

HC 7540/03
CHARLES SYNETH MUGADZAHWETA
versus
JONATHAN BANDA
and
MOVEMENT FOR DEMOCRATIC CHANGE
and
THE REGISTRAR-GENERAL

HIGH COURT OF ZIMBABWE
HUNGWE J,
HARARE, 28 and 29 August, 2003

Urgent Application

A A Musunga for the applicant
S Jarvis for the 1st and 2nd respondents
Ms Gatsi for the 3rd respondent

HUNGWE J: The applicant, seeks an order that:

- (a) **the nomination of 1st respondent to stand as a candidate for 2nd respondent in the Norton Town Council Elections due on 30 August, 2003 be and is hereby set aside; 1st respondent be and is hereby barred from contesting the urban Council elections for Norton Town Council scheduled for the 30th and 31st August, 2003;**
- (b) 1st respondent pays the costs of suit.

This application is opposed by 1st respondent, his party and the Registrar-General.

In his founding affidavit applicant states that 1st respondent does not reside in Ward 1 Norton and is therefore not qualified to stand as councillor for the elections. He bases his averment on the following facts. 1st respondent registered himself as a voter on the Ward 1 Voters Roll Norton Town Council as residing at Stand No K 375 Poort Road, Katanga, Norton. There is no such address on Poort Road in Norton. That address K 375 is found in Katanga Township. 375 Poort Road is a stand leased by one Maponga. A Mr Wellington Maponga of that address swore to an affidavit stating that he did not know the respondent nor was he related to him. Mr Matika Pearson Tichaona of K 375 Katanga Norton, deposed to another affidavit stating that the 1st respondent is not known to him nor has he ever resided at that address. The director of Housing and Community Service for Norton Town Council, Mr Doga, in a letter addressed to whom it may concern, states that Mr Takaendere leases K 375 Ngoni Township whilst Mr W Maponga leases stand No 375 Norton. In a separate letter of the same date similarly addressed, the director of Housing and Community Services also states that -

".....the Rates Clearance certificate for Jonathan Banda was issued on the strength of a letter from the landlord who considers that he is a lodger at K 53 and

HH 74-03
HC 7540/03

that he had resided on the Council for the past 10 years".

Makosa Navaya does not deny any knowledge of the first respondent. He explains that he was conned into signing a document by which 1st respondent obtained the rates clearance certificate. What he denies is that 1st respondent was at any time his lodger, contrary to Doga's claims.

The primary documents relied upon by the applicant is an extract of the Norton 2003 Main Voters Roll Block 010632. It gives 1st respondent's address as K 375 Poort Road, Katanga Township Norton. It is the basis of the applicant's claim that 1st respondent obtained his registration through misrepresentation.

The 1st respondent explains in his opposing affidavit as follows. He denies making any misrepresentations in order to be a registered Voter. When he registered as a voter in 1999 he was staying at 375 Poort Road, Norton where he was employed as a trainee motor mechanic by a "Sekuru" Maponga/ He has since moved to the United Kingdom. He suggests that the address as recorded in the Voters Register was an error by the data capture clerk in the office of the 3rd respondent. He says that Wellington Maponga is the son of Sekuru Maponga.

He knows Makosa Navaya of K 53 Katanga Township. He was registered as a lodger at his house for 3 years. He produced proof to that effect in the form of a lodgers card. That card shows that on 18 August, 2000 he paid lodgers fees for a whole year. He did the same in 2001 when he paid \$250,00 on 22 June, 2001 and 7 July, 2003.

He explained that he was born in Norton and has continually resided there from that date to the present. He now stays in an informal dwelling with his parents but by its nature he cannot have any paper trail necessary to effect any change of address for voting purposes. As he has continuously lived in the Norton Council area, there is no basis upon which he could be disqualified.

He pointed to the fact that the 3rd respondent's office has accepted nominations for candidates of persons as ward councillors whose residential

HH 74-03
 HC 7540/03

addresses are outside the ward but inside the Council area, arguing that there could be no basis now for dismissing his nomination on that basis.

The 1st respondent has alleged that Makose Navaya may have been unduly influenced, by threats of assaults, to swear to an affidavit wherein he denies that he lodged at his house in the past ten years. He gave a narration of physical harassment by his opponents of his family after his nomination. He says applicant took over a bottle store on a farm where a farmer was killed and is widely feared in the area. These are serious allegations. The applicant must have challenged the respondent to prove to them.

If he does not, they are taken as true. In the present case I note that the applicant has not controverted the allegations although he was present in chambers at the hearing.

In considering the merits of this application the Court examined the explanation given by the respondents in opposing the order sought.

It is true that the address given in the Voters Roll Annexure A to the founding papers is not an address at which the 1st respondent currently resides. The fact is that it is not an address that can be found in Norton. It is patently a wrong address for any purpose. He gave the correct address in Poort Road, Norton where he once resided. He was a trainee mechanic under the employ of the registered lessee who has now emigrated to the United Kingdom. These allegations were not disputed by the applicants. The applicant, further, did not dispute that Wellington Maponga is the son of that Maponga who went to the United Kingdom. If this is correct, then it shows that the 1st respondent was always resident in the Council area in which the election is to be held.

Furthermore, third respondent confirms that the error reflected in the Voters register is a result of its office staff. Most importantly 1st respondent in Form V.1, which he completed on 27 May, 2003 the correct address is given as 375 Poort Road, Norton declared that he was entitled to be registered in the constituency of his residence. Ward 1 is part of the constituency where the elections will be held on 30 and 31 August, 2003. There is an endorsement that there was on 27 May, 2003, presented to the constituency registrar, proof of such residency in the form of an envelope addressed to him at that address. It was at the time deemed satisfactory proof of residency in the constituency. I am therefore satisfied that 1st respondent is resident at the address given to the registrar. That address falls under Ward 1 of

**HH 74-03
HC 7540/03
the Constituency.**

The basis of the applicant's objection to 1st respondent's candidature was that by the relying on an address at which he is no longer resident and a rates clearance certificate relating to a property on which he is no longer resident, the 1st respondent misrepresented to the registrar and therefore his nomination is liable to be set aside.

It is the spirit of the Electoral Act [Chapter 2:01] which must guide the Court in the determination of the parties rights.

In terms of section 103 G of that Act, any person who -

- (a) is a citizen of Zimbabwe;
- (b) has reached the age of 21 years; and
- (c) is enrolled on the voters roll for the council area concerned and
- (d) is not disqualified in terms of sub-section (2) shall be qualified to be elected as a councillor.

There has been no suggestion that the 1st respondent is disqualified in terms of sub-section (2) of that section.

As the 1st respondent is a Zimbabwean citizen over the prescribed age who is on the voters roll for the Norton Area Council he is *prima facie* entitled to be elected as a councillor for the Ward 1.

Even if it is accepted that the 1st respondent has not shown that he is resident in the ward in which he is registered, it is sufficient if he satisfies the third respondent that it is appropriate if he is registered as a voter in a council area in which he is not resident. (Section 103C). He has demonstrated that he has been resident in the same Council area for a period in excess of 12 months. In matters of this nature, the Court's approach must always be guided by the principles that uphold the fundamental liberties set out in the Constitution. An order of Court barring a prospective candidate from running in an election can hardly be said to be concomitant with the upholding of the fundamental freedoms. In any event, in the view that I take of the matter and in view of the opposition filed by the 3rd respondent serious prejudice to 1st respondent will result from an order barring the 1st respondent from contesting the election.

A stronger case has to be made out before this Court can bar a candidate from

HH 74-03

HC 7540/03

running in an election. This is not a case in which a Court could grant the order sought.

In the premises the application is dismissed with costs.

***Musunga and Associates* , applicant's legal practitioners**

***Atherstone & Cook* , 1st and 2nd respondent's legal practitioners**