

DISTRIBUTABLE (1)

- (1) RAYMOND MAJONGWE
- (2) HILLARY YUBA
- (3) INTERNATIONAL SOCIALIST ORGANISATION
- (4) MUNYARADZI GWISAI

v

- (1) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE N.O.
- (2) THE CHAIRPERSON OF THE ZIMBABWE ELECTORAL COMMISSION N.O.
- (3) THE SPEAKER OF PARLIAMENT N.O.
- (4) MUNYARADZI PAUL MANGWANA N.O.
- (5) DOUGLAS TOGARASEI MWONZORA N.O.
- (6) EDWARD MKHOSI N.O.
- (7) ZIMBABWE BROADCASTING CORPORATION
THE ATTORNEY-GENERAL (INTERVENING)

**SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,
GARWE JA & GOWORA JA
HARARE, MARCH 15, 2013**

C Mucheche, for the applicants

P Machaya, for the first respondent and the Attorney-General

T M Kanengoni, for the second respondent

R Chingwena, for the third, fourth, fifth and sixth respondents

No appearance for the seventh respondent

MALABA CJ: This is an application for relief in terms of s 24(1) of the Constitution of Zimbabwe (as amended by Constitution Amendment No. 19) (hereinafter referred to as “the Constitution”). On the day of the hearing, the Court ordered as follows:

“Accordingly the application to hear this matter on an urgent basis is refused with costs.”

The application was removed from the roll.

The Court indicated to the parties that reasons for the above order would follow in due course. These are they. The reasons ought to have been written for the Court by the late former CHIEF JUSTICE.

FACTUAL BACKGROUND

The applicants were interested in the Constitution making-process. This process was led by the Constitutional Parliamentary Committee, commonly known as “COPAC”, which was a Committee of Parliament mandated with the drawing up of a new Constitution for Zimbabwe. COPAC was established by Article VI of the Global Political Agreement, which was signed on 15 September 2008 and was co-chaired by the fourth to the sixth respondents.

COPAC, pursuant to fulfilling its mandate in terms of the enabling agreement, held two “all-stakeholder conferences” in which the applicants participated. On 31 January 2013 COPAC produced a final draft Constitution. The applicants were dissatisfied with the final draft of the Constitution. They alleged that it did not reflect the views and interests of the people. As a result, the applicants collectively and publicly adopted a stance that they would advocate for a “VOTE NO” at the Constitutional Referendum (“the Referendum”).

On 15 February 2013 the first respondent, through Proclamation No. 1 of 2013, (“the Proclamation”) set 16 March 2013 as the date on which the Referendum was to be held. This was followed by the second respondent issuing an election notice detailing how the Referendum was to be conducted. On 20 February 2013 COPAC issued a public notice, indicating that it would be undertaking public awareness campaigns, which would be commencing in all districts of the country on 25 February 2013, urging a “VOTE YES” in the Referendum.

On 25 February 2013 the applicants, through their legal practitioners, sent a letter to the second respondent voicing their concerns regarding the intended Referendum. In the letter the applicants alleged that COPAC, in urging for the “VOTE YES” campaign, was unduly influencing the electorate and tilting the Referendum in favour of the “VOTE YES” campaign, with the result that COPAC wore “the garb of a judge and prosecutor in its own case”. In essence, it was alleged that the second respondent had permitted COPAC to openly adopt a partisan role. The applicants alleged that COPAC was in violation of their constitutional rights to protection of freedom of assembly and association.

It was further alleged by the applicants that the partisan stance adopted by COPAC was in violation of s 3 of the Electoral Act [*Chapter 2:01*] and provisions of Part IV (“Voter Education”) and Part VIA (“Media Coverage”) of the Zimbabwe Electoral Commission Act [*Chapter 2:12*], as read with the Referendums Act [*Chapter 2:10*].

The second respondent responded to these allegations through a letter dated 26 February 2013. She stated that the Zimbabwe Electoral Commission (“the Commission”) had written to the print media and broadcasters, reminding them of their obligations in terms of the electoral law to provide fair and balanced coverage of the Referendum. As regards the

allegations of voter education on the part of COPAC, the Commission requested information substantiating the applicants' claims. The applicants did not pursue the matter any further until 13 March 2013, when the application was filed.

The application was brought before the Court as an urgent application, seeking relief against the alleged violation of the applicants' fundamental rights by the respondents. The certificate of urgency filed with the application stated that the allegations of violations of the Declaration of Rights were caused by the Proclamation issued by the first respondent on 15 February 2013. The applicants sought the following relief:

“IT IS ORDERED THAT PENDING THE FINAL RESOLUTION OF THIS MATTER:-

1. INTERIM RELIEF SOUGHT

- (a) Proclamation No. 1 of 2013 issued by the first respondent and gazetted on the 15th of February 2013 as Statutory Instrument 19/2013, in so far as it gives insufficient time for the applicants to exercise their political rights is in its effect *ultra vires* section 23A(1)(c) of the Constitution and as such is hereby set aside.
- (b) Consequent to (a) above the first respondent may issue a proclamation of another referendum date provided that it affords the applicants reasonable time to campaign, promote and/or disseminate information relating to their position on the Draft Constitution.
- (c) In the interim the seventh respondent is hereby interdicted from disseminating, promoting, flighting or carrying any material whether audio or visual solicited by the fourth to the sixth respondents encouraging citizens to vote 'YES' in the upcoming referendum.
- (d) Further the seventh respondent is hereby ordered to afford free and equitable coverage for the applicants and those legitimately permitted to lobby for the adoption of the Draft COPAC Constitution.

2. FINAL TERMS OF THE PROVISIONAL ORDER

IT IS ORDERED THAT:

- a) The second respondent's conduct in failing to meaningfully address the applicants' concerns be and is hereby declared *ultra vires* sections 18 and

18(1a) of the Constitution. Consequently, it is ordered that in any future referendum, the second respondent shall conduct itself in accordance with the law and uphold the rule of law.

- b) In adopting a biased stance toward the adoption of the COPAC Draft Constitution utilising public funds to popularise the ‘Yes Vote’, the third to the sixth respondents’ conduct impairs the free and fairness of the Referendum. Accordingly, such conduct is hereby declared *ultra vires* section 23A(1)(c) of the Constitution.
- c) In failing to promote and broadcast material for those opposed to the adoption of the COPAC Draft Constitution in the face of clear legal obligations to that effect, the seventh respondent’s conduct is in its effect *ultra vires* the Constitution. Further in failing to direct the seventh respondent to abide by its legal obligations the second respondent’s conduct is *ultra vires* section 18(1) of the Constitution and s 18(1a) of the Constitution.
- d) In openly denigrating the applicants for lobbying against the adoption of the COPAC Draft Constitution and refusing to accord them equal access in their meetings and functions, the third to the sixth respondents acted *ultra vires* section 23(1) and section 20(1) of the Constitution.
- e) The costs of this suit shall be borne by the respondents jointly and severally one paying the other to be absolved.”

SUBMISSIONS BY THE PARTIES

It was the applicants’ case that the Referendum date proclaimed by the first respondent did not give them sufficient time to propagate their views on the final draft of the Constitution. They contended that their fundamental right to protection of the law would be violated if the Referendum was permitted to be held on 16 March 2013 as scheduled. Thus, they prayed for the urgent intervention of the Court to direct that the Referendum be held at a later date, in order to give the parties reasonable time to campaign in support of their respective positions.

The application was opposed by the first, the second and the fifth respondents. The first respondent averred that the applicants had no cause of action against him, on the basis of their failure to assert that the date declared for the holding of the Referendum was irrational.

It was contended that no grounds had been presented to justify a declaration that the Proclamation was *ultra vires* s 23A(1)(c) of the Constitution.

The second respondent denied the allegations made against the Commission. She averred that the Commission was mandated to monitor the media space, its obligations being limited to ensuring that the legislative parameters were complied with in this regard. The second respondent contended that if it was alleged that there had been some infringement of the applicants' rights, the remedy was provided for in s 161 of the Electoral Act, which gave the Electoral Court the power to review any decision made by the Commission in terms of the Act.

The fifth respondent raised a preliminary objection, questioning the urgency of the application. It was contended that the date of the Referendum was proclaimed by the first respondent through the Proclamation which was published on 15 February 2013. The Proclamation set 16 March 2013 as the date on which the Referendum was to be conducted. The fifth respondent averred that the applicants did nothing, save to write a letter to the second respondent, but waited until 13 March 2013 (that is, approximately forty-eight hours before the Referendum date) to challenge the Proclamation.

It was submitted that the applicants had approximately a month's notice of the date of the Referendum and that writing a single letter did not suffice to qualify as "exhaustion of domestic remedies". Further, it was submitted that COPAC inserted public notices in the local newspapers from 20 February 2013, stating that it would be conducting public awareness campaigns starting from 25 February 2013. The applicants did nothing, despite the notice.

On the merits, the fifth respondent averred that COPAC was a creation of Article 6 of the Global Political Agreement, which meant that any expectation that it would be non-partisan was not supported by the enabling Agreement. He denied all the allegations levelled against him.

In light of the preliminary point taken by the fifth respondent, the Court first made a determination on the question of whether or not the matter was urgent.

WHETHER OR NOT THE MATTER WAS URGENT

In every urgent application, there are essentially two applications involved. The first one serves as a procedural vehicle for the substantive application to be heard on an urgent basis. The merits of the matter are not considered at this stage. The Court is only seized with a question of fact pertaining to whether or not the matter is urgent on the facts presented. If urgency is established, the substantive application will then be heard and determined on the merits. The hearing of the second application depends on a finding of whether or not the matter is urgent.

An order of urgency is within the purview of a court's discretion. In constitutional matters, an order of urgency is only granted in the clearest of and exceptional cases. One has to take the Court into one's confidence on the factors giving rise to the claimed urgency, through the certificate of urgency and the founding affidavit to the application. The remarks of the Court in *Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* 2014 (2) ZLR 78 (C) at 88B-F are pertinent. The Court said:

“An order that a constitutional matter should be heard on an urgent basis is an extraordinary remedy designed to be granted in the clearest of cases.

The principle of equality of treatment requires that a litigant whose case is pending hearing in a court must be subjected to the same procedure as is applied to

others for the determination of the question whether his or her case is ready to be set down for hearing by the court. The decision that a case should be set down for hearing by the Constitutional Court is made by the Registrar. It is only in exceptional circumstances, and upon an application on a certificate of urgency signed by a legal practitioner, that the CHIEF JUSTICE will order that a matter should be heard on an urgent basis.

A party favoured with an order for a hearing of the case on an urgent basis gains a considerable advantage over persons whose disputes are being set down for hearing in the normal course of events. A party seeking to be accorded the preferential treatment must set out, in the founding affidavit, facts that distinguish the case from others to justify the granting of the order for urgent hearing without breach of the principle that similarly situated litigants are entitled to be treated alike.

The certificate of urgency should show that the legal practitioner carefully examined the founding affidavit and documents filed in support of the urgent application for facts which support the allegation that a delay in having the case heard on an urgent basis would render the eventual relief ineffectual. See *Pickering v Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71 (H); *Dilwin Investments (Pvt) Ltd v Jopa Engineering Company (Pvt) Ltd* HH-116-98; *Triple C Pigs & Anor v Commissioner General, Zimbabwe Revenue Authority* 2007 (1) ZLR 27 (H).” (emphasis added)

It is imperative for a party seeking to have a constitutional matter heard on an urgent basis to give reasons justifying the granting of preferential treatment to his or her or its case.

The applicants stated in their founding affidavit that the application should be considered on an urgent basis for reasons contained in the certificate of urgency. The founding affidavit itself did not adequately address the question of urgency, as contemplated in the *Mayor Logistics (Pvt) Ltd* case *supra*. The requirement for a certificate of urgency does not obviate the need to relate to the question of urgency in the founding affidavit.

It is a principle of law that an application stands or falls on the founding affidavit. See Cilliers, Loots & Nel “Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa*” (5 edn Juta & Co Ltd, 2009) at pp 440-441; *Fuyana v Moyo* 2006 (2) ZLR 332 (S). In order for a matter to be heard on an urgent basis, an applicant must demonstrate in his or her or its papers factors that give rise to the urgency and justify the preferential treatment

sought to be accorded. The applicants failed to set out such factors justifying an order that the application be heard on an urgent basis.

Further to the above, it should be noted that, in determining whether or not the matter is urgent, the Court is guided by the legal practitioner's statement in the certificate as to the urgency of the matter. In this exercise the Court is entitled to read the certificate and construe it in a manner consistent with the papers filed of record by the applicant. See *Chidawu and Ors v Shah and Ors* 2013 (1) ZLR 260 (SC). In the certificate of urgency filed, the applicants' legal practitioner stated that the applicants were raising allegations of violations of the Declaration of Rights stemming from the Proclamation issued by the first respondent on 15 February 2013 setting the date for the Referendum as 16 March 2013.

It was further averred that the day of reckoning was imminent and that, if the matter was to be heard on the ordinary roll, the relief sought would be rendered academic. In explaining the delay, an allegation of an attempt to exhaust domestic remedies was made. It should be noted that this was a reference to the letter written by the applicants on 25 February 2013, addressed to the second respondent. There was no explanation for the delay in making the application after 26 February 2013, when the applicants were favoured with a response as to the second respondent's position.

It has been held in various cases that a matter is urgent if, at the time the need to act arises, the matter cannot wait. In *Econet Wireless (Pvt) Ltd v Trustco Mobile (Pty) Ltd and Anor* 2013 (2) ZLR 309 (S), it was held at 320G as follows:

“The position is now settled that what constitutes urgency is not only the imminent arrival of the day of reckoning but also 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.” (the underlining is for emphasis)

It was common cause that the date of the Referendum was published on 15 February 2013. The date set for the Referendum was 16 March 2013, whereas the application was only filed on 13 March 2013 - two days before the date scheduled for the Referendum. The applicants waited until the eleventh hour to bring the application. This was a case of self-created urgency.

The applicants failed to make out a case for the application to be heard on an urgent basis.

It was for these reasons that the Court refused to hear the application on an urgent basis.

CHIDYAUSIKU CJ:

ZIYAMBI JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

Matsikidze and Mucheche, applicants' legal practitioners

Civil Division of the Attorney General's Office, first respondent's legal practitioners

Chikumbirike and Associates, second respondent's legal practitioners

Mangwana and Partners, third, fourth, fifth and sixth respondents' legal practitioners

Civil Division of the Attorney-General's Office, for the Attorney-General