Judgment No. HB 28/05
Case No. HC 495/05

RENSON GASELA

Versus

CONSTITUTENCY ELECTIONS OFFICER FOR GWERU RURAL CONSTITUENCY

And

CHAIRMAN OF THE ZIMBABWE ELECTORAL COMMISSION

And

JOSPHAT MADUBEKO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 AND 24 MARCH 2005

N Mathonsi for applicant
G Chikumbirike for 1st and 2nd respondents
M Makonese for 3rd respondent

Urgent Chamber Application *(Point in limine)*

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of Final Order sought

That 1st , 2nd and 3rd respondents show cause to this honourable court why a final order should not be made in the following terms:

1. That respondents make available to the Registrar of this honourable court and the applicant's legal practitioners all documents constituting the nomination papers of the 3rd respondent to stand as parliamentary candidate for Gweru Rural Constituency filed of record at the nomination court in Gweru on 18 February 2005 within 48 hours of service of this order upon them.
2. That in the event that 3rd respondent's nomination documents do not meet the requirement of law, his nomination be and is hereby nullified and he is prohibited from contesting the parliamentary elections set for 31 March 2005.
3. That the applicant be and is hereby declared duly elected member of parliament for the Gweru Rural Constituency.
4. That the costs of this application shall be borne by the respondents jointly and severally the one paying the other to be absolved.

Interim Relief granted

Pending the finalisation of this matter the petitioner (sic) is granted the following relief:

5. That the 1st and 2nd respondents or the one or other of them be and are hereby ordered and directed to file with the Registrar of this court the original documents constituting the nomination papers filed by the 3rd respondent at the nomination court on 18 February 2005 for the Gweru Rural parliamentary elections and serve copies of the same documents upon the applicant's legal practitioners, Messrs Coghlan and Welsh within 48 hours of service of this order upon them …"

The background facts giving rise to this application are the following. The applicant and the 3rd respondent are candidates in the forthcoming parliamentary elections pencilled for 31 March 2005. They represent the Movement for Democratic Change (MDC) and ZANU(PF) respectively in the Gweru Rural Constituency. The 1st respondent is the Constituency Elections Officer who presided over the nomination court sitting at Gweru Magistrates' Court. The 2nd respondent is the Chairman of the Zimbabwe Electoral Commission, a statutory body constituted in terms of section 3 of the Zimbabwe Electoral Commission Act [Chapter 2:12] and assigned with the responsibility of conducting and overseeing elections. On 18 February 2005 the 1st respondent presided over a nomination court for candidates at Gweru. The 1st respondent received nomination papers from *inter alia*, the applicant and 3rd respondent for the Gweru Rural constituency in the Midlands Province. At the close of the nomination court, the 1st respondent declared the applicant and the 3rd respondent as the only two candidates who had successfully filed their papers in terms of section 48 of the Electoral Act [Chapter 2:13]. The results of the nomination court were duly published in the Government Gazette by General Notice 50A of 2005 on 24 February 2005. Immediately after the announcement of the nomination court results

by the 1st respondent the applicant took issue with 1st respondent about the acceptance of the 3rd respondent's nomination papers. The basis of his case is aptly captured in the following extract from his founding affidavit:-

> "7. I have reason to believe that the 3rd respondent did not qualify to stand as a candidate for the parliamentary elections and for this reason his nomination should have been rejected by the 1st respondent and I should have been nominated unopposed and therefore duly elected member of parliament for the constituency.
> 8. This obtains from the fact that the 3rd respondent is a traditional leader as he is the headman under Chief Bunina of Lower Gweru and carries out his functions as such as Headman Chisadza up to the time of the acceptance of his nomination papers by the 1st respondent the 3rd respondent had not relinquished his traditional position of Headman Chisadza and to the best of my knowledge even after his nomination as a parliamentary candidate, the 3rd respondent has continued to hold the office of headman and continues to discharge his duties in Lower Gweru.
> 9. In terms of section 45(1) of the Traditional Leaders Act (No. 25/98); Chapter 29:17 no headman shall be eligible for election as a member of parliament in terms of the Constitution whilst still holding office as such is peremptory and admits of no exceptional whatsoever. In the circumstances, to the extent that the 3rd respondent held the traditional position of headman he was not qualified to stand for parliamentary election and his nomination should have been rejected.
> 10. Efforts to inspect 3rd respondent's nomination papers were unsuccessful although I am advised and genuinely believe that they contained neither a letter of resignation from the headman position submitted to the Minister of Local Government nor letter of acceptance of the resignation by the said Minister both done prior to 3rd respondent nomination for parliamentary election."

There is no explanation given why the applicant did not act when the need to act arose on 18 February 2005. He only instituted proceedings on 4 March 2005 by way of petition in EP 1/05. He issued process out of the Electoral Court sitting at Bulawayo in which, against substantially the same parties, he sought the same relief on the same cause of action as in this application. The petition was dismissed by the Electoral Court having sustained the respondent's contentions raised *in limine*. As regards the 1st and 2nd respondents it was held that they had been wrongly cited. The

Electoral Court also upheld the respondents' contention that it i.e. Electoral Court lacked jurisdiction to deal with the matter.

At the commencement of the application before me the respondents raised two preliminary issues which are now subject of this judgment. I propose to deal with these points in turn.

Urgency

The case of the 1st and 2nd respondents is that the matter is not urgent in view of the fact that from 18 February 2005 when the need to act arose, the applicant did nothing until 4 march 2005. Even when he belatedly decided to act, he approached the wrong court and his citing of parties was improper. They submitted that in the circumstances the urgency is self-inflicted. Further it was submitted that apart from making a bald statement that the applicant will suffer prejudice the legal practitioner whose certificate of urgency is relied upon does not state the nature of irreparable prejudice that the applicant will suffer if the matter is not dealt with urgently. This is particularly so in the this case where the applicant has an alternate remedy provided for in section 167 of the Electoral Act which provides:

> "A petition complaining of an undue return or an undue election of a member of parliament by reason of want of qualification, disqualification, court practice, legal practice, irregularity or any other cause whatsoever may be presented to the Electoral Court by any candidate at such election."

A number of decision of this court have dealt with test for urgency. In *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188(H) at 193F-G CHATIKOBO J had this to say-

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or a careless absention from action until the deadline draws near is not the type of urgency

> contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non timeous action if there had been any delay."

In *Dilwin Investments (Pty) Ltd t/a/ Formscuff* v *Jopa Eng.Co (Pvt) Ltd* HH-116-98, GILLESPIE J had this to say:

> "A party who brings proceedings urgently gains a considerable advantage over persons whose disputes are being dealt with in the normal course of events. This preferential treatment is only extended where good cause can be shown for treating one litigant differently from most litigants. For instance where, if it is not afforded, the eventually relief will be hallow because of the delay in obtaining it."

General Transport & Engineering P/L & Ors v *ZIMBANK Corp P/L* 1998(2) ZLR 301(H); *Mshonga & Ors* v *Min of Local Government & Ors* HH-129-04; *Gulmit Investments (Pvt) Ltd* v *Ranchville Enterprises (Pvt) Ltd Ors* HH-94-04 and *Laval Investments (Pvt) Ltd* v *B A Ncube Holdings (Pvt) Ltd t/a Airport Road Filing Station* HB-158-04. The applicant must in his affidavit set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course – *Sikwe* v *S A Mutual Fire & General Insurance Co Ltd* 1977(3) SA 438(W); *Salt & Anor* v *Smith* 1991(2) SA 186 (Nm) and Herbstein & Van Winsen – *The Civil Practice of the Supreme Court of South Africa* (4th Ed) at pages 357-8. From the foregoing it is evident that specific averments of urgency must be made and the facts upon which those averments are based must generally be set out in the founding affidavit. These requirements were not met in this matter. It has to be borne in mind that the applicant is seeking the indulgence of the court to proceed to have the matter dealt with as an urgent one deserving the dispensing with the forms of service provided for in the Rules. In *casu*, the applicant did not act timeously and has not bothered to explain his

failure to do so. Further, and more importantly section 167 *supra*, provides alternative remedy to the applicant to obtain redress. He has not explained the nature of prejudice that he is likely to suffer if he waits until the elections and petition the Electoral Court in the event that he loses the elections. Mr *Mathonsi*, for the applicant argues that it is unreasonable to allow a flawed election to take place and petition the Electoral Court thereafter. It may be so but that is unfortunately what the legislature enacted in section 167. That obviously is what the legislature is presumed to have intended.

Such alleged unreasonableness does not constitute urgency as contemplated by the rules. Overall the matter is not urgent. On this ground alone the application must be dismissed. In the event I am wrong in this conclusion I propose to consider the point *in limine* raised by 3rd respondent.

Can review proceedings be brought by way of chamber application

Mr *Makonese*, for the 3rd respondent, submitted that in terms of Order 33 Rule 256 of this Court, proceedings for review should be brought by way of court application. This, in my view, is the correct statement of the law. In response Mr *Mathonsi* submitted that a court application can be also dealt urgently. I have no qualms with that statement of law but here the application was filed as chamber application. It has not been converted to a court application. He further submitted that the rules are there to assist the court and as such the court may depart therefrom. I generally agree with this submission. But this departure has to be done in terms of the rules. Rule 4C gives this court such discretion to depart therefrom in the interest of justice.

GUBBAY CJ in *Forestry Commission* v *Moyo* 1997(1) ZLR 254(S) at 259A-B had this to say-

> "In so far as the High Court Rules are concerned, rule 4C (a) permits a departure from any provision of the rules where the court or judge is satisfied that the departure is required in the interests of justice. The provisions of the rules are not strictly peremptory; but as they are there to regulate the practice and procedure of the High Court in general strong grounds would have to be advanced to persuade the court or judge to act outside them"

Makaruse v *Hide and Skin Collectors (Pvt) Ltd* 1996(2) ZLR 60 (S); *Wilmont* v *Zimbabwe Owner Driver Organisation (Pvt) Ltd* 1996(2) ZLR 415(S) and *Mpofu & Anor* v *Parks & Wildlife Management Authority and Ors* HB-36-04. But, absent an application, it would erroneous of this court to allow, a grave departure or non-compliance with rules. For it is the making of the application that triggers the granting of the indulgence or the exercise of the discretion – *Forestry Commission* v *Moyo, supra* at pages 260D-G to 261A. The applicant has not filed a substantive application for departure from the rules and as such the submission is rendered academic. Further there are material disputes of facts on whether the 3rd respondent had resigned as headman prior to the nomination. A section 167 petition provides an appropriate forum as *viva voce* evidence may be required to resolve this crucial issue. Generally, the application does not meet the requirements of review as prescribed in order 33. On this ground alone the application must fail.

Costs

This application is characterised by procedural flaws. After the failure on the adjectival flaws at the Electoral Court the applicant should have exercised caution this time around. His failure to do so has brought a huge financial burden on the

respondents. The preliminary problems were relatively foreseeable. I believe that a case has been made out for award of costs at an enhanced scale.

Accordingly, the application is dismissed with costs on a legal practitioner and client scale.

Coghlan & Welsh, applicant's legal practitioners
Chikumbirike & Associates, first and 2nd respondents' legal practitioners
Makonese & Partners, 3rd respondent's legal practitioners