

**QHUBEKANI DUBE**

**And**

**MQONDISI MOYO**

**And**

**PHATHISANI NONDO**

**Versus**

**CONSTITUTIONAL SELECT COMMITTEE (COPAC)**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 17, 21 AND 24 JUNE 2010

*S S Mazibisa*, for applicants

*Ms N. Ncube and J Tshuma*, for respondent

Urgent Chamber Application

**NDOU J:** The applicants seek a provisional order in the following terms:

“Terms of the final order sought

That you show cause to this honourable court why a final order should not be made in the following terms:

1. The decision of the respondent to remove the applicants from the list of persons who are part of the Outreach Teams of the constitution-making process without giving the applicants a hearing and without giving reasons, be and is hereby declared to be unfair, and in contravention of section 3(1)(a) of the Administrative Justice Act [Chapter 10:28].
2. The respondent be and is hereby directed to include the applicants as part of the Outreach Teams in the constitution-making process without loss of benefits.
3. The respondents be and are hereby ordered to pay the costs of suit on an attorney and client scale if it oppose [*sic*] confirmation of the provisional order.

Interim Relief Granted

Pending the finalization of the matter, applicants be and are hereby granted the following relief:

1. The respondent be and is hereby ordered and directed to take all reasonable steps to forthwith include the applicants as part of the individuals in respondent's Outreach Teams on constitution making with full benefits including payment of allowances.
2. The respondent must further forthwith communicate in writing to the applicants' legal practitioners of record the inclusion of the applicants in the Outreach Teams for the constitution-making process."

The salient facts of this matter are the following. The respondent ("Copac") is a parliamentary body set up in terms of the Constitution of Zimbabwe (as amended by the Constitution of Zimbabwe Amendment Number 19 of 2008) to spearhead the drafting of a new Constitution. The applicants are members of a civic organization known as Ibhetshu likaZulu ("Ibhetshu") which is based in Bulawayo and is a pressure group advocating for "equitable development of all parts of the county."

When Copac commenced the process of setting up structures to facilitate the making of a new constitution, it selected individuals across the country to be part of the Outreach Teams that will gather people's views and input on the content of the new constitution. The applicants were initially part of the people selected to be part of the outreach team.

They underwent training to achieve this objective between 10 and 14 January 2010. The training was conducted by Copac for all delegates from all over the country. At the end of the training Copac caused the applicants and all the delegates to sign Codes of Conduct binding themselves as members of Copac's outreach teams. The applicants, like all other members of the outreach teams, were accredited and issued with accreditation cards. All the outreach teams' members were detailed in the media. A copy of the Chronicle newspaper of 9 January 2010 was filed of record to evince this. On 11 June 2010 Copac published another list of members of its outreach teams. The applicants' names did not appear on this latter list resulting in this application. Copac's explanation for this state of affairs is that it does not nominate members to the outreach teams. The political parties and civic organizations do the nomination. Whilst it is beyond dispute that the applicants are members of Ibhetshu, they are also active members of ZAPU political party. The applicants have not disputed this fact by averments in answering affidavits. Copac set out a framework which was to be strictly adhered

to by the political parties and civic organizations in selecting individuals for the outreach teams. The framework that had to be followed was as follows:

- (a) Political parties were to provide thirty percent (30%) of the total membership of outreach teams.
- (b) The remaining seventy percent (70%) was to be drawn from the civic society.
- (c) The political parties were to nominate and submit to Copac, the names of candidates from their perspective political parties and also the names of those selected from the civic society. In other words, all names of selected individuals for the outreach programme were submitted by the political parties, be it from the political parties themselves or from the civic organizations.
- (d) A person who is an active member of a political party cannot be selected under the slot given to civic organizations. The rationale for this provision is to ensure that political parties do not gain unjust advantage over political parties by selecting their members in the slot given to political parties and also have some of its members selected under civic society. Not only would this be prejudicial to other political parties but it would prejudice the civic organizations.

*In casu*, the applicants' names were submitted to Copac by the Movement for Democratic Change ("MDC-M"). It is submission by MDC-M that resulted in the applicants' inclusion in the abovementioned training programmes and accreditation. Copac later received communication from the MDC-M that it had discovered that applicants enjoyed active dual membership of ZAPU and Ibhethshu a fact they were not aware of at time when their names were submitted to Copac. Applicants have not disputed Copac's assertion to that effect. The criteria was agreed upon by political parties. In fact the applicants are said to be prominent members of ZAPU with 1<sup>st</sup> applicant being the provincial chairperson of ZAPU's Youth Wing in Bulawayo Province. In terms of the above criteria, applicants could not be allowed to proceed to participate in the outreach programme, as this would give undue advantage to ZAPU over other political parties. ZAPU was allowed to nominate five (5) people just like other political parties of its size. By allowing applicants to participate it would have meant that ZAPU would be represented by eight (8) people, i.e. three (3) more than other political parties of its size. It was on this ground that applicants' names were dropped from the latter list of members of the outreach programme. The applicants were not expressly informed of the decision to remove them from the programme neither did the applicants demand the reasons for their removal from Copac.

It seems to me that they were so much affected by the removal that they approached this court directly without first asking Copac for reasons. They did not confront Copac or MDC-M about their removal.

The crucial preliminary issue to be determined before I deal with the merits of the application is the definition of this application. Is this an application for review of the decision of Copac to remove the applicant from the outreach programme or a declaratur? [Section 14 of High Court of Zimbabwe Act (Chapter 7:06)] ("the Act"). If the application is one for review, then section 27 of the Act and Order 33 of the High Court Rules, 1971 is applicable. The applicants' position is that the application is one for a declaration of rights and not review. Mr *Mazibisa*, for the applicants, submitted that the application takes the form of a declaratur and mandamus. It is trite that an interdict and a mandamus are two sides of the same coin, unauthorized action is presented by means of an interdict and compliance with a statutory duty is enforced by means of mandamus – *Continental Landgoed (Edms) Bpk v Bethelrand* 1977 (3) SA 168 (T) at 169G. There is no difference in principle between the enforcement of a statutory prohibition by way of an interdict and the enforcement of a statutory duty by way of a mandamus. The mandamus is a legal remedy which is aimed at compelling an administrative organ to perform a prescribed statutory duty.

The procedure for a declaration of rights like review proceedings, is either by way of summons and filing of pleadings in the usual way if there is a dispute of fact, or in the form of a special case on application if there is no dispute of fact. When the facts are disputed the court has a discretion as to the future course of the proceedings – *Hattingh v Ngake* 1966 (1) SA 64 (O) and *Adbro Investments Co Ltd v Minister of Interior* 1956 (3) SA 345 (A). The applicants were wrong to use an urgent chamber application for an application for a declaratory order. They equally cannot seek a review of Copac's decision in an urgent chamber application. This court has held that a declaratory order is merely one of a species of relief available and that a party should not be able to get around the requirements for review proceedings by instituting proceedings for a declaratory order – *Kwete v Africa Community Publishing & Development Trust* HH-216-98; *Mutare City Council v Mudzime* 1999(2) ZLR 140 (S); *Marasha v Old Mutual Life Insurance Co Ltd* 2000 (2) ZLR 197 (H) at 198 H to 199C and *Mpofu & Anor v Parks and Wild Life Management Authority* HB-36-04.

The only issue left is whether the application is one for a mandamus. The applicants are alleging that Copac has failed to comply with statutory duties enshrined in Administrative Justice Act [Chapter 10:38] i.e. their removal of the applicants from the outreach programme was done in contravention of section 3(1)(a) as it was done without giving the applicants a hearing and without giving reasons. As alluded to above compliance with a statutory duty is

enforced by means of a mandamus. Mandamus is available to serve two purposes i.e. (a) to compel the performance of a specific statutory duty; and (b) to remedy the effects of unlawful action already taken. The mandamus will only be granted where the public authority is under a clear duty to perform the act ordered. Where the public authority has a discretion in the matter, the order will only extend to directing the authority to comply with its duty of deciding the matter properly – *Minister of Law and Order (Bophuthatswana) v Maubane* 1981 (3) SA 453 (A); *Moll v Civil Commissioner of Paarl* (1897) 14 SC 463 and *Britten v Pope* 1916 AD 150. Mandatory interdicts are by their very nature urgent. In the circumstances I will hear the merits of the application for the mandamus.

As alluded to above, Copac informed the applicants by mere publication of fresh list of membership of the outreach programme without the names of the applicants. Equally the reasons for the removal were not given to the applicants. The applicants also did not bother to ask for the same. The reasons were only in answer or opposition to this application. It seems beyond dispute that in the first place the placement of the applicants was done in a similar fashion i.e. an advertisement in the same media. The applicants were content with the newspapers being the bearer of good news but not bad news. The applicants have not established in their application the need for hearing before their removal from the programme. The relationship between the parties does not require a hearing to terminate it. Participation in the outreach programme is on a volunteer basis. The volunteer is not in some kind of employment and he/she offers the national service for free. The volunteers receive US\$25 each per day for lunch meals and other expenses are paid for directly to service providers. This is not the kind of relationship that warrants a hearing before termination. As alluded to above, the applicants have now been informed why they were removed i.e. in addition to being members of Ibhetshu, they were active or prominent ZAPU politicians. They have not disowned such ZAPU membership. In the circumstances, they do not meet the set requirements for membership of the outreach programme. They may have gone into the programme by withholding their political involvement but it is now common cause. Once it was discovered they do not meet the set criteria their entry into the programme became a nullity. The oversight of Copac cannot grant them membership of the outreach programme if they do not meet the minimum criteria. To allow such oversight of Copac give right of membership would only result in political parties being over represented i.e. beyond the 30%, *supra*. They were lucky to have got into the programme in the first place and they cannot cry foul when their entry deficiencies are discovered and they are accordingly removed from it. Ibhetshu should have submitted names of individuals who do not enjoy such prominent membership of both the civic organization and a political party. An oversight or error by Copac cannot overrule the express provisions of the constitution on the participation in the outreach programmes.

Judgment No. HB 43/10

Case No. HC 1133/10

For the record, the applicants can still participate in the constitution making process in other forms. Every Zimbabwean is free to participate in the constitution making process but not everyone will do so via the volunteer outreach programme.

In light of the above, the application for mandamus has no merit. I accordingly dismiss the applications with costs.

*Cheda & Partners*, applicants' legal practitioners

*Webb, Low & Barry*, respondent's legal practitioners