

MATHEW SIBANDA

And

ECHEM NKALA

And

GEDION DLAMINI

And

EARNEST NDLOVU

And

MILDRED MKANDLA

Vs

ZIMBABWE AFRICAN PEOPLES UNION [ZAPU]

And

SIBANGILIZWE NKOMO

And

DERECK KATSENGA.

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J.

BULAWAYO 12, 13, 18, 22, 26 MARCH & 21 NOV. 2024.

Civil Action

L. Mcijo for the Plaintiffs.

P. Butshe-Dube for the Defendants.

NDLOVU J:

INTRODUCTION.

The plaintiffs are all former members of the 1st Defendant. At some point, they held various positions within the Executive of the 1st Defendant for Matabeleland South Province. The 1st

Defendant is a political Party and as such is a universitas capable of being sued in its name and the 2nd Defendant is its current President. The 2nd Defendant's nomination and subsequent election to the presidency of the 1st Defendant at the 1st Defendant's Elective Congress in October 2021 has given birth to this litigation.

RELIEF SOUGHT

Plaintiffs seek to nullify the nomination and subsequent election of the 2nd Defendant to the 1st Defendant's presidency. They also seek the striking off of section 8:19 of the 1st Defendant's Constitution, which forbids members from approaching the courts without the leave of the 1st Defendant's National Executive Committee [NEC]. It is the claim by the five Plaintiffs that the 2nd Defendant did not qualify for nomination as he did not meet the criteria required for one to be elected president. According to the Plaintiffs, even though the 2nd Defendant joined the Party in 2010, he ceased to be a member in 2011 when he allegedly did not renew his membership card by not paying his subscriptions. He rejoined the party in 2019 by obtaining a new card. Therefore by 2021, he did not meet the 5-year membership threshold set by the National Peoples Committee for presidential candidates. They also claim that section 8:19 is unconstitutional.

On the other hand, the two Defendants argue that the 2nd Defendant was eligible to stand for nomination for president of the 1st Defendant because he had been a member of the 1st Defendant since 2010 and his membership was primarily with Mahetshe Branch of the 1st Defendant in Matobo North. They further argue that the Plaintiffs should have exhausted domestic remedies before approaching the courts and that section 8:19 is constitutional.

ISSUES

The 4 issues referred to trial were as follows:

- 1. Whether or not the 2nd Defendant was a member of the 1st Defendant over 5 years at the time of his nomination in June 2021.***
- 2. Whether or not the 2nd Defendant was eligible to stand for election as a candidate for the presidency of the 1st Defendant.***

3. *Whether or not section 8:19 of the 1st Defendant's Constitution violates the Plaintiffs' rights enshrined in the Constitution of Zimbabwe.*
4. *Whether or not the Plaintiffs exhausted domestic remedies enshrined in section 8:19 of the 1st Defendant's Constitution before issuing summons.*

EVIDENCE.

The evidence is a substantially common cause. We thus turn to resolve the issues.

Whether or not the 2nd Defendant was a member of the 1st Defendant over 5 years at the time of his nomination in June 2021.

Three of the five plaintiffs testified. They were not consistent on this point. According to the 1st plaintiff, once a member fails to pay his subscription fees he automatically ceases to be a member of the 1st Defendant. He conceded that membership of the 1st Defendant is branch-level based. He never checked the Mahetshe Branch register. The 5th plaintiff testified substantially in line with the 1st plaintiff adding that at some point she was the Provincial Secretary, Matabeleland South and used to process membership names. She does not recall seeing the 2nd Defendant's name in the registers. It was her evidence that the 2nd Defendant was nominated by someone in Matobo North while according to her, Mahetshe is in Matobo South. It was later established that Mahetshe Branch falls under Matobo North. Like the 1st plaintiff, she did not check the Mahetshe Branch Register. She insisted that the 2nd Defendant's membership lapsed in 2011.

Mr, Earnest Ndlovu was eloquent in his testimony. He told the court that at one point he was the Provincial Secretary of the 1st Defendant in Matabeleland South and that during his tenure in that portfolio, he never saw the 2nd Defendant. He testified that one's membership does not lapse due to failure by one to pay his membership subscriptions. He however suspected forgery surrounding the 2nd Defendant's card owing to the poor management of the cards within the party at the time. Like the other two plaintiffs who testified earlier than him, he too conceded the fact that he did not check the Mahetshe Membership Register.

The 1st and 5th plaintiff could not reconcile their evidence with a common cause fact that at the Elective Congress members who were in arrears with their subscriptions were allowed to settle their arrears and in doing so regularized their standing within the 1st Defendant and

went on to participate in the electoral processes. Neither of them drew the Court's attention to a particular clause in the 1st Defendant's Constitution dealing with or supporting their assertion regarding the lapsing of membership on account of non-payment of subscriptions. There is none. Their failure to point to a clause and the fact of allowing members in arrears to pay up their arrears and put in order their standing on the eve of the congress served to buttress the evidence of the 4th plaintiff where he said non-payment of subscriptions does not affect one's membership of the party. 2nd Defendant's membership did not lapse in 2011. He joined in 2010. Whatever he did about paying subscriptions between 2012 and 2019 is immaterial. He was a member for over 5 years and in good standing by June 2021 when he was nominated.

The three plaintiffs who testified were tightly united in their view that the 2nd Defendant was not a member of the 1st Defendant for five continuous years and in so doing they spoke to the 2nd issue to be resolved. With the finding I have made on the 1st issue, the second issue falls away. The 2nd defendant was eligible to avail himself for election into the office of president of the 1st Defendant.

I however find it necessary to accord justice to Earnest Ndlovu gripe with the nomination of the 2nd Defendant. Earnest told the Court that the 2nd Defendant's nomination, in his view, did not bring political capital to the Party owing to his lack of visibility in Party activities. In my view that is a political argument for political combat better suited for Congress and not the Courtroom.

Whether or not Section 8:19 of the 1st Defendant's Constitution violates the Plaintiffs' rights enshrined in the Constitution of Zimbabwe.

The 1st Defendant is a *universitas*. It is a voluntary organization. Its members are glued together by its Constitution. Membership to it is voluntary and so is vacating that membership. It has a right to control its internal processes. Section 8:19 provides for a process to be followed before one takes the Party to Court. It does not bar the Party members from taking the Party to Court but provides for a procedure to be followed. Even if it were to be taken that the laying down of that procedure is onerous and undemocratic on the face of it, limitation of a right is not uncommon in a democracy. It would be unconstitutional had it barred its members from taking the Party to court. It does not.

Section 8:19 of the 1st Defendant's Constitution is therefore Constitutional.

Whether or not the Plaintiffs exhausted domestic remedies enshrined in Section 8:19 of the 1st Defendant's Constitution before issuing summons.

From the evidence on record, the Plaintiffs did not exhaust the domestic remedies provided for in the 1st Defendant's Constitution. However, it is not that they did not try. The evidence on record exhibits a draught of zeal on the part of those in charge of the domestic mechanisms to seriously engage their disgruntled colleagues over their grievances. Even lawyers for the Plaintiffs wrote to the NEC of the 1st defendant and there was no response to their letter. In civilized societies and democracies, one responds to a letter written to them, even if it is to acknowledge receipt of the letter only. The conduct of responding to letters is an act of decency. The plaintiffs were forced by the circumstances they found themselves in, to come to court. This calls for an order that spares them the agony of costs.

This issue however is no longer of a moment. The fact that the matter was referred to trial at the pre-trial conference should have been an indicator to the parties to drop the issue. Courts are reluctant and slow to close their doors to anyone aggrieved. The parties have been heard.

DISPOSITION

The Plaintiffs' claim is dismissed with no order as to costs.

NDLOVU J

Liberty Mcijo and Associates, plaintiffs' legal practitioners.
Mathonsi Ncube Law Chambers, defendants' legal practitioners.