

COMBINED HARARE RESIDENTS ASSOCIATION  
and  
DAVID SAMUDZIMU  
versus  
REGISTRAR GENERAL OF ELECTIONS  
and  
THE PRESIDENT OF ZIMBABWE  
and  
THE MEMBERS OF THE CHANAKIRA COMMISSION

HIGH COURT OF ZIMBABWE  
CHINHENGO J  
HARARE 28 January 2002

Mrs *E. Mushore*, for the applicants  
Mrs *L. Matanda-Moyo*, for the respondents

CHINHENGO J: The causes of this application revolve around the provisions of the Electoral Act as amended in 1997.

This is an application for the grant of a Provisional Order with the following relief:-

Paragraph 1:

“That the Registrar General shall forthwith give Notice of the mayoral and Council Elections for the City of Harare in accordance with the Supreme Court Order.”

The earlier draft which was amended at the hearing read as follows:-

“The Registrar General shall forthwith give notice of the Mayoral and Council Elections for the City of Harare in accordance with Section 103 L of the Electoral Act, [*Chapter 2:01*], fixing the polling date, 28 days thereafter being the shortest possible time thereafter permitted by the Electoral Act, and to take all such other steps as may be necessary in terms of that Act to have such Mayoral and

Council elections on the date so fixed.”

Paragraph 1, has therefore been amended.

Paragraph 2:

“The Registrar General shall within twenty four hours (24), hereof arrange publication of such notice in at least one Newspaper circulating in the area as quickly as possible and file proof of this with this Court, and furnish a copy of it to Applicant’s legal practitioners within 24 hours hereof.”

Paragraph 3:

“Should the Registrar General fail to comply with any part of the interim relief granted under this Provisional Order, Applicants may approach this Court to anticipate paragraph 3 of the Final Order so that this Court may commit the Registrar General to goal until such time as such steps as maybe specified by it are taken. Applicants are hereby given leave to supplement their papers to show good cause for this. Applicants should first approach the Registrar General’s legal practitioners to agree in consultation with the Registrar of this Court or appropriate Judge’s Clerk on a suitable hearing date. If this cannot be agreed or there is a great urgency, they may make a Chamber Application on Notice to the Applicants for directions from a Judge as to when that issue can be argued.”

Paragraph 4:

“That in the event of an appeal being noted against this Provisional Order, notwithstanding such noting of an appeal, this Order is declared operative and in effect and shall not be suspended, unless the Court or a Judge with appropriate jurisdiction is duly furnished with all the documents filed herein and in accordance with due process orders otherwise.”

That is the provisional relief sought by the Applicants in this matter. The final relief sought by the applicants is fourfold. First, the confirmation of the interim relief which I may grant

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with the issuance of the Provisional Order. Second, the declaration as null and void of the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002, (Statutory Instrument 13A of 2002), which I will refer to as “the Notice”. Third, the committal to jail of the first respondent, the Registrar General, if he has not complied fully with the interim order. Fourth, a declaration that the Order granted shall remain operative and in effect notwithstanding any appeal noted against it.

The interim relief sought by the applicants and the final relief as well, seemed to me to be at some variance with what, going by the applicants’ founding affidavit, is the relief which this Court may grant if it is so satisfied. The founding affidavit and the certificate of urgency filed by the applicant’s legal practitioner in terms of rule 244 of the rules of this Court make it apparent that the applicant is seeking to enforce the judgment of the Supreme Court in Case Number SC 348/01. Whereas the relief sought in terms of the draft provisional order before it was amended at the hearing is not for a strict implementation of the Supreme Court Order but for its variation in some degree. I will endeavour to show later as I hand down this judgment how this is so and reflect my own appreciation of the issues at stake in the order that I will make.

It is important to recite the facts forming the background to this application. The first applicant made an application in Case Number HC 9073/01 to this Court to compel the first respondent to hold the Mayoral and Council elections for the City of Harare by a given date. This Court ordered that those elections were to be held on the 28<sup>th</sup> of December 2001 and in compliance with a timetable which this Court set for the publication of various notices required by the Electoral Act to be published in respect of the holding of such elections.

The order stipulated that it was to remain operative despite the noting of any appeal. The Registrar General, that is the first

respondent, nonetheless appealed to the Supreme Court against the judgment of Mr Justice Hungwe in HC 210/2001 and the first respondent did not comply with the order of this Court at that stage. His appeal was however thrown out by the Supreme Court, which issued the following Order and I quote:-

- (1) That subject to the qualification that the election timetable set by the Court *a quo* is set aside, the appeal is dismissed.
- (2) That the 1<sup>st</sup> Appellant shall hold Mayoral and Council elections for the City of Harare in terms of the Electoral Act, [Chapter 2:01] on or before the 11<sup>th</sup> of February 2002.
- (3) That the Appellant shall pay two thirds of the Respondent's costs jointly and severally, the one paying the other to be absolved."

It seems to me that if the first respondent in this case was to comply with the Supreme Court Order, which I have recited, he had to have, by the 14<sup>th</sup> January 2001, commenced the various steps required to be followed for the holding of elections on the 11<sup>th</sup> February 2002. He apparently did not do so, and has not done so to date.

At the hearing today, some programme was mentioned as having been put in place by the first respondent for holding the elections on the 9<sup>th</sup> and 10<sup>th</sup> of March 2002.

The applicants clearly seek the enforcement of the Supreme Court Order by this Court. Whilst in my view they are entitled to do so, the remedy they have sought before the amendment at the hearing, is not consistent with the strict enforcement of the Supreme Court Order. They have sought to give latitude to the first respondent to hold the elections other than on or before the 11<sup>th</sup> February 2002, hence in paragraph 50, of the founding affidavit, which I would say encapsulates their position, they state and I quote:

"The only way for him, (that is the 1st Respondent) to

purge his contempt, is to immediately give notice that he will hold the elections within the shortest possible period allowed by the Electoral Act.”

I do not think that it would be competent for me to give the relief sought by the applicants as originally framed in the manner they have sought it and at the same time achieve what I believe is the primary objective of this application, which is to enforce the Supreme Court Order.

The power of this Court to enforce an order of the Supreme Court derives from section 24 of the Supreme Court Act, [*Chapter 7:13*], which provides in section 24 that:

“Except as otherwise provided in any other law, a judgment of the Supreme Court in any appeal in terms of this Part, shall be recorded in the Court or tribunal of first instance and such judgment may be enforced in all respects as if it had been given by that Court or tribunal.”

This provision does not, in my view, give the Court of first instance, in this case the High Court, the power to vary the Supreme Court Order in any way. The power to enforce an order is not, I do not think, necessarily contemporaneous with the power to vary the order concerned.

The first respondent in any case has attempted to obtain a variation of the Supreme Court order when he filed the applications referred to at this hearing, that is, in Case Number SC 8/02 and Case Number SC 12/02. He however withdrew that application or those applications on or about the 24<sup>th</sup> January 2002.

It is not in dispute that the Electoral Act (Modification) (Postponement of Harare City Council Elections) Notice 2002, which I said I will refer to as the “Notice”, was promulgated on the 23<sup>rd</sup> January 2002. That Notice provides that the Harare City Council elections shall be held on the 9<sup>th</sup> and 10<sup>th</sup> March 2002 notwithstanding the provisions of the Urban Councils Act, [*Chapter 29:15*], the provisions of the Electoral Act, [*Chapter*

2:01] or any other law or Order of Court to the contrary. I lay emphasis on the words, 'or Order of Court'.

The applicants have averred in the affidavit and orally at the hearing, that this Notice is liable to be struck down as null and void for the reasons which they give in the founding affidavit as well as the reasons advanced by Mrs *Mushore* at the hearing.

The declaration that that Notice is null and void is a part of the final relief which the applicants seek. But it seems to me, and it has been stated by Mrs *Mushore*, that apparently the first respondent withdrew its application to the Supreme Court in Case Number SC 12/02, because he must have believed that he was now saved by the Notice.

I must emphasize that I am concerned in this application only with the issuance of a provisional order together with the interim relief prayed for. To issue the provisional order, I must be satisfied that the applicants have made out a *prima facie* case. This is trite law. Rule 245(2) of the Rules of this Court provides and I quote:

“Where in an application for a Provisional Order the Judge is satisfied that the papers establish a *prima facie* case, he shall grant a Provisional Order either in terms of the draft filed or as varied.” (**emphasis added**)

Now to satisfy myself whether or not a *prima facie* case has been made, I think I have to have regard, in this case, to the following considerations. First, whether *prima facie* the Notice is null and void. I must mention and emphasise the fact that the question of the validity or otherwise of the Notice is a matter to be dealt with on the return day. But in order to satisfy myself whether in fact a *prima facie* case has been made, I think I must be satisfied too that the Supreme Court Order is extant, i.e. is still alive and surviving even in view of the Notice, and I think I must be satisfied that *prima facie* the first respondent is in contempt of the Supreme Court Order. The Notice in effect sets aside the Supreme Court Order and any Court Order which may have been made against (or it attempts to nullify any Order of Court made against) any decision or any act of the Commissioners appointed for the City of Harare.

I do not want to enter the debate, which is really a jurisprudential question, as to whether in view of the doctrine of the separation of powers, a law may be passed to directly nullify *ex post facto* an order of the Supreme court. This point may be addressed by the parties on the return day of this provisional order.

I think however that the Notice may be found wanting and therefore likely to be declared invalid because of its wide sweep as alluded to by the applicants in paragraphs 33 and 34 of their founding affidavit. In this regard one needs only to give an example arising from the provisions of s 4 of Statutory Instrument 13A of 2001, which provide as follows:

“Notwithstanding anything in the Urban Councils Act, [Chapter 29:15] the Electoral Act, [Chapter 2:01] or any other law or order of court to the contrary-

- (a) (not relevant)
- (b) all decisions and acts of the Commissioners referred to in paragraph (a), (that is the Commissioners running the City of Harare), made before the date of commencement of this Notice, in the exercise or purported exercise of the functions of the Harare City Council are hereby validated.”

The emphasis as I said is on the sweep of this provision. Some examples have been given as to the possibility that if these courts had issued an order, for instance re-instating an employee dismissed by the City Council, quite conceivably this section might render that order inoperative. And it is that sweep which I consider might result in, among other reasons, this Court pronouncing that the Notice may in fact be null and void.

Additionally, there is what may appear to many as the obvious point, that the Notice was made in terms of section 158

of the Electoral Act. That section empowers the President to make certain Statutory Instruments as he considers desirable. I do not wish to recite the entire section. But what is significant is that, in my view, the section does not empower the President to issue a Notice or issue a Statutory Instrument which has the effect of setting aside a Court Order. That is my reading of that section. It is specific that it relates to the provisions of any Act or any other law.

I must confess I do not subscribe to Mrs *Matanda-Moyo's* view that "any other law" includes a Court Order. And even if one were to look at section 158 of the Electoral Act from the point of view of the interpretation of statutes, one would obviously say, if the Legislature intended to include a Court Order, it would very easily have done so. It is not a matter which would have been left to doubt, but the reason why it was not done that way is probably self evident, considering the respective functions of the three arms of the State.

If I am correct in what I have said, it means therefore that the Supreme Court order is still valid. It is apparent that the Supreme Court Order may be in danger of being disregarded. There is no doubt that the Supreme Court Order was quite obviously disregarded during the period between the 14<sup>th</sup> January and the 23<sup>rd</sup> January 2002 and no steps were taken in terms of the Electoral Act to meet the deadline for holding the elections as established by the Supreme Court.

I think the point that a Court Order must be obeyed, whatever a litigant might think about it is adequately dealt with in a number of cases in this court and elsewhere and in particular, the case drawn to my attention, *Hwata v Hwata*, 1994 (2) ZLR 277, a



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Supreme Court judgment at 281F - 282A.

So it seems therefore that, having said that the Supreme Court Order is extant and having satisfied myself that there might be no validity in relying on Statutory Instrument 13A of 2001, the Registrar General, the first respondent, should have long taken steps to ensure that the elections will be held on or before the 11<sup>th</sup> February 2002.

This of course means that the first respondent is more than just *prima facie* in contempt of the Supreme Court Order.

It must be apparent that the applicants, from what I have said, have established a *prima facie* case for the issuance of the provisional order sought. But, to give effect to the Supreme Court order and for this court to enforce it without variation or amendment, it seems to me that the first respondent must work towards the holding of the elections on the 11<sup>th</sup> February 2002. Nothing in my view short of holding the elections on or before that date will amount to full compliance with the Supreme Court Order.

The various steps which must be taken by the first respondent in terms of the Electoral Act, must of necessity be modified to ensure that the Supreme Court Order is complied with.

In my view the guiding principle is that an Order of the Supreme Court must be complied with in all respects and any other consideration must take second place. In the time available and in order to meet the deadline set by the Supreme Court of 11<sup>th</sup> February, 2002 for the holding of the elections, the draft order must be so worded as to enable the first respondent to hold the elections on February the 11<sup>th</sup>, 2002 at the very latest.

Further in my view, the issuance of the provisional order gives to the first respondent the opportunity to attempt to purge his contempt of the Supreme Court order, because for as long as he holds the elections on the 11<sup>th</sup> February 2002, he cannot be held absolutely to be in contempt as long as he can secure the

holding of the elections by the 11<sup>th</sup> February, 2002. I do not think he can be held to be absolutely in contempt of the Court Order.

If I must err in this particular judgment, I choose to err on the side of giving effect to an existing Supreme Court Order and grant such provisional relief as will be consistent with the intention of giving effect to the Supreme Court Order.

The relief sought in paragraph 4 of the draft order is merited. The case of *Hwata v Hwata (supra)* beckons me to issue that part of the draft order because it is competent that such an order may be issued by this Court.

The Supreme Court Order, therefore, shall, pending the final determination of this matter be enforced by the issuance of a provisional order and the granting of the following interim relief:-

1. That the first respondent shall on or before the 31<sup>st</sup> January 2002, give Notice of the Mayoral and Council Elections for the City of Harare and fix the 11<sup>th</sup> February 2002 or the 11<sup>th</sup> February 2002 and any preceding day or days as the polling date or dates on which a poll take place, if a poll becomes necessary.
2. The first respondent shall fix 4<sup>th</sup> February 2002 as the day on which the Nomination Court will sit to receive nominations of candidates for election of councillor or Mayor, as the cay may be.

3. For the purposes stated in paragraph 1 and 2 hereof and for the purpose of giving effect to the Supreme Court Order of 7<sup>th</sup> December 2001, the provisions of the Electoral Act [*Chapter 2:01*] shall be construed with such necessary modification as will ensure compliance with those paragraphs.
4. Should the Registrar General fail to comply with any part of the interim relief granted under this Provisional Order, applicants may approach this Court to anticipate paragraph 3 of the Final Order, so that this court may commit the Registrar General to gaol until such time as such step/s as may be specified by it are taken. Applicants are hereby given leave to supplement their papers to show good cause for this. Applicants should first approach the Registrar General's legal practitioners to agree, in consultation with the Registrar of this Court, on a suitable hearing date. If this cannot be agreed or there is a great urgency, they may make a Chamber Application, on notice to the applicant, for directions from a judge as to when that issue can be argued.
5. That in the event of an appeal being noted against this Provisional Order, notwithstanding such noting of an appeal, this order is declared operative and in effect and shall not be suspended, unless a court or judge with appropriate jurisdiction is duly furnished with all the documents filed herein and, in accordance with due

process, orders otherwise.

SERVICE OF THIS ORDER AND FILING OF FURTHER  
DOCUMENTS

Service of this provisional Order shall be deemed to have taken place at the time of granting hereof.

That therefore is the decision I have come to on this application for a provisional order.

*Atherstone & Cook*, applicants' legal practitioners.  
*Office of the Attorney General's Office*, legal practitioners for the respondents.