

- (1) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
versus
ABEDINICO BHEBHE
and
NJABULISO MGUNI
and
NORMAN MPOFU
- (2) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
THE ZIMBABWE ELECTORAL COMMISSION
and
THE CHAIRMAN OF THE ZIMBABWE ELECTORAL COMMISSION
versus
THE ZIMBABWE NATIONAL YOUTH SERVICE GRADUATE ASSOCIATION
- (3) THE PRIME MINISTER OF THE REPUBLIC OF ZIMBABWE
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
ABEDINICO BHEBHE
and
NJABULISO MGUNI
and
NORMAN MPOFU

HIGH COURT OF ZIMBABWE
CHIWESHE JP

HARARE, 28 March 2013, 3 April 2013 & 5 April 2013 and 8 April 2013

Adv P. Machaya, for the applicants in the first and second case
Adv T. Mpofo & *Mr T. Zharara*, for the 1st to 3rd respondent in the first case
Mr T. Shomwe, for the respondent in the second case
Mr C. Mhike, for the applicant in the third case

CHIWESHE JP: I heard these three applications together. The first two applications seek similar relief. The applicant in the third application seeks to be joined as fourth respondent in the first application.

The respondent in the second application is not opposed to the relief sought and the application for joinder in the third application has since been withdrawn. This judgment therefore relates in the main to the issues raised in the first application.

In that application the applicant sought, on an urgent basis, a provisional order in the following terms:

“TERMS OF THE FINAL ORDER SOUGHT

That the applicant be and is hereby excused from performance of the order granted in Case No. HC11222 of 2012.

INTERIM RELIEF GRANTED

That the applicant be and is hereby excused from performance of the order granted in case No. HC 11222 of 2012 provided that harmonised elections are held on or before the 29th June 2013”

The respondents are opposed to the grant of this order.

The background facts of this matter may be summarised as follows:

The three respondents were elected members of the National Assembly in the 2008 general elections. They were elected under the ticket of their party the MDC and were dully sworn in as members of Parliament for Nkayi South, Lupane East and Bulilima East constituencies respectively. They were subsequently expelled from the party and their membership of parliament terminated at the behest of that party.

As a result the speaker of the House of Assembly proceeded to notify the applicant of the three Parliamentary vacancies so created as required of him in terms of s 39 (1) of the Electoral Act [*Cap 2:13*]. The applicant did not take the necessary steps to fill the vacancies as required by law. The respondents, under case number HC 1485/10, then approached this court for an order compelling the applicant to gazette a date for elections to fill the vacancies in the three constituencies. After hearing arguments from the parties, NDOU J granted the relief sought in the following terms:

“IT IS ORDERED THAT:

1. The 3rd respondent (applicant in the instant case) be and is hereby directed to gazette a date for elections within fourteen days of service of this order on him in the following House of Assembly constituencies, Nkayi South, Lupane East and Bulilima East.
2. There is no order as to costs.”

The order was granted on 13 October 2011. The applicant, displeased with that result, filed an appeal with the Supreme Court. After hearing argument from counsel, the Supreme Court, under Civil Appeal No. SC 267 of 2011, made the following order on 12 July 2012:

“IT IS ORDERED THAT:

- (1) The appeal is dismissed with costs.
- (2) The order of the lower court is altered to read as follows-
 - “(a) The application is granted.
 - (b) The respondent (the President of the Republic of Zimbabwe) is hereby ordered to publish in the Gazette a notice ordering new elections to fill the vacancies as soon as possible but by no later than 30 August, 2012.
 - (c) There will be no order as to costs.”

Under case No. HC 9781/12 the applicant sought and was granted, by consent of the parties, the following order:

- “1. The period within which to comply with the order granted in case No. SC 267/11 be and is hereby extended to the 1st October 2012.
2. There be no order as to costs.”

This order is dated 30 August 2012.

Under case number HC 11222/12 the applicant sought and was granted another extension to 31st March 2013. In the present application the applicant seeks to be excused altogether from the performance of that order.

The founding affidavit is deposed to by P.A. Chinamasa, the Minister of Justice and Legal Affairs. It is to the following effect. The deponent is authorised by the applicant to swear to that affidavit. The applicant was ordered by this honourable court to publish in the Gazette a notice ordering by-elections to fill three vacant House of Assembly seats in the Nkayi South, Lupane East and Bulilima East constituencies by 30 August 2012. This date was later extended to 31st March 2013. The applicant has to comply with the said order by that date. The applicant is unable to comply with the order for the following reasons. In

terms of the Global Political Agreement a referendum was held on 16 March 2013 to adopt a draft constitution. The electorate voted to adopt that draft. A Constitutional Amendment Bill has since been gazetted. The bill will be debated in both Houses of Parliament. It is anticipated that the bill will take 4 days to complete its passage through Parliament. Thereafter the bill should be assented to by the President, who will enact it into law. In terms of para 3 (1) of the Sixth Schedule to the draft Constitution, provisions of the new Constitution relating to elections will be brought into effect. Thereafter amendments to the Electoral Act will be gazetted with a view to align the electoral laws with the new Constitution. It is expected that Parliament would take 4 days to debate and pass these amendments leading to assent by the President. Thereafter the electoral process will commence. It is anticipated that a proclamation for harmonised elections will be published immediately after 8 May 2013. In terms of the Constitution the life of Parliament terminates on 29 June 2013 by which date harmonised elections must be held.

According to the applicant it does not make economic or practical sense to conduct a parallel process leading to the holding of by-elections about the time it is anticipated to hold harmonised elections. Compliance with the order to hold by-elections in the three constituencies is therefore no longer feasible as a general election is now imminent. It is for these reasons that the applicant seeks the court's indulgence to be excused from performance of the order requiring him to publish a proclamation for by-elections in the three constituencies by 31st March 2013.

The opposing affidavit is deposed to by the 1st respondent Abedinico Bhebhe. It raises a number of preliminary issues. It is averred that the application seeks relief that is beyond the court's jurisdiction as the court has no power "to suborn, condone or in the very least countenance" disobedience of its order. The respondents contend that the court has become *functus officio*. Whereas in the past the applicant has sought extensions within which to abide by the order, what is presently sought is a different relief which the court cannot entertain.

The respondents further argue that the application lacks urgency and should on that basis be dismissed without further ado. The authority of P.A. Chinamasa to depose to the founding affidavit on behalf of the applicant is also queried. It is alleged that the deponent to the founding affidavit is acting on a frolic of his own and for that reason the application must fall. The respondents also relate to what they call "speculation" in the founding affidavit

with regards dates for general elections and the time lines necessary for the debate and adoption by Parliament of the draft Constitution and proposed amendments to the electoral law. However in view of the abandonment by the applicant of that part of its prayer touching on the holding of general elections, these averments are no longer in issue.

The respondents also allege lack of probity on the part of the applicant stating that the applicant has all along lied to the court in seeking extensions under the pretext of lack of funding when in fact it had contrived to bring the present application at an opportune moment. That avers the respondents, constitutes abuse of court process, and, for that reason the application should not be heard.

On the merits the respondents insist that they have vested rights to participate in the by-elections regardless of the fact that general elections may be imminent. Besides it is argued that there is no guarantee that general elections will be held by 29 June 2013 and in any event the applicant has not told the court what would happen if general elections are not held by that date. They insist that the court order to hold by-elections must be obeyed. It should not be sacrificed on the alter of economic or practical sense.

The applicant has filed a detailed answering affidavit. His averments may be summarised as follows:

It is competent for the court to hear an applicant who seeks to have an order of court declared *brutum fulmen*. In hearing such application the court cannot be said to be countenancing disobedience with its order. The court thus has jurisdiction to determine this application.

The applicant wishes to be excused from compliance with the court order on the basis that Parliament will stand dissolved on 29 June 2013 and that harmonised general elections will constitutionally have to be held by that date.

The applicant also argues that the order to hold by-elections obliges the applicant to perform a duty. It does not, as contended by the respondents thereby create any vested rights in their favour. All that respondents have is an interest that the applicant will perform his duty so that by-elections can be held.

Further the applicant takes exception to the averments by the respondents that he has “routinely lied” to this honourable court in previous proceedings pertaining to this matter and challenges the respondents to put up facts in support of that accusation. Applicant insists he has at all times acted in good faith in both the present and past applications.

The applicant reiterated his position that the present parliament will stand dissolved on 29 June 2013 and harmonised elections, if not held by then, will remain imminent.

He also argued that the matter under consideration is of national importance and for that reason deserves urgent attention. The deponent scoffs at suggestions that he is on a frolic of his own acting without or outside the authority of the applicant.

The applicant also explains why he is unable to comply with 31st March 2013 deadline as previously undertaken. He says he had previously envisaged that the referendum on the draft constitution would have taken place by the first week of November 2012. That did not materialise for reasons beyond his control. It then became difficult to predict progress towards harmonised elections.

It became apparent that the parties were not agreed as to when the present parliament would stand dissolved. As I considered this point of crucial importance I directed that we adjourn in order that the parties prepare and submit heads of argument on that point. At that stage *Adv Machaya* (for the applicant) had argued that parliament will stand dissolved at midnight 28 June 2013 whilst *Adv Mpofo* (for the respondents) was of the view that the term of Parliament would end on 29 October 2013.

I heard their arguments the next day. *Adv Machaya's* argument is in line with the provisions of s 66 (4). That section reads as follows:-

“Parliament unless sooner dissolved, shall last for five years, which period shall be deemed to commence on the day the person elected as president enters office in terms of section 28 (5) after an election referred to in section 28 (3) (a), and shall then stand dissolved:

Provided that, where the period referred to in this sub section is extended under sub section (5) or (6), Parliament, unless sooner dissolved, shall stand dissolved on the expiration of the extended period.”

It is common cause that applicant was sworn in as President on 29 June, 2009. The life of the present Parliament must be deemed to run from that date, for a period of five years. Calculated from that date there is no doubt whatsoever that the life of the present Parliament shall end on 29 June 2013. On that date Parliament shall stand dissolved by effluxion of time. It is however permissible to extend the life of Parliament beyond that date on the grounds provided under s 63 (5) and (6) of the Constitution. These sections allow for that extension only if the country is at war or under a declared state of public emergency. No such situation presently obtains in the country. I have no reason to believe otherwise today or any time in

the near future. I am convinced therefore that the life of the present Parliament will end by operation of law on 29 June 2013. In other words the Parliament, to which the respondents aspire to be elected, shall cease to exist on that date.

Advocate *Mpofu* (for the respondents) could hardly argue against this interpretation of provisions so clear and unambiguous. Instead he sought, without much success, to emphasise the possibility of an extension of the five year period due to the calamities referred to under section 63 (5) and (6). His thrust in that regard is understandable given the intimation I had made to the parties, namely that if Parliament stands dissolved on 29 June 2013, it may not be prudent to conduct by-elections immediately before that date and that if, on the other end, dissolution occurs on 29 October 2013 (as argued by the respondents) then it may be reasonable to assume that by-election may be held in accordance with the order of this court given under case number HC 11 222/12.

It is illustrative to demonstrate by way of time lines what would obtain if one were to find in favour of the respondents and direct that by-elections be conducted forthwith. Adv *Machaya* has indicated that the general time line from the date of proclamation would be a maximum of 71 days in terms of s 38 (b) (i) and (ii) of the Electoral Act [*Cap 2:13*].

That assertion has not been challenged by the respondents save to state that in terms of the Electoral Law, by-elections may be held not less than 21 days before dissolution of Parliament. That provision is permissive and not mandatory. Using the maximum 71 day period Adv *Machaya* was able to show that, assuming the relevant proclamation is published on 5 April 2013, the by-elections would be held on Saturday 15 June 2013 and the winners would be sworn in on Monday 17 June 2013. The winners would then sit in the House of Assembly only up to 29 June 2013, a period of 12 days!

One may also consider the following scenario. If the proclamation were to be published on 31 March 2013, in terms of s 38 (1) (b) (i) of the Electoral Act, Nomination Court must be held not less than 14 days after that publication and not more than 21 days after publication. This means Nomination Court would sit between 15 and 19 April 2013.

In terms of s 38 (1) (b) (ii) of the Electoral Act [*Cap 2:13*] polling must be held not less than 28 days and not more than 50 days after nomination day. This means therefore that by-election would be held on 13 May at the earliest or 4 June 2013 at the latest. If held on 13 May 2013, the winners of that by-election would enjoy their newly found status! If held on 4 June 2013, that period is reduced to a mere 25 days!

These time lines, whose accuracy is subject to scrutiny, clearly demonstrate that there is merit in applicant's submissions that it no longer makes practical economic sense to insist that these by-elections be held at all costs.

The court is informed that apart from the three House of Assembly constituencies under consideration there are further vacancies in other constituencies, namely 16 in the House of Assembly, 12 in the Senate and 164 council wards. Should this application fail the country would need to hold by-elections to fill these vacancies. Again the winners would be in their seats for a very short period of time. The scale and extent of these by-elections suggests that enormous resources would need to be mobilised. *Adv Mpofu* argues that by-elections will be held under consideration and no other. The truth of the matter however is that if not granted the relief he seeks, the applicant will be obliged to hold by-elections in all vacant constituencies and wards.

In the final analysis I agree with the applicant that compliance with the existing order is no longer reasonable or practical. *Adv Mpofu* (for the respondents) argues that this court, being a court of law, has no jurisdiction to grant relief based on equity and other practical considerations. I disagree. This is as much a court of law as it is a court of justice and equity. In any event it is trite that this court has inherent jurisdiction to manage the execution of its own orders, ensuring whenever necessary that the execution of the same does not lead to absurd or irrational outcomes.

The respondents raised a number of preliminary points to do with urgency, jurisdiction and others. I dealt with similar or the same preliminary matters in previous rulings in this matter. These preliminary objections stand dismissed.

It was for these reasons that I found for the applicant. The respondent in the second application did not oppose the application. For that reason I also found in favour of the applicant.

Accordingly I ordered as follows:

1. That the applicant be and is hereby excused from performance of the order of this honourable court granted on 2 October 2012 under case number HC 11222/12.
2. That the applicant be and is hereby excused from performance of the order of this honourable court granted on 16 October 2012 under case number HC 11962/12.

Civil Division of the Attorney General's office, applicant's legal practitioners in the first and second case

Zimbabwe Lawyers for Human Rights, respondents' legal practitioners in the first case

Mambosasa Legal Practitioners, respondent's legal practitioners in the second case

Atherstone & Cook, applicant's legal practitioners in the third case