

REPORTABLE (81)

SCB 59/23

(1) DISCENT COLLINS BAJILA (2) SICHELESILE MAHLANGU
(3) GIFT SIZIVA (4) SURRENDER KAPOIKILU (5) JANE
NICOLA WATSON (6) MINENHLE NTANDOYENKOSI GUMEDE (7)
PRINCE DUBE (8) TATENDA MADZIRASHE MOYO (9) DESMOND MAKAZA (10)
OBERT MANDUNA (11) PAHOR RAPHAEL SIBANDA (12) GONO
ERECK

(1) TATENDA MADZIRASHE (2) HARDLIFE NDLOVU (3) ASHLEY
LETTERS MOYO (4) SANDRA DUBE (5) LINDA MPOFU (6)
RAMSON JUNIOR CHINGWARA (7) PANASHE GLEYN
MACHEKANO (8) GLORIA DUBE (9) HELLEN MOYO (10)
RACHEL DUBE (11) MAYIBONGINKOSI NKOMO (12) MARSHALL
NKOMO (13) INNOCENT NCUBE N.O. (14) ZIMBABWE
ELECTORAL COMMISSION (15) CHAIRPERSON OF THE
ZIMBABWE ELECTORAL COMMISSION (16) OBERT MANDUNA
(17) FRANK MHLANGA (18) NOMPILO BHEBHE (19) STRIKE
MKANDLA (20) NQOBIZITHA NDLOVU

SCB 60/23

FRANK MHLANGA

v

(1) RAMSON JUNIOR CHINGWARA (2) INNOCENT NCUBE N.O.
(3) ZIMBABWE ELECTORAL COMMISSION (4) CHAIRPERSON OF
THE ZIMBABWE ELECTORAL COMMISSION (5) MINENHLE
NTANDOYENKOSI GUMEDE

SCB 61/23

(1) ADELAIDE MHLANGA (2) NQOBIZITHA NDLOVU (3)
DOUGLAS NCUBE (4) NOMPILO BHEBHE

v

(1) TATENDA MADZIRASHE (2) HARDLIFE NDLOVU (3)
ASHLEY LETTERS MOYO (4) SANDRA DUBE (5) LINDA
MPOFU (6) RAMSON JUNIOR CHINGWARA (7) PANASHE
GLEYN MACHEKANO (8) GLORIA DUBE (9) HELEN MOYO
(10) RACHEL DUBE (11) MAYIBONGINKOSI NKOMO (12)
MARSHALL NKOMO (13) INNOCENT NCUBE N.O. (14)
ZIMBABWE ELECTORAL COMMISSION (15) CHAIRPERSON OF
THE ZIMBABWE ELECTORAL COMMISSION

SCB 62/23

SANPOULOS MAPLANKA

v

(1) LINDA MPOFU (2) INNOCENT NCUBE N.O. (3) ZIMBABWE
ELECTORAL COMMISSION (4) CHAIRPERSON OF THE
ZIMBABWE ELECTORAL COMMISSION

SUPREME COURT OF ZIMBABWE

UCHENA JA, CHITAKUNYE JA & MWAYERA JA

BULAWAYO: 2 AUGUST 2023 & 3 AUGUST 2023

T. Mpofo with *P. B. Saurombe*, for the first to the sixth appellants in SCB 59/23

W. Ncube with *T. Runganga*, for the seventh to the twelfth appellants in SCB 59/23

J. Bamu, for the sixteenth appellant in SCB 59/23, the appellant in SCB 60/23 and the appellant in SCB 62/23

M. T. Mahlangu, for the first to the fourth appellants in SCB 61/23

T. Magwaliba with *N. Ndlovu*, for the first to the twelfth respondents in SCB 59/23, the first respondent in SCB 60/23, the first to the twelfth respondents in SCB 61/23, and the first respondent in SCB 62/23

T. M. Kanengoni, for the thirteenth to the fifteenth respondents in SCB 59/23, the second to the fourth respondents in SCB 60/23, thirteenth to the fifteenth respondents in SCB 61/23 and the second to the fourth respondents in SCB 62/23

MWAYERA JA

1. The four appeals are against parts of the High Court’s Judgment HB 157/23 (“the court *a quo*”), which was handed down on 27 July 2023. The appeals are against the decision of the court *a quo* setting aside the thirteenth respondent’s decision to accept the appellants’ nomination papers as candidates for the impending harmonised general elections. The four appeals SCB59/23, SCB 60/23, SCB 61/23 and SCB 62/23 were consolidated and heard by this Court on 2 August 2023.

On 3 August 2023, we issued the following order:

1. The appeals be and are hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted as follows:
“The applications be and are hereby dismissed with costs.”
3. The reasons for the court’s decision will follow in due course.”

We undertook to furnish reasons for our disposition. These are they.

FACTUAL BACKGROUND

2. On 21 June 2023, the fourteenth respondent constituted a nomination court to receive submissions for the nominations of candidates for the election of constituency members to the National Assembly for the Bulawayo Metropolitan Province. This was in accordance with Proclamation 4 of 2023, gazetted under S.I. 85 of 2023 by the President. The determinant facts of this appeal emanate from the events that transpired on 21 June 2023 at the nomination court.
3. The appellants appeared before the nomination court for their nominations as candidates for elections scheduled for 23 August 2023. The nomination officer accepted their nominations and registered them as candidates.

4. The respondents except for the thirteenth to fifteenth respondents applied to the court *a quo* for the setting aside of the appellants' (respondents *a quo*) nominations. They alleged that their nomination papers were in disarray. They further alleged that when the appellants lodged their papers before 4 pm they were advised to correct them. The respondents further alleged that the appellants thereafter filed their corrected papers out of time after 4 pm in violation of the Electoral Act [*Chapter 2:13*] ("the Act"). They further alleged that by 4 pm the appellants were outside the courtroom frantically trying to rectify their nomination papers. They further asserted that such nominations were null and void.
5. In response, some of the appellants asserted that their papers were in order and that they lodged them with the nomination officer who accepted them before 4 pm. The other appellants stated that their papers had errors which were pointed out by the nomination court and were corrected and filed with the nomination officer before 4 pm. Some of the appellants maintained that they were in court with their corrected papers which were accepted before 4 pm.
6. In his opposing affidavit the 13th respondent, Innocent Ncube, in his official capacity as the Provincial Elections Officer and for and on behalf of the Zimbabwe Electoral Commission ("ZEC") and the Chairperson of ZEC, indicated that the nomination papers were procedurally and timeously lodged between 10am and 4pm. He also pointed out that the designated courtroom could only accommodate 12 to 15 people at any time. During the proceedings at 3:55pm, he announced that all prospective candidates who were queuing outside because of his administrative decision (to allow 12 to 15 people at

any time) should hand over their nomination papers to the police officer as the court was due to close at 4 pm. The police officer collected all the nomination papers and handed them over to the thirteenth respondent before 4 pm. Thereafter, the nomination officer would call in those whose papers he would be processing.

7. In respect of the form, Annexure “B”, relied upon by the applicants *a quo*, he pointed out that it was a register in which the secretary captured the times when the nomination forms were inputted into ZEC’s records. In other words, he stated that the form was for the purpose of data capture into ZEC’s system and not a record reflective of the time when the nomination papers were lodged with the nomination officer.
8. On the basis of the above facts the court *a quo* found for the applicants *a quo* (now respondents). It held that the appellants’ nominations had been lodged after the stipulated cut-off time of 4 pm. It, therefore, declared the nominations of the appellants as null and void.

PROCEEDINGS BEFORE THE COURT A QUO

9. The parties made submissions on both the preliminary points and the merits before the court *a quo*, after which the court *a quo* rendered a composite judgment for all the applications which had been consolidated by consent.
10. Mr *Kanengoni* for the thirteenth, fourteenth and fifteenth respondents raised a preliminary point that the court *a quo* had no jurisdiction. He submitted that all the applications ought to have been filed in the Electoral Court.

11. Mr *Mpofu* for first to the sixth appellants associated himself with submissions made by Mr *Kanengoni* on jurisdiction. He further submitted that there was no application before the court because the first to twelfth respondents had irregularly truncated the *dies induciae*. Counsel also argued that the respondents had no *locus standi* and that the applications were based on hearsay evidence. He submitted that the first to twelfth respondents had not attended the nomination court but sought to rely on social media reports and a document, Annexure “B”, which was differently interpreted by the Electoral Commission.
12. He also argued *in limine* that there were material disputes of fact that could not be resolved on paper. He further submitted that there was a material non-joinder of Citizens Coalition for Change party (CCC) which had sponsored some of the appellants. In support of this assertion, he contended that the party would be prejudiced in obtaining proportional representation seats. Finally, on preliminary points, counsel submitted that the applications were an abuse of the court process.
13. Mr *Ncube* for the seventh to twelfth appellants in SCB 59/23 associated himself with the preliminary points raised by Mr *Kanengoni* and Mr *Mpofu*. He emphasised that the applications were based on hearsay evidence and that only the Electoral Court had exclusive jurisdiction to hear the applications.
14. Mr *Mahlangu* for the first to forth appellants in SCB 61/23 associated himself with submissions made by counsel who addressed the court before him.

15. Mr *Bamu* for the appellants in SCB 60/23 also associated himself with submissions that had been made by counsel before him.
16. *Per contra*, Mr *Magwaliba* for the first to twelfth respondents opposed all the preliminary points raised, characterising them as meritless. He relied on the case of *Kambarami v 1893 Mthwakazi Restoration Movement Trust and Others* SC 66-21 for the proposition that the court had jurisdiction. Regarding the validity of the applications, he submitted that the parties had attended a case management meeting and agreed on truncating the *dies induciae*.
17. On *locus standi* he submitted that the respondents had a legitimate interest in the nomination proceedings because they had a direct and substantial interest in the outcome of the process. In relation to the applications being based on hearsay evidence, he contended that the respondents relied on public information and that there was Annexure “B” which supported their position. He further submitted that there were no material disputes of fact. A robust approach would resolve the matter.
18. Mr *Magwaliba* further submitted that the applications *a quo* were not an abuse of the court process, given the substantial interests which the respondents had in the nomination of candidates for the constituencies, where they were registered voters. Finally, in relation to the non-joinder of CCC he argued that the party had no direct and substantial interest in the acceptance of the nomination papers.
19. The court *a quo* deferred the determination of the preliminary points to the end of the hearing and sought to be addressed on the merits.

20. Mr *Magwaliba* submitted in support of the applications that the nominations ought to be nullified since they were accepted after 4 pm in defiance of s 46 of the Act. He further submitted that the nomination officer unlawfully opened the court to specifically allow the affected candidates to present their papers out of time. He argued that the police officer who collected the papers was not a nomination officer. Annexure “B” confirmed that the nomination papers were filed out of time.

21. Mr *Kanengoni* for the thirteenth to fifteenth respondents submitted that Annexure “B” was not a document reflective of the times when the nomination papers were lodged with the nominations officer. Further, he submitted that the nomination papers were submitted and received before the cut-off time of 4 pm on the day in question. He emphasised that the officers of ZEC who placed evidence before the court through their supporting affidavits spelt out that no nomination papers were submitted after 4 pm. Finally, he submitted that there was no breach of s 46 of the Electoral Act.

22. Mr *Mpofu* submitted that the respondents were relying on hearsay evidence that the social media was awash with information that the appellants’ nomination papers were in disarray and filed out of time. He pointed out that the appellants filed their papers in compliance with s 46 of the Electoral Act before 1600 hours. Further, in opposing the allegations he relied on ZEC and the nomination officer’s evidence that Annexure “B” was not a document indicative of the lodgement of nomination papers but that the time reflected on it related to the time of data capture.

23. Mr *Ncube* was also critical of Annexure “B” and he agreed with submissions by Mr *Mpofu* on it. He submitted that the respondents were relying on hearsay evidence and that they failed to discharge the onus and to prove the factual basis of their allegations. Their evidence was speculative as they relied on social media assertions.
24. Mr *Bamu* associated himself with submissions made by counsel who addressed the court before him. He emphasised that his clients submitted their nomination papers on time. He further added that the collection of nomination papers by the police officer at the instruction of the nomination officer did not amount to contravening s 46 of the Electoral Act.
25. Mr *Mahlangu* and Mr *Robi* associated themselves with counsel for the other appellants’ submissions.

DETERMINATION OF THE COURT A QUO

26. The court *a quo* gave a composite judgment. It dismissed all the preliminary points and made a finding that Annexure “B” was a document prepared by a ZEC official and that it spoke for itself that the nomination papers were submitted after 4 pm. It found that the submission of papers from the appellants through the police officer was unlawful. It thus declared the nominations as null and void and issued the following order:

“IT IS DECLARED THAT:

1. That the decision of the 1st Respondent, sitting as a nomination court at Bulawayo on 21 and/or 22 June 2023 to accept the following Respondents’ nomination papers and candidature in the elections scheduled to be conducted on 23 August 2023 was in contravention of Section 46(7) & (8) of the Electoral Act [*Chapter 2:13*].
2. That the decision of the 1st Respondent sitting as a Nomination Court at Bulawayo on 21 and/or 22 June 2023 to accept the following Respondents’ nomination papers and candidature in the elections scheduled to be

conducted on 23 August 2023 is declared null and void and is hereby set aside.

ACCORDINGLY, IT IS ORDERED THAT:

3. 1st Respondent is prohibited from including the names of the following Respondents in the preparation of ballot papers to be used in the general elections scheduled to be conducted on 23 August 2023.
4. Respondents shall jointly and severally, pay the costs of suit.
OBERT MANDUNA
ERECK GONO
DOUGLAS NCUBE
GIFT SIZIVA
SANPOULUS MAPLANKA
PRINCE DUBE
NQOBIZITHA NDLOVU
DESMOND MAKAZA
BAJILA COLLINS DESCENT
SICHELESILE MAHLANGU
DESIRE MOYO
ALELAIDE MHLANGA
NOMPILO BHEBHE
SURRENDER KAPOIKILU
RAPHAEL PASHOR SIBANDA
NTANDOYENKOSI MINENHLE GUMEDE
FRANK MHLANGA.
5. The application against Zvikwete Innocent Mbanobe and is hereby dismissed with costs.
6. The application against ADMORE GOMBA, NIGEL NDLOVU, SONENI MOYO, DINGILIZWE TSHUMA, STRIKE MKANDLA & ALBERT MHLANGA be and is hereby withdrawn.”

GROUNDS OF APPEAL

27. Aggrieved by the judgment of the court *a quo* in all the four applications the appellants in SCB 59, 60, 61 and 62 of 2023 launched appeals with this court on more or less similar grounds. All the appellants’ grounds of appeal can be summarised as captured in SCB 59/23 except for ground 5 which is specific to candidates for Citizens Coalition for Change party (CCC). Ground 5 speaks to non-joinder of CCC.

It reads as follows:

“5) Having found that the Citizens Coalition for Change political party was adversely affected by the proceedings before it, the court *a quo* erred in relating to and affording an application which adversely affected its interests without affording the concerned political party the opportunity of being heard.”

28. The grounds of appeal which are similar for purposes of these appeals as discerned from the record are as follows:

- 1) Having heard the argument on points *in limine* including critical point (*sic*) on the jurisdiction, the court *a quo* grossly misdirected itself and erred in proceeding to hear the argument on the merits of the matter without making a determination on the points taken before it *in limine litis*.
- 2) The court *a quo* erred in assuming jurisdiction over a matter which is by constitutional and statutory command subject to the exclusive jurisdiction of the Electoral Court and so erred in entertaining a review disguised as a *declaratur*.
- 3) The court *a quo* erred and misdirected itself having invented their own *dies induciae* in violation of the rules and of superior court authority and so erred in condoning a fatal defect and where no application for condonation had been made.
- 4) The court *a quo* erred in granting relief to parties who had no *locus standi in judicio*, who could not swear positively to the “facts” they relied upon and who sustained their cause on the basis of objectively established falsehoods.
- 5)
- 6) The court *a quo* having found that there was a dispute of fact material to the resolution of issues before it, erred in purporting to resolve such dispute in the absence of any work tools for such resolution and so erred in making credibility findings on motion that were unsupported by the evidence placed before it.

- 7) The court *a quo* erred in not finding that matters factual stood to be resolved on the basis of the position given by the Electoral Commission as well as appellants who were physically in attendance at the nomination court and which positions could not be gainsaid by first to twelfth respondents' hearsay evidence.
- 8) The court *a quo* erred in not concluding that appellants had timeously presented their papers, had an absolute right to have them processed and accordingly, had been properly declared duly nominated by the nomination court.

SUBMISSIONS BEFORE THIS COURT

(1) Preliminary issues

29. Mr *Magwaliba* for the first to the twelfth respondents raised three preliminary issues. The first point related to the status of the fifth appellant in SCB 59/23. He noted that the order of the court *a quo* did not list her as one of the respondents, which omission was accepted by the fifth appellant. Counsel accordingly sought an order deeming the judgment of the court *a quo* as being applicable to the fifth appellant as such a course would prevent the appeal by the fifth appellant from being struck off the roll.
30. The second point raised was that the appeals were fatally defective because appellants appealed against the whole judgment instead of the parts that affected them. He further pointed out that some of the appeals did not cite some of his clients who were applicants before the court *a quo*. This was particularly argued to be the case with SCB 60/23. In his view, such an omission denied parties who were before the High Court the right of

audience. It was contended that the appeals could not be valid appeals if they left out interested parties.

31. *Per contra*, Mr *Mpofu* for the first to sixth appellants opposed the procedure suggested in respect of the omission of the name of the fifth appellant in the court *a quo*'s judgment. He argued that it was incompetent. After an argument by both counsels, it was resolved that the issue will be determined by the court in terms of s 22(1)(b)(ix) of the Supreme Court Act [*Chapter 7:13*].
32. Further in respect of the points *in limine*, Mr *Mpofu* argued that the points that were taken by counsel for the respondents were not procedurally raised because no notice had been given in compliance with r 51 of the Supreme Court Rules, 2018. He added that a declaratory order could not be separated into parts and hence it was necessary for the appellants to appeal against the whole judgment of the court *a quo*. Counsel submitted that an appellant challenging the jurisdiction of a court could not challenge it in part.
33. Mr *Ncube*, Mr *Mahlangu* and Mr *Bamu* on the points *in limine* raised essentially associated themselves with the arguments that had been advanced by Mr *Mpofu*. Eventually, all parties agreed that in light of the decision of the Constitutional Court in the case of *Chamisa v Mnangagwa CCZ-21-19* it was not necessary to dwell on the preliminary issues. More so considering the role of the court in matters of public importance as set out in the cited case. Mr *Magwaliba* abandoned the preliminary points and accepted that the appeal be determined on the merits.

(2) Submissions on the merits

34. Mr *Mpofu* for the first to sixth appellants, in SCB 59/23, submitted that the High Court had no jurisdiction to hear the matter. He submitted that s 161 of the Electoral Act as read with s 5 of the Judicial Laws Amendment (*Ease of Settling Commercial and Other Disputes*) Act, 2017 constituted the Electoral Court as a specialised division of the High Court and therefore now has jurisdiction to hear an application for a *declaratur*. He further argued that, the relief sought was worded in the form of a review relief. Further, he submitted that, the authority of *Kambarami v 1893 Mthwakazi Restoration Movement Trust and Others* SC 66–21 relied upon by the court *a quo* was rendered *per incuriam* and, thus, it was inapplicable.
35. It was also Mr *Mpofu*'s submission that there were no valid applications before the High Court. He argued that the court *a quo* disregarded two binding authorities of this Court to the effect that an applicant cannot specify a *dies induciae* other than the one that is set out in the rules. He proceeded to argue that the court *a quo* compounded its error of adjudicating over an invalid application by proceeding to grant condonation where such had not been applied for.
36. On the merits of the applications that were before the court *a quo*, he further submitted that s 46(7) of the Electoral Act, which the court *a quo* relied on, was not properly engaged. He also submitted that the decision of the court *a quo* was wrong and contrary to the evidence adduced. To illustrate his point, Mr *Mpofu* mentioned the case of *Zvikwete Innocent Mbanjo* who was also a respondent in the same matter but treated differently by the court *a quo* despite his circumstances being identical to those of the appellants.

37. He submitted that his clients had filed their papers before 4 pm. In any event, the thirteenth respondent (nominations officer) had before 4 pm requested for all prospective candidates queuing outside awaiting their turn to file nomination papers, to hand in their papers through the police officer attached to the nominations court. By so doing, the thirteenth respondent enabled everyone in the queue outside the small courtroom to submit their papers within the prescribed time. He further submitted that the thirteenth respondent acted in terms of s 24 (1) of the Interpretation Act [*Chapter 1:01*]. He also submitted that the appellants' evidence established that they had lodged their papers before 4 pm. He further submitted that there was no evidence that his clients' papers were collected through the police officer. He thus argued that these facts were at variance with the conclusion of the court *a quo*.
38. In respect of Annexure "B", counsel contended that the times set out in that document were the times of inputting data as opposed to the time for filing nomination papers with the thirteenth respondent. Finally, counsel argued that the applications were based on hearsay evidence from social media as deposed to by the respondents. This disregarded the fact that the appellants' papers were presented in open court as required by s 46 of the Electoral Act. He, therefore, prayed that the appeal be allowed with costs.
39. Mr *Ncube* for the seventh to twelfth respondents, submitted that there were no valid applications filed by the respondents before the court *a quo*. He associated himself with submissions made by Mr *Mpofu*. He further submitted that the respondents' cases were based on hearsay evidence, which issue was not resolved by the court *a quo*. Counsel submitted that the conclusion reached by the court *a quo* was indefensible. He prayed that the appeal be allowed with costs.

40. Mr *Mahlangu* for the first to fourth appellants in SCB 61/23, associated himself with submissions made by Mr *Mpofu* and Mr *Ncube*. He however, further pointed out that the court *a quo* erroneously took all the respondents who were before it to be CCC sponsored candidates when this was not correct as some of the respondents were affiliated to different political parties and others were independent candidates. To demonstrate his point, he quoted the portion of the judgment *a quo* which mentioned that if one read one affidavit, he would have read all.
41. In respect of one of his clients, Adelaide Mhlanga, Mr *Mahlangu* submitted that she averred that she was in the court at all material times. To counsel, there was no evidence that the papers were collected after 4 pm from persons who were outside.
42. In his submissions, Mr *Mahlangu* intimated that the court *a quo* took a casual approach to the evidence of the appellants and that of the nominations officer and ZEC. He stated that the court *a quo* regarded the appellants' averments as merely bald denials. The court *a quo* was also accused of making sweeping statements against the electoral authority. For instance, it is said to have referred to the majority of the respondents but without specifying who they are. He prayed for the appeal in SCB 61/23 to be allowed with costs.
43. Mr *Bamu* for the sixteenth appellant in SCB 59/23 and the appellants in SCB 62/23 submitted that the court *a quo* had no jurisdiction to deal with the matter because the Electoral Court exercises the general jurisdiction of the High Court in any matter before it. In addition, counsel moved the Court to depart from the *Kambarami* decision *supra* as, in his view, it conflicted with s 171(1) of the Constitution and s 161 of the

Electoral Act. He associated himself with submissions made by counsel for the appellants who addressed the Court before him.

44. He further submitted that the matter was disposable on the one question of whether or not the nomination papers were received by 4 pm.
45. He finally submitted that s 46 of the Electoral Act simply requires papers to be received by a nomination officer and it does not prohibit any person from delivering the forms. Thus, to the extent that s 46(7) did not prohibit a police officer assigned by the nominations officer from receiving nomination papers from any person before 4 pm, the conduct cannot be said to be illegal as it is not forbidden by statute. Mr *Bamu*, therefore, prayed that the appeal be allowed with costs.
46. Mr *Magwaliba* submitted that the seventh ground of appeal resolved the appeal. He submitted that the court *a quo* accepted the evidence of the thirteenth to the fifteenth respondents. He however, said that what the court *a quo* rejected were the opinions of the Electoral Commission. Counsel further submitted that in terms of s 46(5) and 46(6) of the Electoral Act, the nomination court is a public and open court that closes at 4 pm, after which time it cannot accept nomination papers from new prospective candidates.
47. He further submitted that the evidence from the Commission was that the appellants were not in court. He also referred to the evidence of Tabeth Mwonzora, a secretary at the nomination court, to the effect that a police detail collected the papers. Relying on the definition of a nomination officer, counsel also submitted that the definition does not include a police officer. Thus, by directing the police detail to collect the nomination

papers, the nomination officer acted unlawfully and his conduct was null and void. He referred the court to *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (S) in support of this proposition. He submitted that the circumstances of this case warranted a declaration on the correct position of the law.

48. In respect of Annexure “B”, Mr *Magwaliba* contended that it was a public document which is acceptable in terms of s 12 of the Civil Evidence Act [*Chapter 8:01*]. He further submitted that the document is a submission form from Bulawayo province which sets out the times when the nomination papers were accepted. He stressed the point that all the appellants’ nominations were captured as having been accepted after 4pm.
49. On the question of jurisdiction, Mr *Magwaliba* submitted that the *Kambarami* decision *supra* was good law having been decided after the adoption of the 2013 Constitution and the enactment of the Judicial Laws Amendment (Ease of Doing Business) Act, 2017. He therefore submitted that the High Court has jurisdiction to grant a *declaratur*.
50. Regarding the issue of the validity of the applications *a quo*, counsel submitted that the High Court issued an order truncating the *dies induciae*. He further contended that r 59(6) of the High Court Rules, 2021 does not specify that urgent applications must be filed with a modified *dies induciae* only after the High Court has granted such leave.
51. In respect of the first ground of appeal he submitted that it was a bad ground at law as it challenged a decision on how the court should have conducted its proceedings. He argued that such a decision was not appealable.

52. In respect of the fifth ground of appeal, Mr *Magwaliba* submitted that the first to the twelfth respondents had *locus standi*. He relied on the decision in *Stevenson v Minister of Local Government & Others* 2002 (1) ZLR 498 (S). On the issue of non-joinder of CCC, counsel averred that it was not an interested party. He prayed for the dismissal of the appeals with costs.
53. Mr *Kanengoni*, for the thirteenth, fourteenth and fifteenth respondents submitted that his clients would abide by the decision of this Court. Accordingly, he did not make any submissions.

ISSUES FOR DETERMINATION

54. The issues which commend themselves for determination by this Court are as follows:
- i. Whether or not the court *a quo* erred and misdirected itself in dismissing the appellants' preliminary points.
 - ii. Whether or not the court *a quo* was correct in its findings that the appellants' nomination papers were submitted to the nomination officer after 4pm.

THE APPLICABLE LAW

55. The appeals are all hinged on the law relating to the procedure for the nomination of candidates for election as members of Parliament. Sections 46(6), (7) and (8) of the Electoral Act are central to the resolution of these appeals. They read:

“(6) The nomination officer shall in open court—

- (a) announce whether any candidate has lodged his or her nomination paper before the sitting of the court and, if so, the name of every such candidate; and

(b) receive any further nominations for election as constituency member of the National Assembly for the constituency for which he or she is the nomination officer.

(7) No nomination paper shall be received by the nomination officer in terms of subsection (6) after four o'clock in the afternoon of nomination day or, where there is more than one nomination day for the election concerned, the last such nomination day:

Provided that, if at that time a candidate or his or her chief election agent is present in the court and ready to submit a nomination paper in respect of the candidate, the nomination officer shall give him or her an opportunity to do so.

(8) The nomination officer shall examine every nomination paper lodged with him or her which has not been previously examined by him or her in order to ascertain whether it is in order and shall give any candidate or his or her election agent an opportunity to rectify any defect not previously rectified and may adjourn the sitting of the court for that purpose from time to time:

Provided that the sitting shall not be adjourned to any other day that is not a nomination day.”

56. The Interpretation Act [*Chapter 1:01*] s 24(1) and (2) are also relevant and provide as follows:

“POWERS AND APPOINTMENTS

24 Statutory powers and duties generally

(1) Where an enactment confers a power, jurisdiction or right, or imposes a duty, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where an enactment empowers any person or authority to do any act or thing, all such powers shall be deemed to be also given as are reasonably necessary to enable that person or authority to do that act or thing or are incidental to the doing thereof.”

57. In our view the appeals can be resolved by a correct interpretation of s 46(6), (7) and (8) of the Act. The interpretation of s 24(1) and (2) will also be considered in resolving the appeals.

58. Section 46 (6)(a) of the Act permits a prospective candidate to lodge his or her nomination papers before the nomination day. On nomination day, the nomination officer must announce in open court the names of all candidates who lodged their nomination papers prior to the nomination day.

59. Section 46(6)(b) provides for the nomination officer's receipt of nomination papers on the nomination day.
60. Section 46 (7) forbids a nomination officer from receiving nomination papers after 4 pm on nomination day except for those candidates or their election agents who will be present in the courtroom and ready to submit their nomination papers by 4 pm. Therefore, candidates or their election agents who will be in the courtroom will not be affected by the cut-off time of 4 pm.
61. Section 46(8) mandates the nomination officer to attend to and examine all nomination papers lodged with him or her between 10 am and 4 pm, and give opportunities to candidates or their agents to rectify anomalies by adjourning the court to enable them to do so by not later than the end of the nomination day.
62. Section 24(1) of the Interpretation Act provides that where a statute gives a public officer power to perform a duty, such power includes the power to organise and perform as occasion requires.
63. Section 24(2) of the Interpretation Act gives a public officer powers to take reasonable steps that enable him or her to accomplish what the law mandates.
64. The principles of interpretation of statutes have been discussed by this Court in a number of cases. In the case of *Endeavour Foundation and Anor v Commissioner of Taxes* 1995

(1) ZLR 339 (S) at 356 F-G, this Court held that:

“The general principle of interpretation is that the ordinary, plain, literal meaning of the word or expression, that is, as popularly understood, is to be

adopted, unless that meaning is at variance with the intention of the Legislature as shown by the context or such other indicia as the court is justified in taking into account, or creates an anomaly or otherwise produces an irrational result.”

See also *Zambezi Gas Zimbabwe (Pvt) Ltd v N. R. Barber (Pvt) Ltd & Anor* SC 3–20 at 7.

65. According to case law on rules of interpretation, the use of the word “shall” in a statute denotes a mandatory intention by the legislature for the provision to be complied with. In the case of *Shumba and Anor v ZEC and Anor* 2008 (2) ZLR 65 (S) at 80 D-G, this Court held:

“It is the generally accepted rule of interpretation that the use of peremptory words such as “shall” as opposed to “may” is indicative of the legislature’s intention to make the provision peremptory. The use of the word “may” as opposed to “shall” is construed as indicative of the legislature’s intention to make a provision directory. In some instances, the legislature explicitly provides that failure to comply with a statutory provision is fatal. In other instances, the legislature specifically provides that failure to comply is not fatal. In both of the above instances no difficulty arises. The difficulty usually arises where the legislature has made no specific indication as to whether failure to comply is fatal or not.”

66. Given that it is generally accepted that the use of the word “shall” in any enactment is understood as being indicative of the legislature’s intention of making the provision peremptory, it becomes necessary to consider some hallowed principles of interpretation for determining the intended effect of non-compliance with a peremptory statute. There are principles that the courts resort to in order to determine whether or not the legislature intended non-compliance with a provision to be fatal.

67. Thus, in the *Shumba* case *supra* at 80G- 81D, it was stated that:

“Francis Bennion *Statutory Interpretation* submits that the courts have to determine the intention of the legislature using certain principles of interpretation as guidelines. He had this to say at pp 21-22:

‘Where a duty arises under a statute, the court charged with the task of enforcing the statute needs to decide what consequence Parliament intended should follow from breach of the duty.

This is an area where legislative drafting has been markedly deficient. Draftsmen find it easy to use the language of command. They say that a thing ‘shall’ be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the draftsman is not expressed in the statute. Yet the courts are forced to reach a decision.

It would be draconian to hold that in every case failure to comply with the relevant duty invalidates the thing done. So the courts’ answer has been to devise a distinction between mandatory and directory duties. Terms used instead of ‘mandatory’ include ‘absolute’, ‘obligatory’, ‘imperative’ and ‘strict’. In place of ‘directory’, the term ‘permissive’ is sometimes used. Use of the term ‘directory’ in the sense of permissive has been justly criticised. (See Craies *Statute Law* 7 ed 1971 p 61 n 74.) However, it is now firmly rooted.

Where the relevant duty is mandatory, failure to comply with it invalidates the thing done. Where it is merely directory the thing done will be unaffected (though there may be some sanction for disobedience imposed on the person bound). (As to sanctions for breach of statutory duty see s 13 of this Code (criminal sanctions) and s 14 (civil sanctions).)’

Thereafter the learned author sets out some guiding principles for the determination of whether failure to comply with a statutory provision is fatal or a mere irregularity. One of those guiding principles is the possible consequences of a particular interpretation. If interpreting non-compliance with a statutory provision leads to consequences totally disproportionate to the mischief intended to be remedied, the presumption is that Parliament did not intend such a consequence and therefore the provision is directory.’”

68. Similarly, in the case of *Sibanda & Anor v Ncube & Ors; Khumalo & Anor v Mudimba & Ors* SC 158–20 at 15, PATEL JA (as he then was) held that:

“The broad test for ascertaining the true nature of a statutory duty was enunciated more than a century ago in the case of *Howard v Bodington* (1877) 2 PD 203, at 211:

‘..... in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case on that aspect decide whether the enactment is what is called imperative or only directory

A further aspect that may be relevant is the need to distinguish between those persons who are bound to perform the statutory duty and those who might be affected by its performance or non-performance. (See Bennion, *op cit*, at p. 21). In this context, the

extent to which the former are in a position to exercise control over the latter may become a crucial consideration. This point was aptly elucidated in *Montreal Street Railway Company v Normandin* [1917] AC 170, at 174:

‘When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect of this duty would work serious inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.’”

69. These principles must be understood within the context of the law relating to electoral matters in general. In *Hove v Gumbo (Mberengwa West Election Petition Appeal)* 2005

(2) ZLR 85 (S) MALABA JA (as he then was) summarised some of the principles. At pp. 92B – E, it was held that:

“The law governing the manner and grounds on which an election may be set aside must be found in statute and nowhere else. In *Nath v Singh & Ors* [1954] SCR 892 at 895, MAHAJAN CJ said:

‘The general rule is well settled that the statutory requirements of election law must be strictly observed and that an election contest is not an action at law or a suit in equity but is a purely statutory proceeding unknown to the common law and that the court possesses no common law power. **It is also well settled that it is a sound principle of natural justice that the success of a candidate who has won at an election should not be lightly interfered with and any petition seeking such interference must strictly conform to the requirements of the law.**’

About twenty years later, the same principle was reiterated by CHANDRACHUD CJ in *Sahu’s case supra*, where at p 39 he said:

‘The rights arising out of elections, including the right to contest or challenge an election, are not common law rights. They are creatures of the statutes which create, confer or limit those rights. Therefore, for deciding the assertion whether an election can be set aside on any alleged ground, the courts have to consult the provisions of law governing the particular election. They have to function within the framework of that law and cannot travel beyond it.’” (my emphasis)

70. Although this relates to the setting aside of an election, it applies with equal force to setting aside nominations of candidates for the National Assembly constituencies as in the present case.

APPLICATION OF THE LAW TO THE FACTS

71. On the preliminary points on jurisdiction, the court *a quo* correctly observed the principle of *stare decisis*. The *Kambarami* case *supra* was binding on it and once bound, the court could not depart from it. It therefore correctly determined the question of jurisdiction.
72. The issue of the applications *a quo* being disguised applications for review was raised by the appellants. However, a close look at the record of proceedings itself shows that the applications were for a *declaratur* in terms of s 14 of the High Court Act [Chapter 7:06].
73. On the issue of *locus standi*, the court *a quo* correctly found that the respondents had material interests in the matter. We agree with the court *a quo*. The respondents, as registered voters, are allowed by the law to inspect nomination records. See s 46(18) of the Electoral Act. Corollary, this will enable them to take appropriate action or pursue appropriate remedies where necessary.
74. As regards hearsay evidence, the court *a quo* correctly deferred the determination to the merits as it is evidence that requires to be analysed with the totality of submissions. More so considering that in their affidavits, the respondents were also relying on Annexure “B”.

75. On non-joinder the court *a quo* found that CCC was a necessary party but correctly held that the non-joinder was not fatal to the proceedings. Rule 32 (11) of the High Court Rules, 2021 is apposite. It states:

“(11) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

76. The court *a quo* correctly dismissed the point *in limine* on material disputes of fact and correctly relied on the case of *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136 F-G. The court correctly took a robust approach to resolve the issue between the parties.

77. In respect of urgency, the matter being an electoral matter was urgent and it is common cause that the parties agreed to proceed on that basis.

78. The last point being on alleged abuse of court process, we agree with the court *a quo* that the respondents had substantial interest and if that is the position, we cannot allude to abuse of court process.

79. On the merits, the Court makes the following observations:

It is common cause that on the nomination day, the court commenced at 10 am. It is also not in dispute that the designated nomination court was a small courtroom and the nomination officer could only allow 12 to 15 people at a time. The rest of the candidates and/or agents queued outside the courtroom. At 3:55 pm, the nomination officer announced that all prospective candidates were to hand over their nomination papers to the police officer attached to the nomination court.

80. The police officer complied and directed from the end of the queue that nomination papers be handed to the police officer at the door who then handed over the nomination papers to the nomination officer before 4 pm. A reading of s 24(1) and (2) of the Interpretation Act shows that the nomination officer, as a public officer, has the power to employ such appropriate administrative tools to accomplish his duty. See the case of *Shumba supra*. He accepted lodgement of nomination papers within the prescribed time limits in compliance with s 46(6) as read with s 46(7) and 46(8) of the Electoral Act.
81. Evidence from the thirteenth to fifteenth respondents confirms that the nominations lodged on the nomination day were lodged before 4 pm and that Annexure “B” was not an official document indicating the times of lodgement of nomination papers in the nomination court. It appears that the court *a quo* turned a blind eye to the responsible authority’s evidence and relied on the first to twelfth respondents’ evidence which was heavily borrowed from social media and that is hearsay.
82. A close examination of Annexure “B” reveals that it is a submission form without specification as regards what was submitted and to whom. Further, the form only starts recording at 1300 hours and the recordings are randomly captured at different times, some of which were prior to 1300 hours. It was therefore speculative for the court *a quo* to ascribe the unsystematically recorded form as proof of the times of lodgement of nomination papers.
83. The court *a quo* thus erred in dismissing the Electoral Commission’s evidence as regards the use of Annexure “B” when it relied on its own interpretation of the

document as opposed to the evidence presented by the nomination officer and all the other officials who deposed to supporting affidavits. It is important to note that the nomination officer deposed the opposing affidavit on behalf of ZEC and its Chairperson

who had authorised him to do so. His deposition must therefore be understood to be the evidence of ZEC and its Chairperson. (underlining emphasis). In our view, the court *a quo* should have exercised caution in dismissing ZEC's explanation of the form because one cannot lightly dismiss the responsible authority's explanation of the purpose for which the form is used in the absence of cogent evidence to the contrary. It is up to an Administrative Authority to devise administrative tools to function efficiently.

84. In any event, Annexure "B" is not clear. It does not, on the face of it, reflect that it is proof of the time of lodgement of nomination papers with the nomination officer. It is just headed as a submission form with mixed time slots. The sweeping remarks by the court *a quo* to the effect that the thirteenth to fifteenth respondents came up with exculpatory explanations upon realising that they were on trial were unwarranted and can be characterised as unfortunate considering the unreliable hearsay evidence the respondents relied on.
85. Even if we were to consider the facts of the case as deposed to by the first to twelfth respondents that some of the appellants came to the nomination court in time and when their papers were found not to be in order, they were requested to go and correct them, they came back before 4pm. The question of having failed to comply with the 4pm deadline would not arise. Further s 46(8) allows a person who is required to correct his or her papers to do so during adjournments taken within the nomination day. In the circumstances, even if for some of the appellants had to correct their nomination papers

after 4pm, they still lodged them with the nomination officer in compliance with s46 (8) of the relevant Act.

86. We are alive to the fact that an appellate court should be loathe to interfere with factual findings of the trier of fact. See *Mangwende v Zimbabwe Newspapers* SC 71/20. However, in circumstances where the decision of the court *a quo* is not anchored on evidence on record and is based on a wrong principle, interference is warranted.
87. *In casu*, whilst the court *a quo* acknowledged that there was a challenge as regards what exactly happened at the nomination court, on the nomination day it nevertheless proceeded to declare the nomination of the appellants a nullity. The challenge with regard to what occurred at the nomination court emanated from the fact that the first to twelfth respondents were not in attendance. They had no first-hand information. They relied on what they said was awash on social media. Further, whilst being alive to the relevant provisions of the Electoral Act, s 46(6), (7) and (8), and acknowledging that candidates and/or agents could lodge nomination papers with the nomination officer who was mandated by the law to allow those with anomalies to rectify the same, it made a finding against the appellants. At the same time, without any justification for differential treatment, the court *a quo* allowed the nomination of one *Zvikwete Innocent Mbano*'s nomination to stand even though he admitted to having corrected and submitted his corrected nomination papers after 4pm.
88. In the absence of proof on a balance of probabilities the respondents' assertions that the nomination papers of the appellants were filed out of time remains speculative. It

is trite that he who alleges has the onus to prove. See *Tetrad Investment Bank Limited v Bindura University of Science Education & Another* SC 5/19.

89. In the circumstances and in view of the misdirections by the court *a quo* on assessment of the facts and the applicable law, interference by this Court is warranted. Considering this court's decision, the exclusion of the fifth appellant's name in the court *a quo*'s order need not be determined.

90. Regarding costs, they are at the discretion of the Court. We find no reason to depart from the general principle that costs follow the cause.

DISPOSITION

91. It is for these reasons that we allowed the appeals with costs and issued the aforementioned order.



UCHENA JA : I agree

CHITAKUNYE JA : I agree

Tanaka Law Chambers, appellants' legal practitioners in SCB 59/23

Mbidzo, Muchadehama & Makoni, legal practitioners for the appellant in SCB 60/23 and for the sixteenth respondent in SCB

Mathonsi Ncube Law Chambers, legal practitioners for the appellants in SCB 61/23

Dube Legal Practice, legal practitioners for the appellant in SCB 62/23

Cheda & Cheda, legal practitioners for the first to the twelfth respondents in SCB 59/23, the first respondent in SCB 60/23, the first to the twelfth respondents in SCB 61/23 and the first respondent in SCB 62/23

Nyika Kanengoni & Partners, legal practitioners for the thirteenth to the fifteenth respondents in SCB 59/23, the second to the fourth respondents in SCB 60/23, the thirteenth to the fifteenth respondents in SCB 61/23 and the second to the fourth respondents in SCB 62/23