

DORCAS STAFF SIBANDA
versus
DOUGLAS TOGARASEI MWONZORA
and
THOKOZANI KHUPE
and
MOVEMENT FOR DEMOCRATIC CHANGE - TSVANGIRAYI
and
SPEAKER OF THE NATIONAL ASSEMBLY (N.O)
and
ZIMBABWE ELECTORAL COMMISSION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 23 October, 2020 & 11 November 2020

Urgent Chamber Application

K Kadzere, for the applicant
J Kadoko, for the 1st & 3rd respondents
L Madhuku, for 2nd respondent
A Demo, for 4th respondents
T Kanengoni, for 5th respondent

MANGOTA J: During his life time, one Morgan Richard Tsvangirai made every effort to remove the Zimbabwe African National Union – Patriotic Front (ZANU PF) from power. Pursuant to his resolve, he and others who shared his views founded the third respondent in or at about 1999. The third respondent is a political party (“the party”). It is to it that the applicant, the first and second respondents belonged.

At the congress which the third respondent held in 2014, the first and second respondents were elected to the positions of Secretary-General and Vice-President of the party respectively. It is at the same congress that the applicant alleged that she was elected to the position of vice-chairperson for the party’s Bulawayo Province.

Morgan Richard Tsvangirai’s intention to dislodge ZANU (PF) from power persuaded him to form a partnership with leaders of six other opposition political parties. He and them signed

their partnership agreement on 5 August 2017. They did so in preparation for Zimbabwe's 2018 plebiscite.

The agreement, in their view, would be to form a common position with a view to fighting ZANU (PF) from an agreed perspective. The material terms of the agreement were that each partner would:

- (i) select its own candidates for various positions which were for taking in the election;
- (ii) field its own candidates under the quota which the partnership allocated to it;
- (iii) maintain its independence over the candidates whom it selected for the 2018 election – and
- (iv) retain the power of recall over its elected officials.

The agreement defined the partners' main objective of working as a team in the treacherous waters of Zimbabwe's electoral process. It allowed them to work as a united front. It coalesced the seven (7) opposition political parties into what they called the MDC Alliance ("the alliance")

The alliance, the record shows, was/is not a political party. It was an association of opposition political parties which shared/shares a common vision. Its agenda was to remove ZANU (PF) which ruled the country from 1980 to date from power. Its life span was to endure for five (5) years which were reckoned from the date that the partners signed the agreement. Candidates whom each partner fielded for the 2018 elections, therefore, contested the same under the ticket of the MDC Alliance.

It is through the above stated process and arrangement that the first respondent made his way into the senate of the Parliament of Zimbabwe. It is also through the same process and arrangement that the applicant found her way into the National Assembly of the Parliament of Zimbabwe. The third respondent nominated them into either house of Parliament.

Following the judgment which the Supreme Court issued in March, 2020 under SC 56/2020, the first respondent who went into the upper house of Parliament through the ticket of the alliance returned to the third respondent where he assumed his former position of Secretary – General. The second respondent whom the third respondent elected its Vice-President at the 2014 congress became the party's acting president whom the Supreme Court charged with the

responsibility of organising and holding an extra- ordinary congress of the third respondent from which its new team of leaders would be elected.

The above described set of circumstances which the court has, in part, taken judicial notice of constitutes the context in terms of which the applicant is moving me to consider the application which she filed through the urgent chamber book. She is saying the first, second and third respondents' recall of her from Parliament is not only unlawful but should, in the final result, be declared a such. She states that the allegation which is to the effect that she belongs to a political party which is different from the third respondent is without foundation. She insists that the first respondent and her were members of the alliance. She alleges that, following the coming into existence of the Supreme Court judgment, both the first respondent and her reverted to the positions which they occupied in the third respondent before the formation of the alliance. The first respondent, she avers, assumed his position of secretary-general and she assumed her position of vice-chairperson for the Bulawayo Province in the third respondent.

The applicant amended her interim draft order during the hearing of the application. She, in the amended draft order, moved me to interdict the first, second and third respondents or anyone who acts through them from:

- (i) interfering with her right to attend meetings of the MDC party leading up to the Supreme Court ordered Extra-Ordinary congress;
- (ii) stopping or barring her from participating in the electoral process including being nominated as a candidate for election at the Supreme Court ordered Extra-Ordinary congress;
- (iii) stopping or barring her from attending the Extra-Ordinary congress of the MDC and contesting in the election to be conducted at that congress- and
- (iv) submitting a name to the fifth respondent for filling the vacancy created by her recall from Parliament.

The applicant, the record shows, prepared and filed her application in great haste. The amendments which she made to her draft order at the eleventh hour constitutes clear evidence of the stated matter. She only became alive to the fact that the fourth and fifth respondents should not have been involved in her issues with the first, second and third respondents during submissions. Before then, she did not take kindly to the fourth respondent's announcement of her recall from

Parliament. She did not realise that, when he announced her recall as he did, he was only performing the function of his office as the Speaker of the National Assembly. The anger and emotion which appeared to have consumed her at the time of the recall, no doubt, clouded her from realising that the fourth and fifth respondents had /have nothing to do with her recall and that, as entities which find their existence in the constitution of Zimbabwe, they could not be interdicted from performing their lawful work.

The above-observed matter will, however, not dent the application where the applicant proves, on a balance of probabilities, that her right in the third respondent has been or is, violated. The *onus* rests upon her to prove the existence of the right and the respondents' violation of the same. She is in the driving seat. She must, therefore, prove (See *Pillay v Krishua*, 1946 AD 946 at 952 – 953, *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (5) SA 534 at 548)

The narrative of the applicant is, from a *prima facie* perspective, simple and straightforward.

It is that:

- i) prior to the formation of the alliance, the first respondent and her were members of the third respondent who occupied the positions of Secretary-General of the party and Vice-Chairperson for the Province of Bulawayo in the party;
- ii) at the formation of the alliance, both of them moved into the alliance and secured their respective Parliamentary seats through the alliance;
- iii) after the Supreme Court judgment of March 2020, they both returned to the third respondent where they took back the positions which they held prior to the coming into existence of the alliance.

It is evident that the applicant seeks to prove her membership in the third respondent by deductive and not inductive logic. She anchors her argument on a comparison of the journey which the first respondent and her travelled in the opposition politics of Zimbabwe. She, in effect, is asserting that she either swims or sinks with the first respondent.

The first and the second respondents deny that the applicant is a member of the third respondent. They allege that she was one but she is no longer such as of the moment. They insist that she lost her membership of the third respondent when she joined another political party. They allege that her conduct of leaving the third respondent in preference to another political party

resulted in her automatic expulsion from the third respondent. They state that her conduct triggered the operation of clause 5.1a of the constitution of the third respondent in terms of which she automatically expelled herself from the party.

The case of the applicant as read with that of the first three respondents would appear to present a material dispute of fact. It would seem to suggest that one cannot tell, from the record, if the applicant is, or is not, a member of the third respondent. She alleges that she is and they state that she is not. They say she was but she is no longer one.

On a closer analysis of the papers which are before me and taking a robust as well as common sense approach which GUBBAY JA (as he then was) enunciated in *Zimbabwe Braded Fireglass (Pvt) Ltd v Peech*, 1987 (2) RLR 338 (S) at 339 C-D, I remain satisfied that there are no disputes of fact, let alone material ones, to talk of in the application.

The applicant cannot prove her membership in the third respondent by way of an argument. She cannot use the journey which the first respondent and her travelled in the opposition politics of Zimbabwe as a launch-pad to her membership in the third respondent. *A fortiori* when she states, as she does that, at the congress which the alliance held in April 2019 in Gweru, she participated in the election and retained her position of Vice-Chairperson for the Province of Bulawayo.

Whilst the applicant states, in para 9.14 of her answering affidavit, that the first respondent took part in the electoral process which the alliance held at its April 2019 congress for the position of the alliance's Secretary-General which position he lost to one Charlton Hwende, she states, in clear and categorical terms, that after the Supreme Court judgment of March 2020, he claimed that he had been reinstated to his former position of Secretary-General of the third respondent. She states, in her founding papers, that the first and second respondents took charge of the affairs of the third respondent. She accuses them of taking questionable decisions on its behalf.

The applicant's point of departure with the first respondent comes from no one else but herself. She states that he left the alliance and returned to the third respondent. She alleges that she did likewise. She states that she attended meetings which the respondents called and she showed her allegiance to the third respondent.

The applicant confirms the activities of the first respondent in the third respondent following the Supreme Court judgment of March 2020. She, however, does not confirm any activity which she performed in furtherance of the interests of the third respondent when she

allegedly returned. She alleges that she attended meetings which the first and second respondents called for, and on behalf of, the third respondent. She produces no minutes of the meetings which she allegedly attended in furtherance of the business of the third respondent. She, in short, makes bare statements which she does not prove.

It is a cardinal principle of the law of procedure that he who alleges must prove. He must adduce clear and unambiguous evidence which points to the veracity of his claims. He does not prove by argument as the applicant seeks to do in *casu*. He proves by evidence

Where he fails to prove, his case will not stick. Where, however, he proves his case will see the light of day.

The applicant's statement which is to the effect that the congress of the alliance elected her to the position of Vice-Chairperson for Bulawayo Province works to her disadvantage. One cannot tell if she is Vice-Chairperson for the alliance or for the third respondent. If she is Vice-Chairperson for the third respondent, as she is persuading me to believe, she deviously must have held meetings which relate to the third respondent's affairs in the Province of Bulawayo.

Nothing prevented the applicant from producing minutes of the meetings which her party's Bulawayo Province executive held. She cannot have me believe that the province did not hold any meeting in furtherance of the third respondent's affairs from March 2020 to date. Even if such was the case, nothing prevented the applicant from enlisting the support of some of her colleagues who allegedly work with her in the Province of Bulawayo. She could easily have filed one or two supporting affidavits deposed to by the third respondent's members who work with her in, or under, the Province of Bulawayo.

The applicant should have made an effort to prove her case on a balance of probabilities. She could easily have attached to her application copies of the minutes of the meetings which she attended in furtherance of the third respondent's business. She, alternatively, could have requested some senior members of the third respondent who are known to her – as she allegedly is one such – to file affidavits which support her position in the third respondent and, therefore, her application.

The applicant's case falls short of the required proof. It is hinged on an allegation which remains completely unsubstantiated. It stands on nothing. It is, in the result, dismissed with costs.

Kadzere, Hungwe and Mandevere, applicant's legal practitioners
Chatsanga and Partners, 1st and 3rd respondent's legal practitioners
Lovemore Maduku lawyers, 2nd respondent's legal practitioners
Nyika Kanengoni and Partners, 5th respondent's legal practitioners