*Chapter 7:06*] in the following;

- “1. That the election and subsequent appointment by the 13th respondent of the 3rd, 4th, 7th, 8th, 9th, 10th, 11th, and 12th respondents as Councillors/Members of the 1st respondent be and is hereby declared null and void.
2. That the 1st and the 2nd respondents be and are hereby directed to hold fresh elections under the supervision of the 4th respondent within three months from the date of service of this order on the respondents’ legal practitioners or on the 1st and 2nd respondents.
3. That the 14th respondent be and is hereby directed to supervise the elections to be held in terms of paragraph 2 of this order to ensure that the same comply with the provisions of the Health Professions Act [*Chapter 27:19*] and the Health Professions (Election of Members of Nurses Council) Regulations 2001, SI 350/01.
4. That the costs of holding fresh elections shall be borne by the 2nd respondent in her personal capacity.
5. That the 2nd respondent shall pay the applicant’s legal costs on an attorney and client scale in her personal capacity.”

The brief facts are that applicants are members of the first respondent. first respondent consists of 15 councillors who are as follows:

- a) Director of Nursing Services
- b) Four appointed by the Minister of Health and Child Welfare and
- c) Ten (10) elected by the nurses.

It is the appointment of the ten nurses that the applicants seeks to challenge on the basis of irregularities.

The respondents raised two points in *limine* namely;

- 1) That the first applicant has no *locus standi* to bring these proceedings and

- 2) That this matter is incapable of resolution through papers. Oral evidence is required to prove certain allegations.

Let me firstly deal with the preliminary points as raised.

The respondents argued that the first applicant has no *locus standi* to bringing these proceedings without a clear mandate from its constituency. Nothing has been produced before the court to show that the first applicant's members elected to have the elections nullified to pave way for fresh elections. The second to sixth applicants are not the only members of first applicant. The first applicant is an association of nurses and the 3rd to 12th respondents are also members of the first applicant. The Constitution of the first applicant does not give her the right to bring proceedings as these without authorization from its members. No such authority was given to the first applicant. The respondents submitted that to the extent that the third to 11th respondent's and second to sixth applicants are members of the first applicant, the first applicant is seriously conflicted and is not entitled to make this application.

The applicants on the other hand opposed the points in *limine* taken by the respondents. They argue that there is a standard test for *locus standi*, which is whether the party has a direct and substantial interest in the right which is the subject matter of the proceedings and the relief sought. The applicants argued that the first applicant as a voluntary association whose objectives include;

- i. The promotion of the development of the nursing profession for the benefit of nurses, the nursing staff, the community and the country as a whole;
- ii. the promotion and/or support of the promotion of the advancement of the nurses and nursing staff at all levels of the nursing profession and;
- iii. representation of nurses in all issues which affect their professional welfare."

do have direct and substantial interest in ensuring that elections are conducted in a regular and fair manner. The applicants' members have an interest in seeing to it that elections into positions of the first respondent are done in a fair and transparent manner.

Firstly in order to resolve the issue this court will look at the constitution of the first applicant. What powers are given to the first applicant in terms of its constitution. Paragraph 2 of the constitution provides;

"2. LEGAL STATUS

The association shall be an autonomous and legal person and shall sue or be sued in its own name.”

Under “OBJECTS” paragraph 3. 10 the first applicant has an obligation “to promote and/or support the promotion of establishing a nursing council.”

It follows therefore that the first applicant has an interest in the affairs of the first respondent.

Locus Standi is a term used for the ability of a party to demonstrate to the court sufficient interest to and harm from the law or action challenged to support the party’s participation in the case. The applicant submitted that as a body representing its members of the nursing profession, it has an interest in how elections of office holders of the first respondent are conducted. The conduct of elections of the first respondent’s office bearers is a matter of substantial and direct interest to its members. It is a right of all members of the first applicant to vote for members of the first respondent and any violations of such right infringe upon the first applicant’s members. The applicant submitted that failure to hold proper elections in terms of ss 43 (1) (c) of the Health Professional Authority Act [*Chapter 27:19*] as read with SI 350/2001 has violated the rights of the applicant’s members. The applicants allege that its members’ rights have been violated. As an Organisation representing nurses it is its duty to protect such members’ rights. I am of the view that the first applicant’s constitution allows it to sue in its name.

I am also of the view that the applicant has shown that its members’ rights could have been violated by the manner in which the elections of the second respondent’s office bearers were conducted. In that respect the applicant has shown that it has substantial and direct interest in the matter and thus has *locus standi* to bring these proceedings on behalf of the members. See *law Society of Zimbabwe v Minister of Justice, Legal and Parliamentary Affairs and Another* (2006) ZWSC 16, *Pilane and Another v Pheto and Ohters* [2002] ZANWHC 10, *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07. It is also my view that the first applicant is not conflicted in any manner as it is in the interests of the members to ensure that elections are properly conducted. The first applicant being a legal persona makes decisions through its executive members and requires no authority from individual members to institute proceedings. The authority required is that of the executive members.

The respondents also argued that this is a matter which is incapable of being resolved on papers. The respondents submitted that they have challenged the applicant's averments that there was no transparent and proper distribution of ballot papers. The proper remedy is to refer the matter to trial in order to canvass the factual disputes.

The applicants deny the existence of such material disputes of fact. The applicants submitted that the issue before the court is capable of resolution on papers filed. The issue for determination is whether or not the election was held in terms of SI 350/01. Reliance should be placed on the election report on pp 337 to 360 of the record.

Let me deal with whether the respondents have pointed out the material disputes of fact in this matter. The respondents submitted that the issue of premature termination of the applicant's tenure of office is not capable of resolution without leading evidence. I do not agree. It is common cause that initially the applicants' tenure of office expired in October 2015. Page 320 of the record is a letter from the Minister of Health and Child Welfare authorizing the synchronisation of all councils elections to June 30 2015. The only issue for determination is the legality of such a decision, which is a question of law. No oral evidence is required for the court to make such a determination.

I have not seen any disputes in this matter, which disputes cannot be resolved on papers. The respondents have failed to point to any such disputes. No disputes have been pointed out by the respondents that require a trial. See *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi*, HH 92/09, *Mudzi v Harry (Estate)* HH 123/06, *Francis R. Fernandes and Sons v Mudzingwa and Others* 2014 (1) ZLR 29 (H).

The respondents also submitted that the present application is improperly before the court. The applicants ought to have approached the court by way of an application for review, since the applicants are alleging;

- “- Irregularities at publication of notice of elections
- Irregularities pertaining to nomination papers
- Irregularities after nomination
- Irregularities relating to list of nominees
- Irregularities relating to voting ----.”

Respondents argued that since the complaints by applicants relate to the manner in which the elections were conducted, then the applicants ought to have filed a review application.

The Supreme Court in the case of *Streamsleigh Investments (Pvt) Ltd v Autoband Investments (Pvt) Ltd* 2014 ZLR 736 (S) dealt with instances where the High Court can grant declaratory orders. At p 750 B-D the court said;

“A declaratory order under section 14 of the High Court Act [*Chapter 7:06*] is appropriate to determine any existing future or contingent right or obligation. An application for a declaratory order must be an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be pre-judicially affected by the judgment of the court. In addition, an applicant must establish that some tangible and justifiable advantage in relation to its position with reference to an existing, future or contingent legal right or obligation may appear to flow from the grant of the declaratory order sought. See *Jonsen v Agricultural Finance Corporation* 1995 (1) ZLR 65 (S) at 72 E-F, *Mun Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) at 344.”

Applying the above test the applicant has a right to bring an application for a declaratur and therefore such application is properly before the court.

The applicants seek an order declaring the election of councillors or members of the first respondent null and void on the basis of failure to comply with the provisions of the Health Professions (Election of members of Nurses Council) regulations, 2001 SI 350/01 and s 43 (1) (c) of the Health Professions Act [*Chapter 27:19*].

Firstly the applicants challenge the holding of elections before the end of the tenure of the second – sixth applicants. The applicants contend that the tenure of such applicants ended on 5 October 2015 and not 6 July 2015. In terms of s 3 (1) of the Health Professions (Election of Members of Nurses Council Regulations, 2001 the term of office bearers is five years. Second to sixth applicants’ term of office ran from 6 October 2010 to 5 October 2015. That is common cause. As I have already indicated (*supra*) the Minister authorised the synchronization of all councils’ elections to 30 June 2015, effectively cutting short applicants’ tenure of office. The applicants participated in the elections. It is my view that the applicants had accepted the limit imposed by the Minister of their terms in office. The applicants waived their rights to challenge that decision. After participating and losing the elections the applicants cannot be allowed to revoke their acquiescence. A waiver is simply the voluntary act of relinquishment or surrender of some known right. The applicants knew their terms of office ended on 5 October 2015 but voluntarily accepted nominations for office for elections which were being held in June 2015. I am of the view that the requirements for waiver have been satisfied. See *Alfred Mc Alpure*

and Sons (Pty) Ltd v Transvall Provincial Administration 1977 (4) SA 310, *Mohamed & Anor v President of the Republic of South Africa & Others* 2001 SACR 66 (C.C).

It is my view that the calling of the elections on 8 March complied with SI 350/01 as such notice was given three months before the beginning of the term of the new Nurses Council Members. Section 3 (1) of the SI 350/2001 provides:

“3 (1) On a date three months before constitution of the new council and thereafter on a date not less than three months before the beginning of each subsequent five year period ...”

The applicants also challenged the notices given as contrary to SI 350/01. The applicants submitted that the Registrar was supposed to publish the notices in both the Government Gazette and in such newspaper as directed by SI 350/01. Notice was only given in the Sunday Mail Newspaper but no notice was published in the Government Gazette.

Section 3 (1) provides;

“-----, the Registrar shall publish, in the Gazette and in such newspapers as council may direct a notice in the form NCZ. I -----”

The respondents conceded that no publication was done in the Gazette. However the respondents submitted that the Notice was also published in the Sunday News, Manica Post, on live television interviews and on live radio. They argued that the purpose of the publication was achieved as most members were reached via alternative media. In any case the Gazette is not a widely read paper and no prejudice was occasioned on the applicants by failure to publish in the Government Gazette.

In *Unlawful Occupiers School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) the Supreme Court of Appeal stated:

“It is clear from the authorities that even where formalities required by statute are peremptory it is not every deviation from the literal prescription that is fatal. Even in that event, the question remains whether, in spite of the defects, the object of the statutory provisions had been achieved.”

The same sentiments were echoed in *Nokeng Tsa Taemana Local Municipality v Dinokeng Property Owners Association & Others* (2010) ZASCA 128:

“It is important to mention that the mere failure to comply with one or other administrative provisions does not mean that the whole procedure is necessarily void. It depends in the first instance on whether the Act contemplated that the relevant failure should be visited with nullity and in the second instance on its materiality ---. To nullify the revenue stream of a local authority

merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the legislature could have intended it”

The publication in the Government Gazette provided for under s 3 (1) of SI 350/01 should be distinguished from publication for promulgation purposes, where the publication is not law and where the regulations provides for alternative to publication in the gazette. The present publication is only a procedural notice to the nursing profession calling for nominations. Such requirement is simply to ensure that the nurses are informed about their obligations and non-compliance therewith may not lead to nullification of the process. I am of the view that the alternative publications by the respondent were sufficient to discharge the Registrar’s obligations in terms of s 3 (1). See also *Sterling Products International Ltd v Zulu* 1988 (2) ZLR 293.

On the issue of improper distribution of nomination papers I agree with the respondents that the regulations do not prescribe any formula for distribution. The applicants have not attempted to show the prejudice suffered by the modus adopted and this court cannot speculate. On that basis alone this ground fails.

The sixth applicant being a candidate was also tasked with distributing, collecting and submitting nomination papers. She effectively became an umpire in her case. The second respondent handpicked and tasked persons to distribute nomination papers. Mrs Chimusoro and Dr Ndlovu who were non-council members participated in the distribution of nomination papers in violation of the regulations. In terms of the regulations the Registrar is to publish form NCCZ II, which the nurses uses to nominate candidates.

The regulations do not provide for distribution of nomination papers. The applicants complain that the distribution of nomination papers by interested parties interfered with the right of applicants to freely choose nominees. The applicants complained that in other instances the distributors were immediate bosses of the members. However, no evidence was produced to prove that the members of the first respondent failed to freely choose nominees.

The applicants submitted that the appointment of two srutinisers to run the elections, done by the second respondent was contrary to the enabling law. One scrutiniser is to be appointed by the Minister to ascertain result of elections. Everything which was done by scrutinizers in violation of the law was null and void. Applicants complained of flagrant violation of the law in publishing names of the nominated candidates and prayed for nullification

of the elections. Section 10 of the regulations does provide for the nomination of one scrutiner by the Minister. Again the applicants failed to show how the appointment of the srutinisers negatively affected the running of the elections.

I agree with the applicants that interested parties ended up being responsible for distributing and collecting nomination papers. However applicants have not gone further to show that particular nurses failed to nominate candidates of their choice. What I have before me amounts to speculation that members rights to freely nominate candidates was interfered with.

I am not satisfied that applicants have managed to show any prejudice to its members. Not every violation of regulations should lead to nullifications of elections. I am unable to declare the elections so held as void.

Accordingly I am unable to grant the relief sought and in the result the application is dismissed with costs.

Matizanadzo & Warhust, applicants' legal practitioners
Chihambakwe, Mutizwa & Partners, respondents' legal practitioners