CHARLTON HWENDE HC 2351/20
and
PROSPER CHAPFIWA MUTSEYAMI
and
THABITA KHUMALO
versus
THE SPEAKER OF THE NATIONAL ASSEMBLY
and
PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
and
DOUGLAS TOGARASEI MWONZORA
and
THOKOZANI KHUPE
and
THE MOVEMENT FOR DEMOCRATIC CHANGE-
TSVANGIRAI (MDC-T)

LILIAN TIMVEOS HC 2352/20
versus
THE PRESIDENT OF THE SENATE
and
PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
and
DOUGLAS TOGARASEI MWONZORA
and
THOKOZANI KHUPE
and
THE MOVEMENT FOR DEMOCRATIC CHANGE-
TSVANGIRAI (MDC-T)

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 8 September 2020, 14 October 2020, 20 October 2020 & 1 July 2021

Opposed Court Application

T Biti, A Muchadehama, A Makoni, for the applicants
L Madhuku, A Demo, Chatsanga, for the respondents

KWENDA J: The applicants made separate applications for similar reliefs couched in the following terms: -

1. "The expulsion and termination of the applicants' membership of Parliament on 5 May 2019 is a nullity and is therefore set aside.
2. The declaration made by the fifth respondent of 3 April 2020 and communicated to the Parliament of Zimbabwe, in respect of the applicants' membership in terms of s 129 (1)(k) of the Constitution of Zimbabwe be and is hereby set aside.
3. The respondents, jointly and severally each paying the other to be absolved, must pay the costs of suit on a scale calculated as between attorney and client."

Charlton Hwende, Prosper Chapfiwa Mutseyami and Thabita Khumalo all allege that the Speaker of the National Assembly acted unlawfully in accepting an instruction or purported declaration from a political party, MDC-T, which was not the political party they belonged to at the time of the election that political party being the Movement for Democratic Change Alliance. In other words, the Speaker of the National Assembly acted unlawfully, in accepting a declaration from any other Party other than a declaration from the Movement for Democratic Change Alliance. In announcing the applicants' expulsion, the Speaker of the National Assembly exercised a quasi-judicial function under circumstances where he unlawfully failed to hear the applicants or respect their rights. Further having dealt with the applicants for two and half years as MDC Alliance, the President was estopped and barred from treating the applicants any differently or giving them a new label or name without due process

Lilian Timveos has made similar allegations against the President of the Senate.

All the applicants do not seek any relief against the Parliament of Zimbabwe.

Douglas Togarasei Mwonzora was cited as a respondent in both matters in his capacity as the person who authored the declarations and signed them in his capacity as Secretary General of the MDC-T. Applicants averred that he acted unlawfully and maliciously when he generated the declarations addressed to Parliament because he had no authority from any person including the legitimate organs of the MDC-T, if any. He very well knew that he had no authority to represent the MDC Alliance or anyone for that a matter. In any event having been elected at a congress in October 2014, his term of office as office bearer expired in October 2019.

The Movement for Democratic Change-Tsvangirai (MDC-T) was cited as the political party which, under the direction of Thokozani Khupe acted unlawfully in expelling the applicants without due process and complying with the provisions of any law or its purported

constitution. It therefore made a false declaration on 3 April 2020 which it communicated to Parliament in terms of s 129 (1) (k) of the Constitution of Zimbabwe (Amendment no. 20) Act 2013 purporting to exercise jurisdiction over the applicants when the applicants are not its members but members of the MDC Alliance. It carried out an unconstitutional *coup d'etat* by usurping and giving itself authority over the MDC Alliance party. It breached the fundamental legal position that a political party is a voluntary association whose rights and interest are protected by ss 66,58 and 67 of the Constitution of Zimbabwe.

I consolidated and heard the two cases at one sitting at the instance of the parties' because the causes of action are identical and closely related both in time and occurrence having accepted that it is convenient to consolidate the matters (Order 13 r 92 of the High Court rules, 1971).

The applications are opposed. The respondents raised two points *in limine*. They submitted that this Court has no jurisdiction to deal with these cases because applicants' cause of action common to both cases is based on an allegation that Parliament failed to fulfil its Constitutional obligations in violation of ss 119 and 129 (1) K of the Constitution. The cases therefore fall to be determined exclusively by the Constitutional Court as provided in s 167 (2) (d) of the Constitution. Thokozani Khupe submitted that relief sought is incompetent at law. She also submitted that the Supreme Court resolved the leadership dispute which was rocking the MDC-T in case of *MDC & Ors* v *Elias Mashavira and Ors* SC 56/20. She submitted that the points *in limine* are dispositive of the application.

On the merits the respondents submitted that the applicants' seats in Parliament fell vacant, by operation of the law, when Parliament received communication from the fifth respondent that the applicants had seized to be members of the fifth respondent. The Speaker of Parliament and the President of Senate were required by law to inform Parliament of the vacancies that had arisen. The letter of notification stated that the applicants were members of the fifth respondent and the Speaker of Parliament and President of the Senate simply acted on the letters. There are required to do no more than receiving the declarations and inform the National Assembly and Senate of the occurrence of the vacancies.

The respondents also submitted that the omission by applicants to cite or join, in these proceedings, the political party referred to as the MDC Alliance was fatal to the application because the applicants were members and office bearers of the MDC-T when they voted to Parliament. On 5 August 2017 the MDC-T entered in an election pact with other political

parties of the purposes of contesting the 2018 combined presidential, legislative and council elections. The pact known as the Composite Political agreement, which was submitted with the Notices of Opposition, gave birth to the MDC Alliance. In terms of the Composite Political Agreement the seven political parties forming it retained jurisdiction of their respective individual members in Parliament. Sometime in the year 2020 all the applicants announced that they had ceased to be members of the MDC-T. Douglas Togarasei Mwonzora advised Parliament of end of their membership of the MDC-T. Clause 5:10 (a) of the MDC-T's constitution states that a member who openly declares that he/she is no longer a member terminates his membership by virtue of such declaration.

Jurisdiction

I ruled, *ex tempore,* that this court has jurisdiction over the dispute. Section 175 (1) of the Constitution makes it clear that this court has jurisdiction in Constitutional matters except those within the exclusive jurisdiction of the Constitutional Court. (See s 171 (1) (c) of the Constitution). In terms of s 175 (1) of the Constitution this court has the power to make an order on any impugned conduct of Parliament subject to confirmation by the Constitutional Court. Clearly therefore this court enjoys concurrent jurisdiction with the Constitutional Court regarding any matter arising from the conduct of Parliament notwithstanding the wording of s 167 (2) (d) of the Constitution. The purpose of exclusive jurisdiction is to ensure that matters within the sensitive area of separation of powers are determined at the appropriate level of the Constitutional Court. See *Directors for Life International* v *Spencer of the National Assembly* 2006 (6) SA 416 CC. This is not one such case which is perilously impacting on the delicate issue of the separation of powers. As already stated, the applicants have not impugned any conduct of Parliament. In addition, no relief is being sought against Parliament.

The relief in paragraph one of the draft order

In argument the applicants conceded that they have no cause of action against Parliament, the Speaker of Parliament and the President of Senate in light of the judgment of the Constitutional Court. See *Madzimure & Ors* v *The Speaker of the National Assembly and Ors* CCZ 8/19. I run the risk of plagiarising the whole judgment because it answers all the questions raised by the present application with relation to both reliefs sought by the applicants. The issues traverse a well beaten path.

> 'Section 129(1)(k) of the Constitution relates to a legal process that has its beginning in the relationship between the Member of Parliament and the political party to which he or she belonged at the time he or she was elected to Parliament. The first fact to trigger the s 129(1)(k)

process is cessation of the status of belonging to the political party concerned by the Member of Parliament. Ceasing to be a member of the political party concerned is the main event. The legal effect on the creation of a vacancy in the seat of the Member of Parliament depends on the subsequent events, which are procedural and communicative in nature.

The status of having ceased to be a member of the political party concerned is a matter of fact, the legality of which is determined by reference to the provisions of the constitution of the political party concerned. It may be a fact resulting from a process of expulsion or voluntary resignation. When it occurs, it remains a matter affecting the internal affairs of the political party concerned. It may remain so without any effect on the tenure of seat of the Member of Parliament unless the political party concerned takes the action prescribed under s 129(1)(k) of the Constitution and communicates the fact that the Member of Parliament has ceased to belong to it to the person appointed to receive the communication.

For the communication to have the legal effect it is required by the Constitution to have, it must not only take a specific form and contain a specific message, it must be addressed to a specific official. The content of the message communicated should be the fact that the Member of Parliament who is specifically identified by name has ceased to be a member of the political party concerned of which he or she was a member when he or she was elected to Parliament.

The fact that the Member of Parliament has ceased to be a member of the political party concerned must be communicated to the Speaker or the President of the Senate by means of a written notice that takes the form of a declaration. The official who signs the written notice must ensure that it declares that the Member of Parliament has ceased to be a member of the political party concerned. A declaration of fact is considered to be a solemn statement of truth that must have the legal effect designed to flow from it. The receipt by the Speaker or the President of the Senate, who are the only officials designated to receive the written notice complying with these procedural and substantive requirements of the written notice envisaged under s 129(1)(k) of the Constitution, grants to the written notice the legal effect it is intended to have.

The purpose of the written notice by the political party concerned, disclosing to a third party a fact relating to its internal relationship with a member, would have been to reclaim the seat in Parliament won by the Member of Parliament on its ticket. Section 129(1)(k) of the Constitution makes it clear that the legal effect of the receipt by the Speaker or the President of the Senate of a written notice complying with all the formal and substantive requirements is to create a vacancy in the seat in Parliament occupied by the Member who has ceased to be a member of the political party of which he or she was a member when elected to Parliament.

A number of considerations flow from the effect of s 129(1)(k) of the Constitution. It is the fact of the cessation of membership of the political party and its communication to the Speaker or the President of the Senate in the form and manner prescribed that creates a vacancy in the seat occupied by the Member who will have ceased to be a member of the political party concerned.

A vacancy in the seat in Parliament is not created by an act of the Speaker or the President of the Senate. It is created as a direct legal consequence of events, the origin of which lies outside Parliament. Termination of the tenure of the right of the Member of Parliament to occupy the seat is what the Constitution, through s 129(1)(k), says must happen when all the procedural and substantive requirements of the provision have been met.

The origin of the act concerned lies in the relationship between the political party concerned and the Member of Parliament who was its member when he or she was elected to Parliament.

> If the cessation of the membership of the political party concerned was by expulsion, it is that act of expulsion that has the potential of creating a vacancy in the seat occupied by the Member of Parliament. The potential consequence of the act materialises when it is communicated to and received by the official appointed to receive it in the form and with the substance prescribed. Similar consequences will follow if the termination of the membership of the political party is by resignation.
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> The Speaker or the President of the Senate would have had no control over the events affecting the relationship between the Member of Parliament and his or her political party. A Member of Parliament whose termination of the membership of a political party is by expulsion is not expelled from Parliament. He or she is expelled from the political party.
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> The Speaker or the President of the Senate cannot be accused of expelling a Member from Parliament whose seat becomes vacant because his or her right to represent the political party of which he or she was a member when elected to Parliament would have been terminated by operation of law.
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> The accusation against the Speaker and the President of the Senate of having expelled the applicants from Parliament shows a failure by the applicants to understand the role of the Speaker or the President of the Senate in the process prescribed by s 129(1)(k) of the Constitution leading to the creation of a vacancy in the seat of a Member of Parliament. The accusation also suggests that the Speaker or the President of the Senate is required to involve himself or herself in some quasi-judicial inquiry into the conduct of the Member of Parliament in which he or she finds the Member guilty of some form of misconduct for which expulsion from Parliament becomes the penalty. The role of the Speaker or the President of the Senate in the process leading to the creation of a vacancy in the seat of a Member of Parliament in terms of s 129(1)(k) of the Constitution is facilitative. It is not judicial in nature."

The concession, which was properly made disposed of paragraph 1 of the draft order. Actually the draft order was not properly cast. The seat of a member of parliament becomes vacant consequent to a declaration in terms of 129 (1) k of the constitution. In other words, the relief sought in paragraph 1 is consequential to the relief sought in paragraph 2 'e' an order setting aside the declaration. Mr *Biti* rightly conceded that much because once the declaration issued by the MDC-T has been successfully challenged in this court, it follows that no vacancy was created in Parliament and that would be the end of the matter.

Relief sought in paragraph 2 of the draft order

The case of *Madzimure & Ors* v *The Speaker of the National Assembly and Ors* CCZ 8/19 is still relevant. The relief sought in paragraph 2 is an order setting aside, the declaration issued by the MDC-T. The declaration was a result of an internal process in the affairs of the MDC-T. This court may only set aside the declaration in the exercise of its powers of review. This is not an application for review. The application before me is named an application for a declarator. In a proper application for review of internal proceedings conducted by the MDC-T there would be no need to cite the Speaker of the National Assembly, The President of the

Senate and Parliament. This application focuses on what happened in Parliament. A declaratory order is an order by which a dispute over the existence of some legal right or obligation is resolved. See Herbstein and van Winsen. *The Civil Practice of the High Court of South Africa*. Any litigant who approaches this court for a declaratory order must locate his /her cause of action within the four corners of that definition. Actually there is an inconsistency between the description and paragraph 2 of the draft order. Paragraph 2 of the draft order does not seek a declaratory order by an order setting aside fifth respondent's declaration. The application was therefore fatally ill conceived and must fail.

Costs must follow the result I am not inclined to award costs on a legal practitioner client scale because this is a case of national importance.

In the result I order as follows:

The applications be and are hereby dismissed with costs.

Tendai Biti Law Chambers & Mafume Law Chambers applicants' legal practitioners
Chihambakwe Mutizwa & Partners, Mwonzora & Associates & Madhuku & Associates respondents' legal practitioners