MASIMBA KUCHERA
and
MICHAEL MUZA
and
TAFADZWA RUGOHO
versus
THE MINSTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HARARE, 27 & 28 March 2008

Urgent Chamber Application

Mr *Muchadehama* for the applicants
Mrs *Mabiza* for the respondent

GUVAVA J: This matter was filed as an urgent chamber application in terms of Rule 241 of the High Court Rules. The applicants were seeking the following urgent relief:

> "Pending the confirmation or discharge of the provisional order, the following provisional order is granted:
>
> 1. The Presidential Powers (Temporary Measures) (Amendment of Electoral Act) (No 2) Regulations, 2008 SI 43/2008, published in Government Gazette Extra Ordinary on 17 March 2008, shall not be applied in respect of the elections on 29 March 2008.
>
> 2. Section 59 and 60 of the Electoral Act [*Chapter 2:13*] as amended by the Electoral Laws Amendment Act, 2007 (Act 17/2007) shall not be applied in respect of elections to be held on 29 March 2008.
>
> 3. Illiterate persons and persons with disabilities or otherwise incapacitated voters where necessary and at their request, shall be allowed assistance in voting by a person of their own choice".

I dismissed the application with costs after hearing submissions. The parties have requested reasons for my decisions. These are they.

The facts in this matter are set out in the applicants founding affidavits and may be summarized as follows:

The first and second applicants are visually impaired. The third applicant is physically handicapped and does not have the use of his arms and legs (though it was noted that his

application was purportedly signed by him before a Commissioner of Oaths). The respondent is the Minister for Justice Legal and Parliamentary Affairs responsible for the implementation of provisions of the Electoral Act. The applicants are all registered voters and wish to exercise their rights at the elections on 29 March 2008. The applicants have submitted that their rights are being violated as they are obliged, in terms of the law, to seek assistance from strangers who will be presiding at the polling station. They averred that the provisions as set out in s 59 and 60 of the Electoral Act and amended by the Presidential Powers (Temporary measures) (Amended of Electoral Act) (No. 2) Regulations 2008 were unconstitutional..

The application was opposed. Mrs *Mabiza*, for the respondent, submitted firstly that the matter was not urgent and secondly that the relief that the applicants were seeking was not capable of being granted as a court cannot suspend a provision of an enactment. She further submitted that as the matter raised a constitutional point it should be determined by the Supreme Court. She also submitted that the Presidential Powers Regulations had been enacted in accordance with the provisions of the enabling Act.

URGENCY OF APPLICATION

The applicants submitted that the application was urgent as the Presidential Powers (Temporary Measures)(Amendment of Electoral Act (No. 2)) Regulations promulgated on 17 March 2008 (The Presidential Powers Regulation). The effect of these Regulations was to allow a police officer to be present and to assist a voter who required assistance if he was incapacitated in some way during the elections on 29 March 2008. The applicants submitted that they did not have any other remedy save to bring this application by way of urgent chamber application. In relation to ss 59 and 60 of the Electoral Act [*Cap 2:13*] (the Electoral Act), the applicants counsel conceded that the legislation had been in existence since 11 January of 2008 when the amendment came into force.

It is trite that no litigant is entitled as of right to have his or her matter heard urgently. (see *Dilwin Investments* (*Pvt*) *Ltd t/a Farmscaff* v *Jopa Enigineering Co* (*Pvt*) *Ltd* HH 116-98) The granting of urgent relief by a court is a matter of the courts discretion and is granted only in the most deserving cases. A matter does not become urgent merely because the date of reckoning has approached and the applicant had sat on his rights until the eleventh hour and done nothing. In the case of *Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188 CHATIKOBO J stated at pg 193:

> "What constitutes urgency is not the only imminent arrival of the date of reckoning; a matter is urgent if at the time the need to act arises the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

There is no explanation in the papers before me why the applicants waited until four days before the elections to lodge an application seeking to suspend the operation of ss 59 and 60 of the Electoral Act. It appears that what woke them up from their slumber was the publication of the Presidential Powers Regulations on 17 of March, 2008. In my view therefore the application as it relates to ss 59 and 60 of the Electoral Act is not urgent.

The urgency in relation to the Presidential Powers Regulations has also not been adequately explained. The applicants complain, in the submissions and Heads of Arguments (which were filed after the hearing) that the applicants would not be able to cast their vote freely as they cast doubt on the impartiality of the police officers manning the polling stations. It seems to me that the Presidential Powers Regulations cannot be looked at in isolation. An examination of ss 59 and 60 of the Electoral Act as amended by the Presidential Powers Regulations shows that persons in the position of the applicants will not be assisted by one person only but by at least four persons at the same time, that is, the presiding officer, two other electoral officers in addition to the police officer on duty. The circumstances under which all four persons, acting together, would interfere with the applicants rights to freely cast their vote is in my view difficult to imagine nor has it been explained. All four would have to conspire in relation to the visually impaired applicant to vote against their wishes and be agreed on whom they wanted to vote for. In relation to the third applicant the court has not been told that he cannot use mouth to mark the ballot paper against the candidates of his choice. If he could sign so elegantly he should surely, be able to place an X on the ballot paper.

It seems to me therefore, that the application cannot suddenly have become urgent merely because a fourth person has been included in the number of persons assisting illiterate and disabled voters. The provisions of the Electoral Act rendering assistance to physically handicapped persons has always been in existence, even before the 2007 amendment. The position would have been different in my view, had the Presidential Powers Regulations sought to remove the other three persons who are already in the Electoral Act and substitute them with one person. However this is not the position in this case.

For these reasons, I would therefore find that the application is not urgent and dismiss it on that basis.

Although I have dismissed the application the basis of the preliminary point raised I, however, wish to comment on the following issues which were raised in this application.

The applicant submitted that the interim relief should be granted on four grounds. It was submitted that the Presidential Powers Regulations were *ultra vires* the Presidential Powers (Temporary Measures) Act [*Cap 10:20*] as they were not made in accordance with s 2 of the Act. Secondly, the provisions of the Presidential Powers Regulations seek to reintroduce the assistance of police officers which had been removed by the Electoral amendment Act no 17 of 2007. Mr *Muchadehama* submitted further that ss 59 and 60 were negotiated provisions between the political parties and it was wrong for the President to reintroduce it through the Presidential Powers Regulations. It was further submitted that the President is also contesting the elections and the Regulations may have been gazetted to further his interest. Finally the applicants submitted that the Regulations violated their rights as enshrined in the Constitution, UN Conventions on the Rights of Persons with Disabilities, the SADC Principles and Guidelines Governing Democratic Elections and the AU Declaration On The Principles Governing Democratic Elections In Africa.

It is trite that once regulations are published in term of the Presidential Powers Temporary Measures Act they have the same force and effect during their life span, as legislation passed by an act of Parliament. The applicant has asked that this court suspend the operation of the Regulations and ss 59 and 60 of the Electoral Act so that they are not applicable in the elections which are to take place tomorrow.

In the case of *The Registrar General of Elections* v *Combined Harare Residents Association & Anor* SC 7/2002 CHIDYAUSIKU CJ held that a court could not suspend the operation of any legislation. He states at p 6 of the cyclostyled judgment as follows:

> "With respect this is where the learned judge fell into error. The court cannot suspend the provisions of the Act for whatever purpose and no matter how desirable and plausible that may be. It is the legislature itself, and possibly an authority properly delegated, that can amend an Act of Parliament……"

It seems to me therefore that where provisions of an enactment may be void whether on the basis of being unconstitutional or on the basis of being *ultra vires* the authority delegated

by Parliament, they remain in full force until they have been declared void and set aside. The court cannot suspend their operation for a limited period, however compelling the reasons.

The applicant further submitted that if the court finds that it cannot suspend an enactment it should declare the Presidential Powers Regulations null and void.

The effect of such an order would be to grant a final order in this matter. This is improper because matters which are brought on a certificate of urgency require that only interim relief be granted as the applicant only needs to establish a *prima facie* case. (See *Registrar General of Elections* v *Combined Harare Residents Association & Anor supra* p 10). In this case I also note that the applicant has raised serious concerns relating to the use of the Presidential Powers (Temporary Measures) Act and the constitutionality of the provisions enacted in both the Regulations and the Electoral Act. The Attorney General has not been cited. He is the Governments chief legal advisor and must be cited in all matters which involve the striking down of legislation in force so that he can be given an opportunity to make submissions in respect to the issues raised.

The application was filed on Wednesday 26 March late in the afternoon. It could only be set down on the Thursday. The respondent was served with the notice of set down barely three hours before the matter was argued. No opposing papers could be filed due to the short notice. In my view it would be improper in these circumstances for a court make a final determination on such important issues. (See also *Kuvarega* v *Registrar General supra*)

It was for these reasons that I dismissed the application with costs.

Mbidzo,Muchadehama & Makoni, applicants legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioner