

ZIMBABWE AFRICAN PEOPLE'S UNION

versus

PAUL SIWELA

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 13, 14, AND 22 FEBRUARY 2002

Miss Ncube for the applicant
T. Cherry for the respondent

Urgent Chamber Application

KAMOCHA J: This application was brought as an ex parte urgent chamber application but I directed that it should be served on all interested parties who were ordered to appear before me and argue the matter the following day. On the appointed date the respondent failed to appear although proper service was effected. One copy of the application was served on the respondent's reception at his office. Another copy was served on his wife at his home.

Because the respondent failed to appear, a provisional order whose interim relief was in the following terms, was granted.

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- "(i) Respondent is hereby, with immediate effect, prohibited from filing nomination papers for President as representing ZAPU and from using its logo or symbol of a black bull.
 - (ii) The Registrar General, Tobaiwa Mudede, or his representative is hereby authorised not to accept respondent's papers if filed using the ZAPU name and logo.
 - (iii) Respondent is hereby prohibited from representing and speaking on behalf of the applicant either to the local or foreign journalists."
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The applicant is the Zimbabwe African People's Union hereinafter called ZAPU. It is a duly registered political party and body corporate with the capacity to

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sue and be sued. The party allegedly authorised, Mr Agrippa Hlangabeza Sheleni Madlela who claimed to be still its president, to depose to an affidavit. Madlela stated

that Paul Siwela - "Siwela" the former secretary-general of ZAPU was expelled by an

emergency meeting of the People's congress of ZAPU at its meeting of 22 December 2001. It was alleged that Siwela's behaviour warranted immediate expulsion

because:-

- (a) He was alleged to have acted and continued to act in a manner which would bring the name of ZAPU into disrepute. He made press statements which were at variance with ZAPU's policies.
- (b) He had allegedly flouted constitutional rulings of ZAPU, in that ZAPU had resolved, at an emergency people's congress, not to field a candidate for the forthcoming Presidential Elections, but Siwela had announced in the press that he had intended to stand as a candidate for ZAPU.
- (c) He was finally alleged to have disrupted a duly convened constitutional meeting of ZAPU by using disruptive language against the delegates, especially Madlela and other members of the central committee.

Madlela filed a copy of the constitution of ZAPU which stipulates under clause 27B(ii) (a) that an offender who has been expelled shall be informed by correspondence. By letter dated 31 December, 2001, filed of record Siwela was advised of his expulsion from the party. The party also advised him that the party would not field a candidate in the forth coming presidential elections but would support the candidate of the Movement for Democratic Change "the MDC".

The emergency people's congress also suspended four members from the party with immediate effect for what was described as their anti-ZAPU activities. The members were Gorden Moyo, Stephen Nkomo, Jethro Mkwanzani and Gifton Dumani.

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Siwela was asked not to represent ZAPU in any capacity whatsoever. He was warned that failure to comply with the decision of the people's congress would result in legal action being taken against him.

After the alleged expulsion Siwela continued to behave as if he was representing ZAPU or as if he was its spokesperson. He frequently appeared in the print media especially the Bulawayo Chronicle being quoted as President of ZAPU

and made allegations which were likely to put ZAPU into disrepute. In the light of

that, the party addressed to Siwela yet another memorandum on 29 January 2002. Its

contents are quoted in extensio infra:

"MEMORANDUM

TO: PAUL SIWELA

FROM: A.H.S. MADLELA

DATE: 29 JANUARY 2002

SUBJECT: SIWELA EXPULSION FROM ZAPU MEMBERSHIP

I refer to my memorandum of 31 December 2001 formerly informing you of the decision of the ZAPU emergency congress on 22 December 2001 expelling you from the membership of the party (ZAPU).

The party is therefore concerned that you are defiantly continuing to pretend that you are still not only a member but that you have also assumed the party presidency or its leadership. You are therefore performing these functions illegally and certainly illegitimately and you are called upon to desist these pretensions.

You are warned that legal action will be taken against your actions, it is, therefore, hoped that you will soon heed this warning.

A.H.S. MADLELA
ZAPU PRESIDENT"

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The emergency party congress which allegedly expelled Siwela and suspended four others was attended by 250 delegates. The congress resolved not to field a candidate in the coming presidential elections and agreed to support the candidate of

another political party with more support in the region. Siwela, who allegedly was not

in agreement with what the congress had resolved, walked out of the meeting with about 20 delegates.

Siwela proceeded to another section of the same hotel where he purported to

convene a meeting of his own with a few delegates some of whom ended up being suspended by the congress. At his meeting he seemed to have declared himself

president of that group and had through the press announced his intention to stand as a

candidate of ZAPU in the forth coming presidential elections. He had no mandate from ZAPU to be its spokesperson, nor to stand as its presidential candidate since it

had resolved not to field any candidate. The party, however, made it clear that Siwela

was free to run for president as long as he did not associate himself in any manner

whatsoever with ZAPU.

Despite the above reminder and warning Siwela continued to receive frequent

coverage in the local press and further caused damage to ZAPU. He gave the impression, through press reports, that the party was divided on whether to field a

candidate or not when such division did not exist. That being the case the party

decided to bring this application on a certificate of urgency because the Nomination

Court was going to sit the following day Thursday the 31st day of January 2002.

ZAPU had already resolved not to field any candidate for the presidential race.

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But Siwela had announced his intention to be a ZAPU candidate. So the party was left with no choice but to seek to interdict him from using the party's name and its

symbol/logo or flag. A provisional order was granted on 31 January 2002.

On the 8th day of February 2002 Siwela filed a counter urgent application citing ZAPU, the Registrar General whom he called the Registrar of Votes and the Government Printers Harare as respondents. The final order sought was as follows:

"(a) That Paul Siwela, be and is hereby declared the official candidate of the Zimbabwe African People's Union (known as ZAPU) and thus be entitled to stand for the Office of President in the forth coming presidential elections and that he be accordingly permitted to use such emblems and in particular the logo of a black bull and to use the name of ZAPU.

(b) That the Registrar General is ordered to amend the papers already filed by Mr Paul Siwela as an independent candidate for the forthcoming presidential (sic) to reflect that he does so for the Zimbabwe African People's Union (ZAPU) and to allow the said Mr Paul Siwela to use the logo of a black bull for that purpose."

The application was filed on Friday 8 February 2002 in the afternoon. Since it

had come on a certificate of urgency I directed that it be served on all interested

parties and that the matter be urged before me on Tuesday 12 February 2002.

In his affidavit which was combined as an opposing and founding affidavit for

the counter application Siwela stated that he was still the secretary general of ZAPU

and Madlela was under suspension and was therefore no longer the party's president.

To that extent, therefore, Madlela would have no right to institute legal proceedings in

the name of ZAPU. He had a right, however, to launch the court application in his

own name.

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Siwela alleged that Madlela had been suspended by the party on 22 December 2001 and would therefore have had no power to convene a meeting on 26 January 2002 when he was still under suspension. He claimed that that meeting was not a proper one. It was his view that it could have been attended by only three people.

There were a number of apologies and yet there was no record of those who allegedly

attended the meeting. He claimed that some of the members listed under apologies in

fact did not support Madlela but supported him (Siwela) R. Mathe for instance voted

for the suspension of Madlela. Further he claimed that E. Njani was one of those who

supported his candidature for presidential elections.

I should pause here to observe that Siwela's claims are not supported by any

evidence. He did not file supporting affidavits from any of those people he claims

supported him. All he could do was to file a letter by Mqondobanzi Magonya who now lives in the United Kingdom. The letter is clearly not an affidavit and is hearsay.

It is inadmissible and should accordingly be regarded as having been expunged from

the record. He failed to file an affidavit from R. Mathe.

Elias Njani has denied ever supporting Siwela. In his affidavit he stated that

he was the Secretary for Economics in ZAPU. He did not attend the meeting of 22 December 2001 due to circumstances beyond his control. He was approached by Siwela on 26 January 2002 at Esigodini who alleged that Madlela had been suspended by the congress on 22 December 2001 and he (Siwela) had become the president. Mr Njani could not dispute what he was told by Siwela since he did not

know at that stage what happened at the congress. Siwela asked Njani to assist him to

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get three names of party members to nominate him for the forthcoming presidential

election. Njani himself did not support Siwela but what he did was to find him the

names of three people who did.

Njani has since learnt of what took place at the congress of 22 December 2001

and he fully supports the resolutions passed by the congress in particular that ZAPU

would not field a presidential candidate as doing so would split the opposition. He

does not support the decision taken by Siwela instead he supports the decision to bring

him to court. In conclusion Njani said had Siwela been honest with him and told him

what had taken place at the congress he would not have assisted him in finding the

names of three people to nominate him. Quite clearly Siwela's suggestion that Elias

Njani supported his candidature is false.

Siwela alleged in his affidavit that what Madlela and the congress purported to

do in terms of the ZAPU constitution was in fact a nullity. The reason being that the

said constitution filed of record by the applicant ZAPU was just a draft which had

never been ratified by the central committee. He then filed of record a copy of the

constitution which he claimed to be binding on ZAPU.

However, a close look at the two documents clearly reveals that in fact the

copy that he filed is just a draft and the one filed by ZAPU seems to be the final

document. His document is still written "DRAFT CONSTITUTION" while the one produced by ZAPU reads "CONSTITUTION OF THE ZIMBABWE AFRICAN

PEOPLES' UNION (ZAPU). It is therefore, simply not true to allege that the constitution filed by ZAPU is still a draft which has not been ratified. Siwela's

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statement is clearly misleading and must be rejected. I accordingly find that the

proper constitution was the one filed by ZAPU.

When dealing with the emergency people's congress of 22 December 2001 Siwela claimed it was not a proper meeting because it was attended by people who were not members who as such could not have been allowed to speak at the party meeting. He alleged that Madlela had hired some drunken youths who were very disruptive at the meeting as they booed down everyone except Madlela himself resulting in him (Siwela) walking out of the meeting with just about 10 legitimate

members of the party. He then held a concurrent meeting with those members in another section of the same hotel. He then claimed that these 10 or so people properly

nominated him as a presidential candidate. In the result he felt he was entitled to

represent ZAPU in the forthcoming presidential election and to utilise its logo and to

speak on its behalf. He however does not deny the meeting was attended by 250 people.

I will pause to observe once more that Siwela's assertions on this point are not

supported at all. He filed no supporting affidavit from any of those alleged legitimate

members who attended his meeting. He alleged that the meeting authorised him to be

the spokesperson of the party. According to Elias Njani he even claimed that that

meeting had made him the president of ZAPU. Even if Madlela had been suspended

the deputy president of the party would have carried out the functions of the national

president not the general secretary. Siwela does not mention the deputy president at

all. The deputy president was not suspended by Siwela's meeting so he should have

taken the functions of the alleged suspended president. Siwela was not entitled to

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assume the presidency of the party where there was a vice president.

The vice president of the party is one Malobele Smith Mbedzi. He filed an affidavit deposing that he chaired the meeting of 26 January 2002. He endorsed the

decision made at that meeting. He went on to say that the congress held on 22 December 2001 had resolved not to field a party candidate for the presidential election. Mbedzi emphasized that he had never at any stage supported Siwela's candidature and was against his decision to represent ZAPU.

Mbedzi said he also chaired the congress meeting. He fully endorsed the

minutes of the congress filed by ZAPU. He further averred that there was one meeting held on 22 December 2001. As far as he was concerned the concurrent meeting held by Siwela was not properly convened on behalf of ZAPU since he had walked out of the properly convened meeting.

Five more senior members of ZAPU filed their affidavits whose contents are to the same effect as Mbedzi's averments.

Siwela filed a document which purports to contain the minutes of the meeting

of 22 December 2001 at which Madlela was allegedly suspended. He claimed these were the correct minutes of the meeting not the ones that were filed by the applicant.

He, however, is not supported by anybody. If what he says is true there is no good

reason why he could not file supporting affidavits from some senior members of the

party. ZAPU has filed affidavits from six senior members of the party endorsing that

the correct set of minutes is the one the party filed. In the result, I am persuaded to

agree that the correct minutes of what transpired on 22 December 2001 are those filed

by ZAPU. They are the minutes of the meeting that the party held on that day.

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In his counter application Siwela averred that his nomination as an independent had been accepted to his prejudice since he was the legitimate candidate

of ZAPU. He therefore sought the Registrar General to amend the existing papers to

reflect his nomination as the candidate for ZAPU and to allow him to use its logo.

As against the Government Printer the idea was to prevent the necessity of re-printing should the application be successful. He averred that the Government

Printer would start printing the necessary documents for the forthcoming Presidential

Elections on Monday 11 February 2002. He asserted that if urgent measures were not

taken the party and himself would be seriously prejudiced. He claimed that the party

had authorised him to represent it. It is noted that Siwela's assertions are bald and

unsubstantiated. The assertions needed some support from some members of the party who allegedly supported his story. Without that his claims are unacceptable

more so when there is evidence to the contrary filed of record.

Siwela knew as far back as 31 January 2002 that the relevant documents pertaining to the forthcoming elections were going to be printed but he did nothing

about the matter for a period of eight days before filing a counter application. The

printing has already started since it commenced on 11 February 2002 according to his

averrments. If he had seriously wanted the order he sought to be effected he would

have filed an urgent application without any culpable delay. In this case the delay is

culpable and unexplained.

Siwela complained that the applicant brought the application ex parte and obtained a provisional order without affording him an opportunity to be heard. He

alleged that as late as the date he filed the counter application i.e. 8 February 2002 he

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had not been served with the provisional order. These assertions are without foundation whatsoever.

Firstly there was proper service of the application after I had directed that it be

served on all interested parties. I also directed that the parties appear before me the

following day to argue the matter. It admits of no doubt that Siwela was aware of all

this. The directive was given on Wednesday 30 January 2002. He must have got possession of the papers for the application that same day that is how he was able to

reproduce verbatim to the Chronicle Newspaper which carried out the story in its issue

of the next day 31 January 2002. Siwela should have either faxed or telephoned his

legal practitioners and given those details as he did with the press. But he chose to do

nothing about the matter until a provisional order was granted. Again no explanation

was given for failure to instruct a legal practitioner to appear on his behalf since he

himself was in Harare.

He also submitted that there were disputes of fact relating to the matter. Hence

there was no leeway for the court to adopt a robust and common sense approach to resolve the matter on the papers. He was clearly blowing both hot and cold because

he himself brought the matter as an urgent one. My view is that the matter is capable

of being resolved on the papers.

Finally I need to determine who the legitimate representative of ZAPU is between Madlela its president and Siwela its secretary general. Each party alleges the

other was expelled/suspended at a meeting of 22 December 2001. It is common ground that Siwela walked out of the meeting with about 10 to 20 people from an
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attendance of 250. He then convened a concurrent meeting in another section of the

same hotel. Siwela alleged that at that meeting he was made representative and spokesperson of the party. Then that meeting suspended the party's president Madlela.

On the other hand Madlela alleged that after Siwela had walked out of the meeting with some members it was resolved to expel him (Siwela). While Siwela's

allegations are unsupported those of Madlela are supported by averments from six

senior ZAPU officials. These officials have never been suspended or expelled from

ZAPU. They all said Siwela was expelled and they support Madlela whom they regard as the president of the party.

It is also inconceivable that in a democratic society a group of ten(10) to

twenty (20) out of a number of two hundred and fifty (250) people can be said to have

held a meeting at which a president of a party is suspended. I am persuaded to agree

with the senior officials of ZAPU who averred that Siwela was expelled after he had

walked out of the meeting. I also accept that Madlela is still the president of ZAPU.

His purported suspension from the party by Siwela's camp which is unsubstantiated is

not safe to accept.

In limine the respondent submitted that the affidavits produced in reply to the

respondent's opposition were inadmissible since they had been attested by a legal

practitioner who is a partner in the same firm as the applicant's legal practitioner.

After hearing both counsel on that point I found that the attestation was improperly

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done and held the affidavits to be inadmissible. I felt that the point taken on the

affidavits did not affect the merits. The applicant was entitled to file affidavits in its

reply after the respondent had claimed to have the support of some senior members of

the party. I therefore felt that the improper attestation did not warrant a dismissal of

the application. To that extent, therefore, I ordered re-attestation. But I shall deprive

the applicant's legal practitioners their costs relating to the affidavits.

In the light of the foregoing the court issues the following order:

It is ordered that:

- (1) The respondent be and is hereby permanently interdicted from representing applicant and using the name ZAPU in any manner whatsoever and the logo of a black bull in the forthcoming presidential elections to be held on 9 and 10 March 2002 with immediate effect.
- (2) The respondent be and is hereby interdicted from speaking on behalf of the applicant to either the local or foreign press or media.
- (3) The respondent pays the costs of this application excluding the costs for the replying affidavit and its supporting affidavits.
- (4) The counter application by the respondent be and is hereby dismissed with costs.

Lazarus & Sarif, applicant's legal practitioners
Editor Ngwenya & Partners, respondent's legal practitioners