

CITIZENS FOR COALITION FOR CHANGE
versus
SENGEZO TSHABANGU
and
SPEAKER OF THE NATIONAL ASSEMBLY N.O.
and
PRESIDENT OF THE SENATE N.O.
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS N.O.

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 20, 21 November & 6 December 2023

Urgent Chamber Application

O *Shava*, for the applicant
L *Uriri* with K I *Phulu*, for the 1st respondent
S *Hoko*, for the 2nd and 3rd respondents
L T *Muradzikwa*, for the 4th respondent

CHITAPI J: This is an urgent application for an interdict directed principally at the first respondent with the rest of the respondents being cited as interested parties who may in law be required to perform consequential acts to give effect to the conduct of the first respondent. The draft provisional order was couched as follows:

“TERMS OF PROVISIONAL ORDER SOUGHT

1. That the provisional order be and is hereby confirmed.
2. That the 1st respondent has no authority to engage 2nd, 3rd and 4th respondents on any matters involving applicant and its members.
3. That any action taken by the 1st respondent, purportedly on behalf of applicant, after the issuance of summons under HCH 6872/23 be and is hereby declared to be null and void.
4. 1st respondents is to pay costs of suit on a client and attorney scale.

INTERIM ORDER GRANTED

3. The 1st respondent is interdicted from recalling applicant’s members of the National Assembly, Senate and Local Authorities pending the finalization of the action under HH 6872/23 in the matter between *The Citizens Coalition for Change v Sengezo Tshabangu*.

SERVICE OF THE PROVISIONAL ORDER

This provisional order shall be served on the respondent by the Sheriff or his lawful agent or employees of the Applicant's Legal Practitioners.”

On the face of it and if one has regard to the draft provisional order the subject matter giving rise to the prayer for the interim relief appears simple and straight forward. The papers themselves however reveal otherwise. The application was vigorously opposed by the first respondent. The first and second respondent filed a note for the court wherein they indicated that they would abide by the decision of the court. The fourth respondent filed a notice of opposition and an opposing affidavit in which he stated that the applicant had no cause of action against the fourth respondent because his role was to only communicate decisions of political parties made in terms of s 178(1) as read with s 129(1)(k) of the Constitution.

At the commencement of the hearing, I asked the fourth respondent's counsel Mr *Muradzikwa* to reflect on the fourth respondent's grounds for opposing the application. The applicant had indicated in its application that the fourth respondent had as with the rest of the respondents save for the first respondent been cited as an interested party with no specific relief being sought against him. The applicant did not plead that it had a cause of action against the fourth respondent. For the sake of clarity, courts generally require that application, be they court or chamber should be served on interested because in a democratic legal system, a court is loathe to decide a legal case wherein the respondent/defendant has not been notified of the hearing and been given an opportunity to participate in the case in defence of the claim if inclined to defend. The courts require service of process to be done on the defendants/respondents and interested parties so that the court can determine its jurisdiction over the subject matter and the defendant/respondent as the case may be. It was critical to involve all the respondents in the litigation as respondents for good order. Certainly, the fourth respondent would need to know about matters affecting Local Authorities as the Minister responsible for administration of the Urban Councils Act.

Counsel for the fourth respondent Mr *Muradzikwa* commendably conceded that since the fourth respondent was cited as a matter of law and no relief was sought against him, he should have been advised to abide the decision of the court as had the second and third respondents. Mr *Muradzikwa* capitulated on the opposition filed by the fourth respondent and took the position

that the fourth respondent would also abide the decision of the court. In the result the application in substance then pitted the applicant against the first respondent.

Typical with the majority of urgent applications that come before this court, points *in limine* were raised and *in casu* by the first respondent. The first respondent also responded to the application on the merits. The parties suggested that they adopt a rolled up approach in terms of which they would address both the point *in limine* and the merits after which the court write one composite judgement in terms of which if the point(s) *in limine* succeed and they are dispositive of the matter the judgment ends there. However if the points *in limine* are dismissed the judgement will then address the merits.

In dealing with the issues arising in this matter I reminded myself that before me in this application is a prayer by the applicant for a provisional order. In relation to whether a provisional order is merited to grant, r 60(9) provides that:

“Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case, he or she shall grant a provisional order either in terms of the draft filed or as varied.”

The rule envisages that the application for a provisional order is decided on the papers filed of record without a formal hearing being held as a matter of course. Thus, where service of the application is affected on the respondent and the respondent files an opposition, then the judge must consider the full set of papers and where the judge considers that the applicant upon a consideration of its application and/or together with opposing papers has established a *prima facie* case, the judge must grant a provisional order as prayed for or as varied.

The parties to an urgent application do not in my view have an automatic right to appear to present argument on the matter where a written application and/or opposing papers have been filed by the respondent. The practice appears to have taken root whereby urgent applications for a provisional order have been treated the same as urgent court or chamber applications for a final order, the latter being where cases are decided upon the burden of proof on a balance of probabilities being applied. As a result, judges spend time holding full hearings in urgent applications for a provisional order. Such course is not envisaged by the rules.

The holding of a full hearing in urgent applications for a provisional order is at the discretion of the judge before whom the application has been placed. In that respect r 60(8)

provides in relation to the disposal of urgent chamber applications for a provisional order as follows:

“(8) A judge to whom papers are submitted in terms of subrules (6) or (7) may –
(a) require the applicant or the deponent of any affidavit or any other person who may in his or her opinion be able to assist in the resolution of the matter to appear before him or her in chambers or in court as may to him or her seem convenient and provide on oath or otherwise as the judge may consider necessary, such further information as the judge may require;
(b) require either party’s legal practitioner to appear before him or her to present such further arguments as the judge may require.”

From the above content, it is clear therefore that urgent chamber applications for a provisional order should as a default position be determined on the filed papers urgently.

The applicant first filed case number HC 6872/23 on 20 October 2023. The declaration in that case reads as follows: PLAINTIFF’S DECLARATION

-costs of suit”

The applicant’s contentions in the declaration aforesaid and stated in brief are that, the applicant as plaintiff therein is a political party operating as such in terms of the laws of Zimbabwe. It was allegedly founded in or about January 2022 whereafter rights and privileges accorded to political parties were extended to the applicant. It averred that members of the plaintiff party participated in the Zimbabwe harmonized elections and some of them were elected as members of the National Assembly, Senate and/or Local Authorities. The applicant further pleaded that the first respondent whose further particulars was to the applicant unknown save for his address for service stated to be Fiva Village, Headman Hlabangana purporting to act on behalf of the applicant recalled some of the plaintiffs members from the National Assembly and Local Authorities. The applicant averred that despite demand made upon him to desist from making recalls, the first respondent has threatened to continue “masquerading” as an official of the applicant authorized to recall elected members despite nor having such authority from the applicant. This is the gist of the applicant’s claim in case number HC 6872/23 to which the first respondent entered appearance to defend on 8 November 2023. Case number HC 6872/23 therefore is pending before the court as a defended action.

Relating to this application to case number HC 6872/23 and so far as the claim for a provisional order is concerned, the relief sought is to have the first respondent temporarily

stopped or interdicted from making any recalls of members of the National Assembly, Senate or Local Authorities who were elected under the applicant ticket until case number HC 6872/23 has been finalized by the court. The crisp issue for my determination on the application in substance is whether or not the applicant's papers establish a *prima facie* case to merit the grant of the provisional order as sought or as varied the latter being a power given to the judge to grant an appropriate interim order which best serves the interests of justice without being fettered by how the applicant wants the order to be expressed.

In the case of *Samantha Nhende v Andrew Zigora and Registrar of Deeds* SC 196/22, MATHONSI JA interpreted r 69(a) of the High Court Rules. After quoting r 69(a) *extenzo* the learned judge stated:

“There is a reason why the rule is couched that way. Firstly, in an urgent application, the applicant is usually granted interim relief on the basis of a *prima facie* case as the applicant would not have proved his or her case. The procedure allows a litigant which can show a *prima facie* right to be accorded interim relief that usually protects the *status quo ante* until the return date of the provisional order. See *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188.

After the grant of interim relief in the form of a provisional order, the matter does not end there. The procedure is that the respondent is allowed to file a full dossier of opposition to the confirmation of the provisional order which confirmation takes the form of granting the terms of the final order sought in the prescribed form of the provisional order. After the provisional order is granted the full procedure of a court application including the filing of a notice of opposition answering affidavit and heads of argument kicks in. It is a procedure which allows the applicant to fully prove his or her case without pressure of urgency.

On the return date of the provisional order, a fully-fledged opposed application is set down and heard on the opposed roll. Following that hearing the court may either confirm or discharge the provisional order. It confirms it by granting the terms of the final order sought.”

The learned judge further stated:

“Given that by its very nature, an urgent application requires the applicant to establish a *prima facie* case for the grant of interim relief the jurisdiction of the court to grant final relief is not triggered.”

I would however comment that the parties may agree that the court grants final relief in which the jurisdiction to grant final relief will be one arising by consent of the parties. I also note that the respondents in urgent applications invariably file detailed opposing papers and then argue the application as though a final relief is sought by the applicant. The judge must not fall into the trap of deciding the matter as if it is for final relief. The judge must avoid making

definitive and final effect findings of fact renders as this will amount to pre-determining the final relief sought. The making of definitive and final effect findings of effect renders such findings *res-judicata* on the return date. The judge must be guided by the consideration that only a *prima facie* case needs be established by the applicant at this stage.

A *prima facie* case is all that the applicants must establish on the papers the test is more or less the same as for absolution from the instance. The word *prima facie* is a Latin expression which means at first sight or upon a first impression “*prima*” means “first or foremost” and *facie* means “*appearance*”. A *prima facie* case is therefore made by the applicant or plaintiff as the case maybe on his or her papers if the factual allegations made therein upon their initial examination, they are sufficient if not controverted by the respondent or defendant to entitle the applicant or plaintiff to judgment in his or her favour. The facts alleged by the applicant or respondent should appear plausible but could be rebutted. Proof on a balance of probabilities is not the test. The requirement that the applicant/plaintiff should establish a *prima facie* case determines whether the *lis* or application should proceed to trial or in an application that the application proceeds to be determined on the opposed roll on the return date. The principle protects the public from vexatious litigation and the law protects them by requiring that the respondent or defendant including the accused in a criminal case is only put to their defences where a case requiring an answer at law has been established. Having reminded myself of the approach to be adopted in this application; I proceed to then examine the first respondent’s opposition to the application. Whilst the application comprised 47 pages, the first respondent’s opposition comprised 181 pages. An answering affidavit numbering 20 pages was filed by the applicant. The application therefore after the papers are consolidated comprised of a total 248 making the application a lengthy one. It would not be possible under such a circumstances to for the court to give an *extempore* order on the turn. I had to reserve judgment after argument.

The first respondent raised several points *in limine* as already alluded to. The first point *in limine* was that the applicant is not described. In other words the first respondent was averring that the legal status of the applicant was not pleaded. The first respondent averred that:

“...The applicant is not introduced as a universitas at common law and there is no reference to how the applicant as an entity with a separate and distinct legal status as well as capacity to sue or be sued in its own right. The deponent has described himself. He is not a party of (sic) the

proceeding. The applicant is. It is the identity of the applicant, which should have been addressed under the self-describing heading, “The parties”

The first respondent then averred that the deponent “does not in fact represent the applicant”. This is a bit of a confusing statement because if there is no pleaded jurisdictional basis for the applicant, then there is no applicant at law and a *fortori*, and no one for the applicant to represent.” The first respondent cannot approbate and reprobate at the same time by then stating and without pleading in the alternative that the deponent to the founding affidavit does not represent the applicant thus suggesting that the applicant is in legal existence but that deponent has no authority to represent it.

The first respondent had averred that the deponent to the founding affidavit, one Jameson Timba had given has personal description as a “founder member of the party and a member of Bureau of Administration and had further described himself as a senator and a member of the Committee of Standing Rules and Orders of Parliament. The applicant in response averred as follows in para 1 of the answering affidavit:

“1. I have read the opposing affidavit of SENGEZO TSHABANGU which contains material irrelevant to the issues before the court. For the avoidance of doubt save as herein specifically admitted. I deny each and every allegation of fact and legal conclusion arrived at in the first respondent’s opposing papers. I wish to responds to some portions of the affidavit where necessary as outlined in the following paragraphs:-.....”

The applicant therefore denied all of such facts and conclusions of law contained in the opposing affidavit to the extent they were not specifically admitted. The court on the return date, should the provisional order be issued herein will consider the disputed facts taking into account further affidavit which the parties may file thereafter and give its definitive and final judgment on them.

The applicant also averred in the answering affidavit that when considering the issue of the identity or description of the applicant note be made that the applicant stated in the summons in the main case which it wishes to protect through the provisional order if issued, that the plaintiff is properly described in the declaration as a politically party operating lawfully in Zimbabwe and that it was formed in or about January 2022 and its members participated in the general elections held on 23 and 24 August 2023. The applicant also produced what it alleged was its constitution which is headed “Consolidated Text of The Constitution of The Citizens

Coalition For Change” with a picture of its alleged leader in circled with the letters “CITIZENS COALITION FOR CHANGE and CCC”

The first respondent through counsel attacked the validity of the constitution noting that even if its physical existence was accepted, it was legally invalid because Article 12 of that constitution provided that the constitution and consolidated version to follow would only take effect on the date of signature by the “Change Champion – in Chief. The constitution was signed by one “Adv Nelson Chamisa, Leader and Change Champion in Chief – Citizens Coalition for Change. There is no date endorsed against the signature. The first respondents counsel argued that the absence of an endorsed date meant that constitution did not come into being. I am not at this stage able to declare the constitution as valid or invalid without anticipating the issues arising for final determination in the main case.

A reading of all papers filed in this application shows that there is in existence a political party called Citizens Coalition for Change (hereafter called CCC). The first respondent accepts the existence of CCC as a political party and submitted in para 6.2 of the opposing affidavit as follows:

“6.2 I submit that the applicant and the deponent have not cited the party CCC because they know that my party, CCC, has no intention of recalling persons who were elected and are still members of the CCC to which I am the Interim Secretary General.”

The first respondent, then averred that the CCC of which he was Secretary General would not interdict him as its functionary from effecting recalls because the recalls were an act of the CCC done through him. He then referred to the judgment of MUTEVEDZI J ostensibly to support his assertion that it was CCC the party doing the recalls through him. The judgment referred to is the case of 1; *Prince Dubeko Sibanda and 15 Ors v Sengezo Tshabangu* HC 6649/23, and case 2; HC 6684/23 *Gideon Choko & 7 Ors v President of Senate*. The learned judge dealt with the two cases as consolidated and passed one judgment HH 601/23.

The judgment aforesaid is subject of a pending on appeal. Its correctness or otherwise rests now with the Supreme Court which has a final say on this. It is not proper that argument on findings made in the judgment be answered by myself without risking usurping the functions of the Supreme Court. What I however, can safely take note of the subject matter of the dispute. The two cases covered by the judgment related to the recall of members of the National

Assembly and the Senate as listed in the judgment in terms of s 129(1)(k) of the Constitution.

The section provides as follows:

“129 Tenure of seat of Member of Parliament

1. The seat of a member of Parliament becomes vacant-
(k) if the member has ceased to belong to the political party of which he or she was a member when elected to Parliament and the political party concerned by written notice to the Speaker or the President of the Senate as the case may be has declared that the member has ceased to belong to it.”

The applicants in those two cases were allegedly recalled by their party CCC through a communication written by the first respondent advising the Speaker and Senate President of the cessation of membership of their party CCC. The speaker and Senate President were notified and they were obliged to and did declare vacant constituencies in the constituencies in which the applicants had been elected to the National Assembly or Senate as the case may be.

The applicants in those cases then filed urgent applications petitioning the court to *inter-alia* set aside the recalls on the basis that they were illegal, *null and void* and of no force and consequence. For many reasons given in the judgment, the declarations (and I have not gone into their details deliberately) and other relief sought was denied with the learned judge holding that the applicants had failed to prove their case for a *declaratur*. One of the significant points made in the judgment was that it was futile for the applicants not to have joined their party CCC to the application. I should state that to the best of my understanding after reading through the judgment of MUTEVEDZI J the learned judge did not make a declaration of the status of the first respondent as Interim Secretary General of the CCC. The learned judge found that the applicants had failed to make a case for the *declarator* which they had petitioned the court to make. In this regard, I should record that Advocate *Uriri* submission that I should be mindful that the findings of fact made by MUTEVEDZI J are to be taken as the position of the High Court and that I be mindful not to contradict a position already reached must be considered against the backdrop that an appeal was noted against the judgement aforesaid and further that MUTEVEDZI J did not make a declaration on the status of the first respondent *vis-à-vis* the party referred to as CCC to which the applicants belonged.

With the relationship between the applicant and the first respondent remaining undetermined, it is in my view improper for me to make findings of fact as to the birth of CCC,

whether it is the applicant whether there is a CCC party in which the applicant is the Interim Secretary General, whether the deponent to the founding affidavit belonged to another CCC and many other questions requiring resolution. For example, the first respondent attached a constitution of CCC which no close scrutiny contains contradictory clauses as pointed out by Mr *Shava*. For example, whilst the party symbol on the face of the constitution resembles the one on the constitution attached by applicant in the answering affidavit, clause 1-2 of the constitution reads:

“1-2 the party’s symbol is an index finger pointing upwards.”

Another example of contradiction is to be found in annexure B to the constitution which defines the code of ethics of office bearers of the party. It is stated in clause 2 as follows:

“2) the code shall apply to all elected appointed or deployed officials of the Movement for Democratic Change Serving in the Party, Government local authorities, any institution receiving public funds, parastatals, voluntary associations and any other public or private body how soever defined. Mr *Shava* in attacking the validity of that constitution submitted that besides the irreconcilable contradictions therein there was nothing in the constitution to show that it was adopted or ratified by the entity to which it purported to apply.

My determination on the issue of the identity of the applicant and again applying the *prima facie* case approach, holistic finding is that the applicant is sufficiently described to be identified. In analyzing whether or not the applicant is described at all or sufficiently for purposes of its identity again on a *prima facie* basis the judge as I did must consider all the papers filed by the applicant. An application is supported by the founding affidavit and all supporting documents attached and referred to in the application.

In considering the applicant’s case, the supporting documents and the founding affidavit are read together. It is wrong to excise them separately. In this respect, the rules are also clear on this. Rule 58 of the current rules of this court applies to all application made in terms of the rules. Subrule (4) is pertinent. It provides as follows:-

“(4) An affidavit filed with a written application-

- (a) Shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein, and
- (b) May be accompanied by documents verifying the facts or averments set out in the affidavit and any reference in this part to an affidavit shall be construed as including such documents.”

In casu, the summons in case number HC 6872/23 as already noted described the applicant as a political party operating lawfully in Zimbabwe as such. On a *prima facie* case level. I am not persuaded to agree that the applicant was not described sufficiently to be identified. Further argument may be made on the return date if the matter proceeds that far but at this stage of the proceedings, I find and hold that there is a valid applicant for purposes of a *prima facie* for a provisional order. The first respondent's objection on that score fails.

The next point *in limine* raised by the first respondent was that there was a material dispute of fact. Under this objection the first respondent questioned the deponent to the founding affidavit's authority to represent the applicant and stated that the deponent Jameson Timba had simply alleged that he was a member of the Bureau of Administration of the CCC and attached resolutions from that entity "so called Citizens National Assembly" without attaching the CCCs founding document or constitution. The first respondent averred that the applicant had not attached any documents that included a membership register of the applicant to show that the first respondent is not a member nor the interim Secretary General of the applicant. The first respondent further averred that the applicant had through the deponent to the founding affidavit not explained why the constitutive documents were not attached to the founding affidavit. The first respondent suggested therefore that in the absence of the supporting documents, disputes of facts which cannot be resolved on the papers were evident and that the matter could be referred for trial with the affidavits filed standing as pleadings.

In response the applicant averred that there were no material disputes of fact which could disable the ability of the court to determine the issue of whether or not the provisional order be granted or not. The applicant averred that the first respondent's affidavit was full of political drama which had nothing to do with the application. In relation to this point *in limine*, I do not see any political drama. The first respondent's point that there are material disputes of fact is a correct observation. This point is actually common cause because this application is concerned with regulating and protecting the litigation in case number HC 6872/23 which is an action case. The main case seeks that the court interdicts the first respondent from his alleged self-imposition as representing the applicant. It is common cause that the first respondent vehemently insists on his authority and position of interim Secretary General of the applicant or according to him the true CCC which he represents. The presence of disputes of fact is therefore a common cause

fact. What however I must address is whether or not the court is disabled from being able to determine whether or not to grant or refuse to issue the provisional order sought.

In my view, the presence of the conceded disputes of fact imply that the main case is not frivolous or vexatious and so is this application by consequence. The trial court will therefore be seized with an admitted dispute, which requires its resolution. This point *in limine* in my view must be considered as supporting the grant of a provisional order to regulate and preserve the subject matter of the dispute between the applicant and the second respondent until the court finalizes the dispute already pending in the court. I therefore, dismiss the point *in limine*. The submission by the first respondent that the matter be referred to trial with affidavits already filed standing as pleadings is a decision which cannot be made at this stage because in an application for a provisional order, that order cannot extend to determining how the court on the return date should determine the dispute.

The next point *in limine* taken by the first respondent was that the applicant is improperly before the court. The first respondent contended that the purported authority of the deponent to the founding affidavit Jameson Timba should have been supported by an affidavit by Mr Nelson Chamisa to authenticate his signature. Just to give a brief recap the applicant attached as annexure to its application a document headed “Resolutions of The Citizens Coalition for Change Citizens National Assembly - 18th Session held on 11 October, 2023. One of the internal resolutions passed was stated this:

- “ 1. Mandate organizing bureau chairperson, Hon Amos Chibaya, and Administration Bureau member, Hon Jameson Timba to take all necessary measures to preserve the name, logo, assets, intellectual property and other rights of the CCC.”

The other internal resolution of significance relating to the first respondent was the fifth resolution in which it was resolved ‘to report communal abuse of the CCC name by Sengezo Tshabanga.’”

The resolution paper was purportedly signed by the applicant’s leader Nelson Chamisa. The first respondent’s objection was that the signature of Nelson Chamisa should have been confirmed by Nelson Chamisa signature. The applicant in response averred that there was no legal basis for this objection pleaded by the first respondent. The first respondent indeed did not provide legal justification to require that the signature of Nelson Chamisa should be

authenticated by an affidavit. The applicant did not plead any facts from which doubt could be cast on the authenticity of the signature of Nelson Chamisa as deposed to on oath by the deponent to the founding affidavit. The point *in limine* if it could be so called, had no merit and it had to and stands dismissed.

The next point *in limine* was headed “*locus standi*”. The issue raised herein is the same as that of the applicant being improperly before the court. The first respondent attacked the want of an affidavit by Nelson Chamisa to confirm that he is the signatory to the resolution to litigate. The first respondent averred that it was typical of Nelson Chamisa not to depose to affidavits in judicial matters. The first respondent also averred that MUTEVEDZI J had alluded to this observation in his judgment and that the applicant had not taken heed. It seems to me that whether or not a confirmatory affidavit is necessary to be filed in any case before the court is a matter of both fact and law. Thus the enquiry traverses two issues being whether there is a legal requirement that signatures on resolutions are backed by an affidavit of the signatory and secondly depending on the answer to the legal question, whether the signature is that of the alleged signatory. This issue is best left to the court to decide on the return date. The first respondent can develop his case on the alleged need for the confirmatory affidavit then. For purposes of this determination, and the prayer for a provisional order as sought, I hold that the *locus standi* of the deponent to the founding affidavit to represent the applicant has been *prima facie* established on the papers. The further point made by the first respondent was that the applicant did not attach its constitution or governing documents was answered by the failing of the same as an annexure to the answering affidavit. The issue of the validity of the constitution filed by the applicant as with that filed by the first respondent are issues to be determined on the return date.

The first respondent repeated the issue of the identity and or description of the applicant as a legal persona and averred that the applicant did not plead its legal status or personality. This point was dealt with earlier in this judgement when dealing with issue of the identity of the applicant. The decision made in relation to that point stands.

The next point raised was that of urgency. The first respondent submitted that the matter was not urgent. The first respondent attacked the certificate of urgency on the basis that its maker Mr Agency Gumbo had not applied his mind to the issues. It was averred that the certifying legal practitioner simply regurgitated paragraphs from the founding affidavit verbatim in a cutting and

pasting exercise. In addressing the court on the issue of urgency, counsel for first respondent did not base the applicants challenge to urgency on the alleged defective certificate of urgency. The implication is that the issue was silently abandoned. The new argument was that the need to act arose on 11 October, 2023 when a resolution was made to take action against the first respondent. It was also contended that there was that there was no resolution passed for the applicant to apply for an interdict as done herein. Upon a consideration of in particular resolution (1) as quoted, the resolution was broad as it referred to the taking of steps to protect all rights of the applicant.

The urgency of the matter in reading of the founding affidavit and the certificate of urgency which the first respondent has impugned without giving much detail of the grounds of attack save to state that the certificate regurgitates the founding affidavit, was alleged to be that the applicant filed a summons case under case number HC 6872/23 on 20 October, 2023 and the matter is pending. The relief sought therein are matters which have a heady been dealt with. The first respondent entered appearance to defend. Despite the existence of the pending litigation, the applicant alleged that the first respondent on 8 November, 2023 wrote a letter to the fourth respondent recalling some councilors elected under the applicant's ticket and are its members. The applicant averred that it immediately filed this application. It is my view that from the papers filed and the basis of urgency pleaded by the applicant, the applicant acted with haste under the circumstances. The submission by the first respondent counsel that the applicant ought to have acted upon the passing of the resolution to the action against the first respondent, is as noted not only a new ground of attack but even in substance the resolution did not give a time line within which the applicant should have taken action against the first respondent. It is also noted that the objection on urgency was not really argued with vigor.

The attack on the certificate of urgency as noted was that it repeated the averments in the founding affidavit. I have gone through it. It is not correct that it is in the form of a copy and paste format. The legal practitioner concerned indicated that he had read the papers filed of record. He gave brief summary of the material facts alleged by the applicant. He opined that the conduct of the first respondent to recall members of the applicant from their elected positions despite the pendency of case number HC 6872/23 in which the first respondent had entered appearance would result in irreparable harm to the applicant and defeat the relief sought in case

number HC 6872/23. The first respondent did not set out the alleged regurgitated portions. They are not there at least to the naked eye. I was not persuaded that the matter was not urgent. The objection therefore stands to be and is hereby dismissed.

The first respondent averred that the matter was pending in another court in reference to the judgment of MUTEVEDZI J which was on appeal with a set down of 1 December 2023. It was averred that the same relief as set out herein was sought save that *in casu* the applicant is an “alleged amorphous CCC.” It was submitted that the matter is already receiving judicial attention. What was not made clear by the applicant is whether he pleads *lis pendens* or *res judicata*. A critical feature of *lis pendens* is that the parties to the cases must be the same. They are not the same because in the cases determined by MUTEVEDZI J the individual members of Parliament and Senate who were recalled acted for themselves in their individual capacities. *In casu*, the applicant as a political party is the one seeking relief. On this score the *lis pendens* issue should not arise. I also hold that the issue can properly be dealt with on the return date or on trial in the main matter.

The first respondent also averred that party members who had been recalled had re-entered the race for elections to be held in constituencies from where they had been recalled. The first respondent averred that those persons had pre-empted the appeal by standing as candidates in the elections called in consequence of the recalls. For purposes of this application I do not consider that I can properly comment on the arguments raised on preemption I have already indicated that the applicant was not party to the other litigations referred to. It was not submitted otherwise. On a *prima facie* consideration of the papers and the arguments made before me, I do not find merit in this objection and I dismiss it.

On the merits the first respondent has delved into them in detail. At this stage I need not usurp the functions of the court on the return date or make findings which potentially impact on the issue to be determined in case number HC 6872/23. I have already indicated that a true dispute of substance arises on the papers for the court to determine. The issue arising concerns the recall of elected members of the National Assembly, Senate and Local Authorities. It is a matter of immense public interest and is also a constitutional matter because the recalls affect the electorate who will have chosen their representatives. Whilst the constitution allows for the recalls where the process of recall has been challenged in the courts and the challenge is not

fanciful and is *prima facie* established as in this case, the litigation to have the court decide on their validity must be protected.

It is necessary *ex abundata cautela* to record that the grant of this provisional order does not affect the recalls which were already done by the first respondent before the hearing of this application. I issued an interim order at the hearing that further recalls by the first respondent should be stayed pending this judgement. Before I determine on the issue of the provisional order sought and as I rounded off this judgement today it has come to my attention that the appeal filed against the judgment of MUTEVEDZI J was struck off the roll by the Supreme Court for noncompliance with the rules. The effect of the striking off is that there is no pending appeal and the judgement of MUTEVEDZI J stands. However, as I have already indicated I cannot determine the impact of the judgment on this matter at this stage. The position still remains that the applicant in this application and case number HC 6872/2023 was not a party to the litigation decided by MUTEVEDZI J on the face of the pleadings therein and the learned judge's judgement. I should again reiterate that I am dealing with a provisional order which is subject to confirmation with the process to have the provisional order set aside or changed being one that can be accelerated in terms of the standard terms of the provisional order which allows the return date to be anticipated.

In the result, I determine the application as follows and issue the order sought as varied as follows:

TERMS OF FINAL ORDER SOUGHT

1. That the provisional order be and is hereby confirmed.
2. That the first respondent has no authority to engage second, third and fourth respondents on any matter involving applicant and its members.
3. That any action taken by the first respondent, purportedly on behalf of applicant, after the issuance of summons under HCH 6872/23 be and is hereby declared to be null and void.
4. First respondent is to pay costs suit on a client and Attorney scale.

INTERIM ORDER GRANTED

1. Pending the determination of case number HC 6872/23 the first respondent is interdicted from recalling or purporting to issue any letter of recall of any member of the National Assembly Senate or Local Authority elected under the applicant or CCC ticket and the

second, third and fourth respondents shall not effect any recalls made pursuant to any communicated made by the first respondent in that regard.

SERVICE OF THE PROVISIONAL ORDER

This provisional order shall be served on the respondent by the Sheriff or his lawful deputy upon the respondents.

Shava Law Chambers, applicant's legal practitioner
Ncube Attorneys, first respondent's legal practitioner
Chihambakwe, Mtizwa and Partners, second & third respondents' legal practitioner
Civil Division, fourth respondent's legal respondents