PATSON MURIMOGA
and
GEORGE RICE
versus
MORGAN RICHARD TSVANGIRAI N.O
and
NELSON CHAMISA
and
ELIAS MUDZURI
and
THE NATIONAL CHAIRPERSON OF MOVEMENT FOR DEMOCRATIC CHANGE
and
THE MOVEMENT FOR DEMOCRATIC CHANGE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 16 February 2017 and 20 September 2017

Opposed matter

Z Macharaga, for the applicants
T Mpofu, for the respondents

MAKONI J: This is an application for a declarator in the following terms:

1. "The appointment of the 2nd and 3rd respondents as Deputy Presidents of 5th Respondents by the first respondent's Constitution be and is hereby declared as null and void.
2. The conduct of the first respondent of appointing 2nd and 3rd respondents as Deputy Presidents of the 5th respondent is in violation of the 5th respondent's Constitution, be and is hereby declared null and void.
3. The respondents be and are hereby ordered jointly and severely the one paying and the other absolved to pay costs of suit on legal practitioner – client scale."

The background of the matter is that on the 15th of July 2016, the first respondent, in his capacity as the President of the fifth respondent, appointed the second and third respondents as Deputy Presidents of the fifth respondent. The applicants made the present application seeking to

challenge the appointment on the basis that it was ultra vires the Constitution of the fifth respondent. The applicants seek that the court declares the appointment null and void.

The applicants aver that the appointment of the second and third respondents as deputy presidents was a violation of the party's Constitution in that the Constitution of the party provides that a Deputy President shall be elected directly by congress from nominations made by provinces not by the President of the party. They further averred that the appointment by the President violated the right of the members of the fifth respondent to participate in the nomination of a Deputy President from their provinces.

The further averred that the appointment is void *ab initio* in that the National Council is not an elective forum were elections are done but at congress. There was no congress that appointed the second and third respondents as Deputy Presidents of the fifth respondent.

The application is opposed by respondents. They took three points in *limine,* that the applicants do not have *locus standi* to bring the present proceedings, the constitution presented by the applicants is the wrong constitution of the fifth respondent and lastly that the applicants did not exhaust the domestic remedies available to them.

On the merits the respondents aver that article 9 of the Constitution empowers the President to appoint the Deputy Presidents with the instruction and guidance of the National Council and National Executive. In *casu* no member of either the National Council or National Executive raised issues with regards to the appointment of the second and third respondents as Deputy Presidents of the fifth respondents, in actual fact the National Council endorsed the appointment.

I will deal with the points in *limine* first.

LOCUS STANDI

Mr *Mpofu* for the respondents, submitted that the applicants do not have *locus standi*, in that when the application was made the applicants were not members of the fifth respondent. The application is not valid.

He further submitted that proof of membership presented by the applicants is inadequate. Membership to the fifth respondent is an elaborate process entailing an application and signing of a solemn declaration form of the party's Constitution. The Constitution of the fifth respondent requires signing of the declaration as proof of acceptance of membership and in *casu* none of the applicants filed a solemn declaration as proof of their membership.

He further submitted that the disputed and inauthentic subscription receipt is not enough evidence of membership particularly where it was obtained after the act complained of. The applicants failed to produce an affidavit from the secretary of the province from which they purport to belong in support of their membership to the fifth respondent.

Mr *Macharaga,* contended that the applicants by being members of the fifth respondents, do have *locus standi*. The first applicant avers that he was a well-known musician advancing the political interests of the fifth respondent and that the fifth respondent's official wrote several letters to members of the public confirming that the first applicant was a member of the fifth respondent. He submitted that the second applicant is a provincial executive member of the fifth respondent. The applicants tendered their membership cards as proof of their membership to the fifth respondent.

He further submitted that as members of the fifth respondent the applicants have a real substantial interest in the way the first respondent appointed the fifth respondent's leadership. They have an interest in the fact that the leaders of the fifth respondent emerge from the constitution not from the first respondent.

It is settled that before a party approaches the court he must have a substantial and direct interest in the matter.

The learned authors in Erasmus *Superior Courts Practice* Juta & Co Ltd 2004 VOL 1 p 308 state:

> "An applicant under this sub-rule must show, in order to establish *locus standi* that he or she has an interest in the subject-matter of the judgement or order sufficiently direct and substantial to entitle him or her to have intervened in the original application upon which the judgment was given or granted. He or she must have a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court."

Further, the interest must be a legal as opposed to a mere financial interest or some other interest. See *Zimbabwe Teachers Association & Ors* v *Minister of Education & Culture* 1990 (2) ZLR 48 (HC) at 53H-I where it was held:

> "… an interest in the right which is the subject matter of the litigation and … not thereby a financial interest which is only an indirect interest in such litigation."

The founding affidavit should specifically make averments which address the issue of the legal interest. The learned authors Jones and Buckle in *The Civil Practice of the Magistrates' Courts in South Africa* Vol II- 10th Edition- Juta Law at r 28-4 state:

> "It is not sufficient for the applicant merely to state that he has an interest in the action: he must produce some *prima facie* proof thereof. He must make such allegations as would show that he has a prima facie *case* that his application is seriously made, and is not frivolous."

In *casu*, it was incumbent upon the applicants to establish that they had a direct and substantial interest in the matter. They asserted that they are full members of the fifth respondent and attached membership subscription receipts. In respect of the first applicant, the subscriptions were paid on 19 July 2016. The receipt indicates that the payment was for subscriptions for 2016.

The second respondent produced a membership card to prove that he was a member. The fifth respondent's process of membership entails an elaborate process which includes an application, admission and signing of a solemn declaration which is Annexure A to the party's constitution. The solemn declaration signifies acceptance as a member of the party. That is the proof of membership.

In casu, none of the applicants filed the solemn declaration to show that they were accepted as members. Furthermore, they did not file an affidavit from the secretary of the provinces from which they purport to belong to support their contention of membership.

The subscription receipt and the membership card are not sufficient proof of membership to the fifth respondent. Such can easily be forged. In any event the first applicant paid subscriptions for the year 2016 on 19 July 2016 after the cause of action had taken place on 15 July 2016.

As correctly submitted by Mr *Mpofu,* evidence has not been placed before the court to prove membership and it must be observed that the rule in application proceedings is that an application stands or falls on the founding affidavit. See *Moyo & Ors* v *Zvoma N.O Anor* SC 28/10.

See also the learned authors Hebstein and Van Winsen *The Civil Practice of the High Courts of South Africa* 5th Ed at p440 where they state:

> "The general rule which has to be laid down repeatedly is that an applicant must stand or fall by the founding affidavit and the facts alleged in it, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated there, because those are the facts that the respondent is called upon either to affirm or deny."

From the above, it is clear that the applicants were not members of the fifth respondent at the time they instituted these proceedings. The issue then is what is their standing in this matter which is entirely premised on the provisions of the fifth respondent's constitution? Could they approach the court regarding violations of the fifth respondent's constitution?

It is trite that they cannot do so. The provisions of a constitution of a voluntary association, which fifth respondent is, are to be construed in the same manner as the articles of association of a company. See *Jacobs* v *Old Apostolic Church of Africa and Anor* 1992 (4) SA 172; *Yiba and Ors* v *African Gospel Church* 1999 (2) SA 949 (C).

One of the rules that apply in the interpretation of articles of association of a company is that same are a contract between the company and its members only. Non-members cannot place any reliance on the provisions of those articles they have no privity to. See *Miller* v *Miller 1963* R & N 60, 1963 (2) SA 199.

The applicants find themselves in this situation. They are aliens to the fifth respondent and its constitution. They cannot seek to place reliance on the provision of the constitution of the fifth respondent as a basis for their claim.

The applicants cannot competently bring the present proceedings before this court. As a corollary to the above findings, the applicants have no cognisable cause of action. They premised their application on an instrument which they have no relationship with.

I will therefore uphold the point in *limine.* Assuming l am wrong l will go on to consider the other points in *limine*.

FAILURE TO EXHAUST DOMESTIC REMEDIES

Mr *Mpofu*, submitted that the matter is improperly before the court in that the Constitution of the fifth respondent provides that any dispute over the interpretation of the Constitution shall be referred for arbitration before the Appeals Tribunal. In support of his submissions he referred to the case of *Kudakwashe Bhasikiti Chuma* v *R.G Mugabe N.O & Anor* HH609-15.

On the other hand, the respondents argued that the applicants did not quote the actual provision of the Constitution of the fifth respondent which provides the internal remedies that must be exhausted before approaching this court.

It is settled in our law that were domestic remedies are capable of providing effective redress in respect of a complainant, a litigant should first exhaust those domestic remedies unless there are good reasons for not doing so. See *Munyira* v *Secretary for Education & Public Service Commission* SC214/1998; *Chikonye & Anor* v *Peterhouse* 1999(2) ZLR 329(S) and *Djordjevic* v *Chairman, Practice Control Committee, Medical & Dental Practitioners Council on Zimbabwe* 2009 (2) ZRL 221 (H).

Relating specifically to parties who are members of an association, which is contractual , BHUNU J (as he then was) in *Bhasikiti supra*, which is on all fours with this matter, had this to say on p.4 of the cyclostyled judgment:

> "The other reason why domestic remedies are best suited to determine this case, is that the matter has to do with voluntary association of free human beings in a democratic environment. While the Constitution confers the right of association on the applicant, he can only associate with those who want to associate with him. The parties are associated for a common purpose of which domestic remedies are best suited to determine whether or not it is in the best interest of the association for the relationship to endure. That determination can only be made in-house and not by strangers."

Earlier on p.2, BHUNU J opined:

> "It is clear that the party Constitution provides the same remedy that the Applicant is seeking in this court in the form of a review. When two or more adults of sound mind come together and consent to a lawful agreement that agreement is sacrosanct, binding and enforceable. In the absence of any cogent and valid reason as to why a party should not be bound by his free volition the courts will always lean in favour of then fulfilment of the parties' agreement rather than its abrogation. When the applicant joined ZANU PF he freely and voluntarily elected to be bound by its Constitution. He therefore stands fully bound by the part constitution until he has exhausted the remedies provided in that constitution."

Article 14 of the respondent's Constitution tendered before this court clearly provides an elaborate process by which the applicants could have asserted their unhappiness. The process avails internal remedies which the applicants would have made use of before approaching this court. The applicants have not shown good cause why they opted to approach this court when there is a procedure in the constitution designed to address their unhappiness. See *Bhasikiti supra* p.4 of the cyclostyled judgment where BHUNU J stated:

> "The exhaustion of domestic remedies before approaching the courts is a well-known administrative law principle. The mischief behind the principle is to avoid clogging the courts with matters that can be resolved in-house at shop level without the involvement of strangers."

As correctly submitted by Mr *Mpofu*, the applicants did not make use of the domestic remedies available to them. It is clear that the fifth respondents' constitution provides the same remedy being sought by the applicants in this court. For the foregoing reason, l conclude that the applicants prematurely approached this court without exhausting domestic remedies available to them.

I will therefore uphold the point in *limine.*

APPLICATION BASED ON THE WRONG CONSTITUTION

Mr *Mpofu*, contended that the constitution relied upon by the applicants is not the correct constitution of the fifth respondent. He further submitted that the Constitution of the fifth respondent has to be validated by the National Council and signed by the President and such is not the case with that alien document attached by the applicants.

Mr *Macharaga,* on contrary submitted that the constitution attached by the applicants is the constitution which was in force when the cause of action arose. He avers that the constitution submitted by the respondents is a new constitution which was considered by the National Council on 3rd of August after the cause of action arose.

Mr *Macharaga,* however submitted that the dispute can still be resolved by looking at the first respondents' constitution.

What is clear from the constitution attached by the applicants is that it is not validated by the National Council and signed by the President of the 5th respondent. The applicants have therefore, relied on the wrong document for their claim that the 5th respondent's constitution was breached.

In view of the above, l will uphold the point in *limine.*

In view of my findings in respect of the points *in limine,* it will not be necessary for me to determine the merits of the matter.

I will therefore make the following order:

1. The application is dismissed with costs.

Mugiya & Macharaga Law Chambers, applicant's legal practitioners.
Atherstone & Cook, respondent's legal practitioners