

MOVEMENT FOR DEMOCRATIC CHANGE  
versus  
TIMOTHY MUBHAWU

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, March 12, 2008

**Urgent Chamber Application**

HUNGWE J: This matter was placed before me through the chamber book as an urgent application on March 10, 2008. Applicant seeks the following provisional order against the respondent:

“Pending confirmation or discharge of this provisional Order;

1. The respondent be and is forthwith hereby interdicted and restrained from using the applicant’s name and materials and posters resembling the applicant’s materials and posters in his campaign for the House of Assembly seat of Mabvuku-Tafara.
2. The respondent be and is hereby ordered to forthwith remove the posters he plastered in and around the Constituency, failing which the applicant’s structures in Mabvuku-Tafara Constituency be and are hereby authorised to remove the said posters in the company of the Deputy Sheriff or members of the Zimbabwe Republic Police, if necessary.

**SERVICE OF THE PROVISIONAL ORDER**

This Provisional Order shall be served by the respondent by the applicant’s Legal Practitioners or the Deputy Sheriff of Chinhoyi. (*sic*)”

No attention has been paid to the drawing of the papers in this matter as is demonstrated by the careless errors contained in the last paragraph of the order sought relating to service. Unfortunately this is becoming more the norm rather than the exception in papers drawn for placement before this court. Legal practitioners need not be reminded about the importance of care and diligence when drafting court papers.

The applicant is a registered political formation in terms of the laws of Zimbabwe. The respondent is the out-going Member of the House of Assembly for the Mabvuku-Tafara constituency for the applicant. The applicant has fielded hundreds of candidates in the

forthcoming harmonised Presidential, Senatorial, Parliamentary and Council elections. In an internal candidate selection process, the respondent failed to garner the support of his political party to stand as that party's chosen representative for the House of Assembly seat of Mabvuku-Tafara constituency. Instead one Shepherd Madamombe is the official candidate for the applicant. Applicant approaches this court for the above relief.

Sekai Holland, the Applicant's Secretary for Policy Research and Ideology deposed to the founding affidavit. In it she states that applicant, on 14 February, 2008, notified the Zimbabwe Electoral Commission of its intention to substitute the respondent with Shepherd Madamombe. On 15 February, 2008, the nomination Court sat to receive the nomination of candidates. Shepherd Madamombe's papers were accepted as representing the applicant. Respondent, who had earlier been endorsed by applicant also, filed his nomination papers but as an independent. His papers were accepted by that Court as such.

Applicant now seeks to interdict respondent from conducting his campaign using its materials and posters.

This application has been brought to the wrong Court. The Nomination Court is the proper court to decide the eligibility of each candidate. Once it was satisfied that a candidate is eligible to be registered, and registered him, then it was up to the applicant to deal with the question of use of its materials in terms of its internal disciplinary procedures, if any was applicable. The applicant does not say in its papers that respondent is no longer its member. If he is, then all the more reason this matter should have been dealt with internally. There is no evidence to suggest that all internal remedies had been exhausted by applicant nor is there an averment that respondent has been expelled from that party so as to require the adoption of conflict management mechanisms available in terms of Part XX1A of the Electoral Laws Amendment Act Number 17 of 2007.

Assuming in favour of the applicant that once it had accepted a candidate's nomination, the Nomination Court and the Electoral Court had no role to play in respect of how candidates conducted their campaigns, I am unable to hold that this is not self-create urgency. Applicant, by its own admission, approved the candidature of the respondent in the impending election. I also must assume that in preparation for the election campaign, it incurred all the expenses usually associated with a national election like printing materials and posters for use by its candidates and generally making its political manifesto public. It would have appropriately armed such of its candidates as it had settled upon. This included the

respondent. The papers do not show that upon request for the return of such material, the respondent had refused. The applicant has already incurred such cost as are incidental to the running of its campaign. I am unable to point to what extra harm or prejudice applicant would suffer from allowing one of its own to continue with that campaign. From the papers applicant at some point recommended the respondent to the Nomination Court. It sought to withdraw this recommendation “at the door of Court” so to speak and succeeded. Respondent had, in all probability, prepared his personal campaign materials for the job at hand. To interdict him on the present papers in my view would result in more harm to an otherwise properly laid campaign course.

In any event, it seems to me that this Court cannot grant, on an urgent basis, relief that will, in effect, limit an election candidate’s entrenched constitutional right to political activity. There is no evidence on the papers that he has breached the country’s criminal laws, or that his conduct, on the face of it, will create or occasion a breach of the peace. The applicant, without more, cannot succeed in securing, by an order of court, a curtailment of lawful political activity.

Section 21 of the Constitution guarantees a private citizen’s freedom of association and assembly. This right, like any other right, is subject to lawful limitations which place a duty upon such citizen not to act in a manner that infringes other citizen’s rights. Section 21 of the Constitution of Zimbabwe accords with Article 13 of the African Charter on Human and Peoples’ Rights and the general tenor of Article 22 of the International Covenant on Civil and Political Rights. Further, the likely prejudice which a political party suffers in such circumstances as obtain in the present case is far outweighed by the need to protect and promote the right in question. It is a right that supersedes any prejudice the applicant may lawfully lay claim to.

Generally passing-off as applicable in commercial disputes involves unfair trade competition. I do not agree, with respect, that a political party can claim successfully that one of its members is passing-off when such member uses that party’s political campaign material for the furtherance of the party’s common political objective. It seems to me the better approach is to promote the right which serve the principle of democratic participation of the wider public in the running of their affairs than to stifle such participation by way of court interdicts as sought here.

In the result I remove the matter from the roll of urgent matters.

*Mbidzo Muchadehama & Makoni*, legal practitioners for the applicant