

HC 2022/03
Ref: HC 3616/02
HC 10149/02
HC 9021/02
HC 8225/02
HC 8657/02
HC 469/03

THE REGISTRAR GENERAL OF ELECTIONS
versus
MORGAN TSVANGIRAI

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE 11 and 12 March 2003

Mrs Matanda-Moyo, for the applicant
Adv. de Bourbon SC, for the respondent

Mr Hussein, for the 1st respondent in the Election Petition HC 3616/02

MAVANGIRA J: This is an urgent chamber application, in which applicant seeks the following order that:

“1. The inspection programme be and is hereby postponed and to commence on 24 March 2003.

2. The rest of the inspection programme to be altered accordingly.”

together with an order that costs be costs in the cause.

This application is made pursuant to the order by GUVAVA J in case No. HC 469/2003 in which the following order was made.

“IT IS ORDERED:

1. That the respondent shall make available for inspection by the applicant’s legal practitioners in terms of Order 24 of the High Court Rules, the Voters Roll for the 2002 Presidential Election, within five days of the date of service of this order upon the respondent.”

The applicant in case No. HC 469/2003 is the respondent in the present proceedings whilst the respondent is the applicant in the present proceedings.

This urgent chamber application was filed with the court on 10 March 2003. It was set down for hearing on 11 March 2003 in chambers. At the onset of the proceedings in chambers, Mr *Hussein* indicated that he was the legal representative for the first respondent in the principal matter, that is the Presidential Election petition being case No. HC 3616/02. He indicated that he was applying for his client, that is, the first respondent in case No. HC 3616/02, to be joined as one of the applicants in this matter.

Mr *Hussein* made the following submissions. That, this urgent chamber application is related to the Presidential Election Petition that was filed by the respondent in case No., HC 3616/02. The first respondent in the main matter that is, His Excellency the President R.G. Mugabe, has an obvious and direct interest in all applications that are made in the matter, a fact which all the parties are fully aware of. He should thus have been notified of the applications and counter-applications that have been made. Further, the other 3 parties, that is, the President, the Electoral Supervisory Commission and the Minister of Justice are “curiously” not cited in this urgent chamber application. He had only become aware of the instant proceedings when he contacted the applicant’s legal practitioner late on Friday, 7 March 2003. He was thus unable to file any affidavits in support of this application. However, the affidavit would have been deposed to by himself anyway, and in any event, it would relate to legal issues. He thus submitted that he was entitled to make the application and referred to Rule 87 highlighting the fact that the court may *mero motu* order joinder of a party. He also referred to the case of *Watson v Gilson Enterprises*, 1997 (2) ZLR 318 at 323 in support of his application.

He submitted that on 15 January 2003 a pre-trial conference minute in case No. HC 3616/02 was duly executed and filed with this court. It gave directions on how the matter is to proceed, dealing, *inter alia*, with matters of discovery and further particulars. He had suddenly become

interested and alarmed in the instant proceedings when he saw a court order and documents which authorise the inspection of the Voters' Roll without reference to any of the other parties. From experience, he knows that Voters' Rolls in this country are usually sealed together with ballot papers and other voting materials, within the ballot boxes. Although this is not required by the Electoral Act [*Chapter 2:01*], that is what is done in practice. Thus the effect of an order granted in the absence of his client, was to allow the breaking open of the seal and allow unfettered access to the contents of the ballot boxes, which, he submitted, cannot be proper. He further submitted that that would not be part and parcel of the discovery proceedings if the respondents should venture to so argue. Further, that for one to have access to the Voters' Rolls requires, in terms of s 78(5) of the Electoral Act, a court order, which will only be granted if such access is for the purposes of a petition. Mr *Hussein* further submitted that the respondent, well knowing his client's interest in the matter, went behind this client's back to get an order without making any mention of the pre-trial conference minute nor the fact that there are interested parties and that it was very fortuitous for him to be present during the present proceedings. He did however agree that as stated by the respondent, a notice to make discovery had been made to the applicant who made discovery and deposed in his discovery affidavit that he has the Voters' Rolls in his custody. The applicant, he submitted, did not however, indicate that he was not entitled to break open boxes which were sealed in terms of the law and allow unfettered access to them. Whether or not he has indicated to the respondent that he can inspect the Voters' Rolls does not make it right as it has to be by order of court.

When clarification was sought by the court of Mr *Hussein* as to what relief he sought, he indicated that he was not opposed to the exercise involving verification of the Voters Rolls by the respondent. However, he preferred a situation where all parties concerned agree on an appropriate and mutually convenient timetable for the carrying out such exercise. It was then pointed out by the respondent that they were not seeking to do

a verification exercise but an inspection of the Voters' Roll. Mr *Hussein* then indicated that he wished to be present when the boxes were opened and unsealed and had no objection to such inspection by the respondent as ordered by GUVAVA J. Mr *Hussein* had at an earlier stage indicated that he suspected that the respondents wanted to and would have access to the documents dealt with under s 78 of the Electoral Act.

The applicant's counsel indicated that she had no objection to the application for joinder as Mr Hussein's client has an interest in the matter and such joinder would make for transparency. Mr *Hussein* should thus be available for the inspection and that in fact that is one of the reasons why the present application for postponement has been made.

The respondent's counsel on the other hand vehemently opposed the application for joinder on the grounds that Mr *Hussein* had not shown the basis on which he is entitled to appear and make this application without any papers. The respondent had had no opportunity to study his application. He had not cited the Rule of Court which allowed him to make an oral application yet he knew since Friday about the instant application.

He submitted that the applicant was required, in terms of a ruling in November 2002, to file his discovery. The respondent complied and discovered the Voters' Rolls. The respondent then, in terms of the Rules, asked for inspection of the documents. The inspection was not given, necessitating the respondent making the application before GUVAVA J resulting in the order compelling inspection being made. The respondent was the only party that asked for inspection. Mr *Hussein* or his client thus had no right to become involved in the inspection because they had not sought it. Neither did they have the right to intervene in an interlocutory dispute between the applicant and the respondent, no authorities having been cited for Mr *Hussein's* client to be joined in interlocutory proceedings relating to discovery or inspection.

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However, after the seeking of clarification by the court of Mr *Hussein* as to what relief he sought, the respondent's counsel submitted, *inter alia*, that there was no basis for Mr *Hussein* to fear that the respondent would access other election materials pursuant to s 78 of the Electoral Act. In any event officials of the applicant's office would be present to ensure the security of the applicant's documents and would only provide the respondent with the Voters' Rolls. Mr *Hussein's* fears would thus be guarded against. Although respondent's counsel initially submitted that the application is ill-founded and has not been properly brought, in his later submissions Mr *de Bourbon* indicated that the presence of Mr *Hussein* or his representative at such inspection is a matter of no concern to the respondent. In other words he was not opposed to the physical presence of Mr *Hussein* or his representative at the inspection of the Voters Rolls. It must be borne in mind that the respondent simply wants to exercise his rights of inspection. If other interested parties wish to be present, they should do so in a manner that does not hinder the respondent's exercise of his rights in terms of the Order granted relating to examination of the Voters' Rolls and the right to make copies of the same.

I indicated that I would determine the application for joinder at the same time as the present urgent chamber application.

The present application is one of several interlocutory applications made pursuant to the filing of the main Presidential Election Petition, case No. HC 3616/2002. The other previous applications are sufficiently outlined in GOWORA J's judgment in case No. HC 10273/2002. I do not consider it necessary to repeat the same here. It is necessary however, to state herein that after the order by GUVAVA J in case No. HC 469/03, the applicant made an urgent chamber application before this court on 27 February 2003 in case No. HC 1788/2003 seeking directions in terms of Order 23 of the High Court Rules. The applicant's counsel stated that this was made because the applicant was unaware of how to give effect to

GUVAVA J's order. That application in case No. HC 1788/2003 was dismissed with costs by MATIKA J on 4 March 2003 who directed compliance with the order by GUVAVA J as granted.

Service of GUVAVA J's order on the applicant was effected on 21 February 2003. Thus the applicant was to make the Voters' Roll available for inspection by the applicant's legal practitioners, within 5 days of 21 February 2003, that is by the 28 February 2003. The applicant's counsel submitted that when MATIKA J dismissed the application for directions on 4 March 2003, it then became imperative for the applicant to comply with GUVAVA J's order. The running of the 5 days in GUVAVA J's order was interrupted by the making of the application for directions and the counting of 5 days therefore starts again anew from the date of MATIKA J's order, that is, 4 March 2003.

I will deal with the effect of that submission in my findings.

The applicant's counsel also submitted that the applicant's application has been misconstrued as it is not an application to vary GUVAVA J's order. It is an application for postponement.

It was submitted by the applicant's counsel that for the inspection to take place, presiding officers, Constituency Registrars and political parties' representatives must all be present. The constituency registrars are all available and in place and ready for the inspection. The presiding officers who are mainly drawn from the teaching profession are not presently available. It had been assumed that they would be available but it only became apparent on Friday, 7 March 2003 that that would not be possible. They need to be given 2 weeks' notice. No explanation was given as to what was done from the date of GUVAVA J's order to 7 March 2003. No explanation was given as to what efforts if any had been made to make the representatives of other political parties aware of the order granted by GUVAVA J. It was submitted that need for the presence of the presiding

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officers was occasioned by the fact that they had sealed the ballot boxes and they must therefore unseal them. The necessity of the presence of representatives of political parties appears to be based on the need for transparency.

The respondent's counsel submitted that the instant application is frivolous and vexatious as all it amounts to is an effort by the applicant to avoid the respondent having access to the Voters' Rolls and that this court cannot and does not have the power to extend the 5-day period imposed in case No. HC 469/2003, in other words, alter GUVAVA J's order, the applicant not having shown that the grounds for variation exist. He cited in this regard *Sayprint Textile (Pvt) Ltd and Another v Girdlestone*, 1983 (2) ZLR 322 in which reference is made to *Bell v Bell* 1908 TS 887, the benchmark decision for guidance in such matters, that is, variation of an interlocutory order.

The respondent's counsel also submitted that the applicant has not complied with the law nor with a previous court order, both requiring him to bring all the relevant election material to Harare. Further, the applicant's plea of poverty has already been dismissed as irrelevant by GOWORA J in case No. HC 10273/2002.

With regard to the applicant for joinder made by Mr *Hussein* on behalf of the first respondent in the main Presidential Election Petition, I understand the parties' counsel's further submissions made after the court sought clarification of the relief sought, to be the effect that there is no dispute. In other words, the respondent has no objection to the presence of Mr *Hussein* or other legal representatives during the inspection of the Voters' Rolls which will be made available to the respondent by the applicant or his officers; as long as there is no hinderance to the carrying out of the inspection by the respondent's representatives. Mr *Hussein* on his part has no objection to the inspection of the Voters' Rolls by the respondent. He however would like

to be present when the ballot boxes are unsealed and the Voters' Rolls are made available to the respondent's representatives. Thus there has been and there is no bar to Mr *Hussein's* or other representatives being present at such inspection. He is clearly an interested party and should be allowed to be present.

It is in my view important that the nature of the order by GUVAVA J is clearly understood. To me the order merely requires the applicant to produce the Voters' Roll for inspection by the legal practitioners for the respondent. This arises from the applicant's discovery of the said Voters' Roll as part of the evidence to be relied upon in the main case No. HC 3616/02.

Secondly, the court is not concerned with the minute details of how this is done.

To emphasise the above, the respondent is not seeking unfettered access to material other than the Voters' Roll. What is to be made available is the Voters Roll. It is appreciated that the applicant is the custodian of other voting material which does not form part of the order and to which the order does not relate. Thus, any concern of unfettered access by anyone does not arise on a simple reading of GUVAVA J's order.

As already stated above, there is in effect no objection to the presence of Mr *Hussein* at the places and times when the Voters' Roll is made available to the respondent's legal practitioners. Should he wish himself or his duly appointed representatives to have the same Voters' Roll made available to them for purposes of examination, they may request such of the applicant, whom it is expected will comply.

With regard to the main urgent chamber application presently before me, I reiterate that the order by GUAVVA J is clear and simple. It requires the applicant in these proceedings to make available for inspection by the respondent's legal practitioners, in terms of Order 24 of

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the High Court Rules, the Voters Roll for the Presidential Election within 5 days of the date of service of the order on the applicant. The order was made on 12 February 2003. It was served on the applicant on 21 February 2003.

In *Sayprint Textile (Pvt Ltd and Another v Girdlestone*, 1983 (2) ZLR 322 at 326 SQUIRES J stated:

“In Bell’s case, *supra*, which seems to contain such guidance as there is, INNES CJ said at 894:

“Courts will not lightly vary their own orders, even though they may be of an interlocutory character. And the cases in which such orders will be altered in the absence of fresh facts cannot be numerous.”

There were such fresh facts in *Bell’s* case and in *Meyer’s* case.”

No fresh facts which were not before GUVAVA J or were unknown to the applicant at the time have been placed before me. What has been made is the submission in one breath, that because the applicant failed to secure funding from Treasury, it is difficult for the applicant to comply with GUVAVA J’s order as he has not been able to bring all the election materials to Harare. In the next breath it has been submitted that by supplying the programme attached to the applicant’s papers, the applicant is in fact complying with the order as it is making the Voters Roll available and the respondent must comply with that programme.

As submitted by the respondent’s counsel, the issue of the applicant’s failure to secure funds has already been dealt with by this court in case No. HC 10273/2002 in which GOWORA J at page 4 of her cyclostyled judgment found:

“The transmission of papers to Harare, is not in my view, a function outside the ambit of the applicant’s functions, such that a specific request for funds should be made to Treasury. It is an administrative function which is part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections.”

If the applicant is correct in his submission that presiding officers must also be present at the inspection, it has not been shown to the court what steps he took since 21 February when the order was served on him to secure and ensure their presence. There is no explanation as to why it was only on Friday, 7 March 2003 that this matter was raised for the first time.

This is particularly significant when regard is had to the fact that compliance with the order in question was to be effected by 28 February 2003. In my view the conduct of the applicant reveals an element of tardiness a lack of willingness to give effect to court orders granted in this matter. No sound or cogent reasons have been given for application for postponement. It cannot be granted simply because it has been sought. The application for postponement is accordingly refused. I am fortified in my decision by the fact that the applicant has produced a programme beginning 10 March 2003 to 21 October 2003 for the purposes of inspection of the Voters Roll. This is a process and not an event, which spans a period of 7 months. The making available of the Voters Roll for inspection is exclusively straightforward matter. The applicant must do so. The application for postponement is accordingly dismissed. The time limits as stipulated on the order by GUVAVA J have not been complied with. That must be a matter of concern. The postponement is premised on the perceived need by the applicant to marshal the Presiding Officers. The applicant is the custodian of the Voters Rolls and what is simply sought is to make the Voters Rolls available for inspection. Clearly he does not need to gather this large array of Presiding Officers to make the Voters Rolls available. He is competent to make the Voters Rolls available himself.

In the result it is orders as follows:

IT IS ORDERED:

1. That the application for joinder is hereby dismissed. The legal

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practitioner or his duly appointed representative for the first respondent in case No. HC 3616 is at liberty to be present at any such inspection of the Voters Roll.

2. The costs in respect of that application are to be borne by the applicant for joinder.
3. The application for postponement is dismissed with costs.

Civil Division of the Attorney-General's Office, applicant's legal practitioners.

Gill, Godlonton and Gerrans, respondent's legal practitioners.

Hussein Ranchhod & Co., 1st respondent's legal practitioners in HC 3616/02