INNOCENT GONESE
and
LYNETTE KARENYI
and
JASMINE TOFFA
and
JAMES CHIDAKWA
and
ALLAN MARKHAM
and
MIRIAM MUSHAYI
and
DICKSON UNGANAI TARUSENGA
and
REUBEN CHIKUDO
and
SUSAN MATSUNGA
and
ENOCK MURAI
and
SETTLEMENT CHIKWINYA
and
STELLA NDLOVU
and
COSTA MACHINGAUTA
and
GODFREY KARAKADZAYI SITHOLE
and
SIBONILE NYAMUDEZA
and
REGAI TSUNGA
and
JAMES SITHOLE
and
WILIAS MADZIMURE
versus
SPEAKER OF THE NATIONAL ASSEMBLY N.O
and
PRESIDENT OF THE SENATE N.O
and
THE CLERK OF PARLIAMENT
and
PARLIAMENT OF THE REPUBLIC OF ZIMBABWE
and
CHAIRPERSON OF THE PRIVILEDGES COMMITTEE N.O.

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17 July and 24 July 2020 and 8 October 2021

Urgent Chamber Application

A Muchadehama, for the applicants
K Tundu, for the respondents

CHITAPI J: The eighteen applicants were elected Honourable members of the Parliament of Zimbabwe which is cited as fourth respondent. The applicants were elected in various electoral constituencies of Zimbabwe under the Movement for Democratic Change – MDC-Alliance for the life of the current Parliament that runs from 2018 to 2023. The applicants base their cause to petition the court on the facts and allegations deposed to in the affidavit of the first applicant, Honourable Innocent T Gonese. The rest of the seventeen applicants each deposed to an affidavit verifying the cause of action and confirming that they gave the first applicant authority to depose to the founding affidavit on their behalf.

The first respondent is the Speaker of the National Assembly. He is the head of Parliament (third respondent). He exercises the functions of that office as provided for in the Standing Orders of Parliament as recorded in ss 135 and 139 of the Constitution. The applicants averred that the first respondent in the exercise of his functions made certain rulings which impact on the issues arising in the applicants' complaint or cause of action.

The second respondent is the Clerk of Parliament (third respondent) in citation. The Clerk of Parliament is appointed in terms of s 154 of the Constitution. The Clerk of Parliament, subject to Standing Orders is the official responsible for the day to day administration of Parliament. He or she exercises administrative power under the central and supervision of the first respondent. The applicants cited the second respondent as an interested party in that they alleged that he is the one who authored correspondence directed at the applicants. The applicants averred that, the correspondence gave rise to the issues that inform this application.

The third respondent is the Parliament of Zimbabwe. It is created by s 118 of the Constitution. The constituent organs of the third respondent are the Senate and the House of

Assembly. The role of the third respondent is set out in s 119 of the Constitution. The provisions of s 119 of the Constitution read as follows:

> "**Role of Parliament**
>
> (1) Parliament must protect this constitution and promote democratic governance in Zimbabwe.
> (2) Parliament has power to ensure that the provisions of this Constitution are upheld and that the State and all institutions and agencies of government at every level act constitutionally and in the national interest.
> (3) For the purposes of subsection (2), all institutions and agencies of the State and government at every level are accountable to Parliament."

The nature of the cause of action that inform the basis of this urgent application which the applicants filed in this court are fairly straight-forward. The applicants averred that a motion was moved in Parliament for the setting up of a Privileges Committee to investigate the conduct of MDC-Alliance Party affiliated Honourable members of the National Assembly. The applicants attached as annexure "A", an extract from the Hansard of 14 November 2019 on deliberations of the National Assembly. I do not intend to go into the matters raised in so far as they inform the background of this application in any great detail because of the issues on which this judgement is based.

From my reading of the Hansard on the deliberations which went on in the National Assembly, Honourable members of that body raised issues concerning the alleged disrespect to His Excellency, The State President, shown by the members of the opposition which would encompass the applicants. It was averred by Honourable members who contributed in the deliberations that the members of the opposition were not acting in the national interest by not recognizing the President as such yet the Constitutional Court had duly made a decision pronouncing the validity of the President's election and declared the current President, His Excellency E D Mnangagwa duly elected to the position of the Head of State and Government and he was sworn into office. The debate also involved an alleged disrespectful behaviour by members of the opposition exhibited on four occasions wherein they refused to rise to their feet which is considered a mark of respect upon the entry of the President into Parliament as per tradition or custom and practice. The members of the opposition were alleged to have again in a sign of disrespect, boycotted proceedings in which the President was making a presentation, only returning into the chamber after the President had left. It was alleged that the first respondent had upon the alleged disrespectful behaviour of the opposition members of

boycotting the President, ruled that they be not allowed back into the chamber and that their allowances for the day be docked or forfeited.

There were other allegations made that the opposition members had stood up when the National Anthem was played and immediately left the chamber when the President commenced his address to the House. An Honourable member of the third respondent, one, captured as HON. TOGAREPI then moved for the establishment of a Committee on Privileges to be constituted for purposes of investigating whether or not the conduct of a committee on privileges to be constituted for purposes of investigating whether or not the conduct of the opposition constituted contempt of Parliament and to come up with "corrective punitive measures". The member requested the first respondent to rule on the matter.

The first respondent ruled that following the presentation by HON. TOGAREPI, a *prima facie* case for breach of privilege leading to contempt of Parliament had been made out. In consequence of the ruling. HON. TOGAREPI further moved for the committee of standing rules to appoint a Privileges Committee to investigate the matter of the conduct of the opposition members of Parliament and report to Parliament. The first respondent then directed that the committee on standing rules and orders should meet on the following day and deliberate on the constitution or set up of the Privileges Committee and the work out the terms of reference of the committee.

The next development was that at a sitting of the third respondent on 3 December 2019, the first respondent announced the names of nine Honourable members of that House as having been nominated to serve on the Privileges Committee by the committee on standing rules and orders. The first respondent also announced the terms of reference of that committee. I consider it necessary for purposes of its judgment to set out the terms of reference which were set: They read as follows form annexure D to "the founding affidavit:

> "1. To investigate the conduct of Honourable members of Parliament of MDC- A party in consecutive instances whereby they:
> a. Did into rise for his Excellency; the President
> b. Walked out of Parliament on his Excellency the President; and
> c. Did not bother to attend Parliament whenever his Excellency the President intended Parliament.
> 2. To establish whether such conduct as outlined in number 1 (a); (b) and (c) above constitutes contempt of Parliament.
> 3. Any other incident that may arise from the investigation; and finally
> 4. To report to its findings and recommendation to the National Assembly by 28 February 2020"

The terms of reference of the Privileges Committee were there clearly or explicitly set out as above quoted.

Following the appointment of the Privileges Committee and the setting out of the committee's terms of reference as aforesaid, the applicants were advised through telephone text messages sent to them in January 2020 advising them of the setting up of the [Privileges Committee and that the committee had commenced investigations. There were follow up standard worded letters which were subsequently written by the third respondent to each of the applicants inviting them to appear before the committee which had been set up to enquire into the conduct of the applicants. The letters were written on 7 July 2020. The applicants succinctly summarized the purport of the letters in para 52 of the founding affidavit as follows:

> "52. On the 7th of July 2020, the 2nd respondent wrote to the applicants inviting them to appear before the privilege committee on the 14th July 2020 to answer to an enquiry into allegations of misconduct levelled against them by the respondents, emanating from the official opening and State of the Nation Address held on the 18th September 2018, the 2019 Budged presentation held on the 22nd of November 2018; the supplementary budget presentation held on the 1st of August 2019, the official opening and State of the Nation address held on the 1st October 2019 and the 2020 Budged presentation held on the 14th of November 2019 find some of the notification letters marked as Annexure"K1 – K8".

In para 53 of the founding affidavit, the applicants averred as follows:

> "53. When we received notices of the hearings on the 7th of July 2020, we were taken aback, as we reasonably expected the hearings to await a decision in case number HC 2922/20, which has already progressed with pleadings having been filed."

As the court is privy to its own records and can refer to a record if necessary, I considered it necessary to pull out the record HC 2922/20 referred to. It showed that the respondents therein had filed a notice of opposition on 26 June 2020. If there is doubt that the court can refer to its records, it was stated by the Supreme Court, per MCNALLY JA in the case of *Mhungu* v *Mtindi* 1986(2) ZLR 171 at p 173A-B as follows:

> "It seems clear from the judgment in which the learned judge *a quo* granted summary judgment that he made reference to the pages in case no. HC 3406/84. In so doing he was undoubtedly right. In general the court is always entitled to make reference to its own records and proceedings and to take note of their contents….."

What the records show is that the applicants filed case no. HC 2922/20 on 12 June, 202. The respondents filed a notice of apposition on 26 June, 2020. The current application was filed on 14 July 2020, just over 30 days after the filing of HC 2922/20. It is important therefore to consider the relief which was sought in case no. HC 2922/20 as set out in the draft order. The draft order reads as follows in material particular:-

"**IT IS HEREBY DECLARED THAT:**

1. Applicants are entitled to enjoy their political rights against any person including the Head of State, whether within or outside the precincts of Parliament.

2. Applicants are entitled to, during the course of any investigation against them, to be advised of the specific statutory provision proscribing the conduct alleged against them as constituting contempt of parliament.

3. Applicants are entitled to appear before an *ad hoc* committee which reflects the political composition of Parliament and not one that is packed with their political opponents as that would violate their right to a fair hearing.

4. Applicants are entitled to equal respect and follow through of the motions they raise in parliament on the same pedestal as their ZANU PF counterparts.

5. Applicants are not obliged to attend each and every session of parliament, provided that they do not exceed twenty-one consecutive sitting of parliament without lawful excuse.

CONSEQUENTLY, IT IS ORDERED THAT:

6. The setting up on Privileges Committee in circumstances where applicants were exercising the political rights is a violation of section 67 of the Constitution and is accordingly set aside.

7. Further, and in any event, the current investigations into Applicants' conduct by the *ad boc* Priviliges Committee of Parliament, as set out in the Hansard Report of 3 December 2019 violates Applicants' right to a fair hearing and is accordingly set aside.

8. Further, and in event, the composition of the Privileges Committee so set up against applicants on 3 December 2019, contravenes Order 24(2) as read with Order 18(1) of the Standing Rules and Orders of Parliament as further read with section 139(4) of the Constitution of Zimbabwe. Accordingly, purported Priviliges Committee against Applicants is hereby declared null and void.

9. The costs of this Application shall be borne by the Respondents, jointly and severally, the one paying the other to be absolved."

The quoted relief in case no. HC 2922/2020 must be compared to the relief set out in the current application because the current application is intended to protect and regulate the conduct of the parties pending the determination of case no. HC 2922/20. The applicants seek relief set out as follows in the draft provisional order to the current application:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
> 1. Pending finalisation of case number HC 2922/20, the Respondents cannot convene or causing the convening of hearings in to the 1st to 18th Applicants' conduct by the *ad-hoc* Priviliges Committee.
>
> 2. The costs of this Application shall be borne by the Respondents, jointly and severally, the one paying the other to be absolved.
>
> INTERIM RELIEF GRANTED:
>
> 1. Pending confirmation or discharge of the provisional order, the applicants granted the following relief:
>
> The respondents be and are hereby interdicted and restrained from convening or causing the convening of hearings in to the 1st to 18th Applicants' conduct by the ad-hoc Privileges Committee.
>
> SERVICE OF THE PROVISIONAL ORDER.
>
> This order may be served by the Sheriff or Applicants' Legal Practitioners."

The reliefs set out in case no. HC 2922/20 are in the nature of declaratory orders of violations of the political rights of the applicants cited therein, violations of a right to a fair hearing and a declaration of nullity of the composition and set up of the Privileges Committee set up to investigate the applicants. In case no. HC 2922/20, the parties are cited as follows:

> "Movement for Democratic Change- Alliance - first applicant
> Prosper Chapfuwa Mutseyami - second applicant
> Chalton Hwende - third applicant
> Happymore Chidziva - fourth applicant
> and
> The speaker of the National Assembly - first respondent
> The clerk of parliament - second respondent
> Parliament of Zimbabwe - third respondent"

None of the eighteen applicants in this urgent application are parties in case no. HC 2922/20 although they seek a provisional order which is predicated on the determination

of that application. There is no indication on the papers and no submission was made that the applicant intended to be joined as applicants in case no. HC 2922/20.

The respondents in their opposing affidavit raised the issue of the non-urgency of the application. They submitted that the applicants had been aware that the Committee on Standing Rules and Orders (CSRO) had appointed a Privileges Committee to "investigate the conduct of the members of the MDC-Alliance". The respondents chronicled the events which followed thereafter and more importantly in my view, the fact that application no. HC 2922/20 was filed against the first, third and fourth respondents herein on 12 June 2020 followed by the dispatch of letters to the respondents inviting them to attend before the Privileges Committee on a specified date which was 14 July, 2020. It was further submitted that the hearings commenced and were postponed to 21 July, 2020. The applicants lodged this application on the date of the hearings on 14 July, 2020. The respondents argued that the need to act had arisen on 28 November, 2019 being the date of appointment of the Privileges Committee. The respondents therefore argued that the applicants did not treat the application with the urgency which it deserved.

The applicants averred that after receiving notices to appear before the Privileges Committee on 7 July, 2020 they were taken aback and had hoped that the Privileges Committee would not conduct the hearings in the light of the pending application HC 2922/20. They averred that they acted after it became apparent that the hearings would not be suspended. That explained why the application was then filed on the hearing date. There is on record letters in which the applicants were seeking further particulars to the accusations which were to be investigated by the Privileges Committee. The fact that there was correspondence on the issue by the applicants was an indication that the applicants did not just sit on their laurels and wait for the day of reckoning before coming to court. The decision to file the urgent application on the date of hearing was explained by the applicants as that, they did not think that hearings would proceed since there had been filed a challenge *inter alia* against the composition of the Privileges Committee and prayers for other declarations which are set out in the draft order in that case as quoted (*supra*).

The objection to the urgency of the matter by the respondent should not succeed. Urgency in every case is considered against the circumstance of each particular case. It is in the judge or court's discretion to decide to hear on the urgent roll a case brought as an urgent

application. There are various considerations which are taken into account in deciding whether or not a matter is urgent. Generally speaking, to a litigant every matter is urgent because any reasonable, genuine and *bona fide* litigant would wish that upon filing a dispute with the court, such dispute is resolved immediately. The rules of court, which are enacted for good order in the filing of cases and how cases progress to a hearing is what stands against the litigants' wish for an urgent hearing of each filed dispute. For purposes of orderly justice administration, the court or judge is given the power to determine whether a particular matter is urgent. The decision as to whether or not a matter is urgent does not depend on whether or not the respondent has raised the objection that the matter is not urgent. The respondent has no onus to prove that the matter is not urgent. If any onus could loosely be said to be, it is evidential in that the respondent should set out facts from which the judge upon their consideration can reach an informed decision on urgency. Urgency arises from the papers filed in support of the submission that the matter is urgent. Very frequently, a judge without hearing the respondent or before any opposing papers are filed strikes off a matter from the urgent court roll because the papers filed in the matter do not disclose urgency. Therefore, whether opposing papers have been filed or not, the decision on whether the matter is urgent is reached upon a consideration of the applicant papers and those of the respondent if the respondent has filed an objection to urgency.

In casu, I was inclined to agree to hear the application on the urgent cases roll. It was my view that the application was of national importance in that it was concerned with the conduct of Honourable members of Parliament who represented various constituencies. The issue of their alleged misconduct and decisions which could be reached by the Privileges Committee would not only affect the individual members of Parliament but the electorate which faithfully elected them into office. The point I make here is that the nature of a case may be a strong consideration for the judge to take into account when determining whether or not to hear a matter on the urgent case roll. There was presented persuasive argument from both applicant and respondents in support of their contentions on the urgency and non-urgency of the matter. Ultimately I was inclined to hear the matter because of its national and topical character and to put the matter to arrest.

The respondents also raised two other points *in limine*. The respondents challenged the jurisdiction of this court to hear the matter. They submitted that the court must observe the

separation of powers and not interfere in the administration of the fourth respondent or Parliament. It was submitted that the fourth respondent had exclusive jurisdiction to determine whether the conduct of any of its members was in contempt of Parliament. Under the Privileges Immunities and Powers of Parliament Act, [*Chapter 2:08*], the fourth respondent under s 16 of the Act, has jurisdiction to deal with acts committed by Honourable members of Parliament where such acts constitute an offence in terms of the rules and laws governing the administration of the fourth respondent including the conduct of members of Parliament.

The appointment of Privileges Committee is provided for in the Act and the Committee reports its findings to Parliament which then makes the final determination on a matter dealt with by the Committee. Under such circumstances, I am in agreement that it would be improper for the court to interfere in the exercise of the functions of the fourth respondent. The aggrieved party should exhaust domestic remedies first and thereafter petition the court after the internal processes have been exhausted see *S* v *Mutasa* 1990 (3) SA 756 where the principle is laid out that if an act or conduct complained of falls under the jurisdiction of Parliament, the court should not interfere with the conduct of the exhaustion of domestic processes of the legislature as an organ of Government created by the constitution and governed in terms of laws created for the purpose. The court always exercised review powers after deferring to the independence of the fourth respondent. *Mutasa* v *Makombe* 1998 (1) SA 397.

In response to the objection on the jurisdiction of the court, the applicant's counsel submitted that there was no law which provided for the ouster of the High Court to exercise its jurisdiction in the matter. It was argued that the applicants in HC 2922/20 were seeking declaratory orders which only the High Court could grant. The respondents also submitted that the fourth respondent could not grant a prohibitory interdict. The applicants' arguments as detailed were not sound. The High Court indeed has original jurisdiction over all civil and criminal matters in Zimbabwe. The High Court and other courts are custodians of the law. Where an existing law is put in motion as in this case, the Privileges Immunities and Powers of Parliament Act, the court does not interfere with lawful processes carried out in terms thereof but can review whether the processes were followed in terms of the enabling legislation. *In casu*, the applicants were expected to raise their objections in the first instance to the Privileges Committee and then to seek outside remedies thereafter. The objection raised by the respondents was valid.

The last objection was that the relief sought could not be granted because it was founded or predicated upon a matter in which the applicants were not party. The objection has merit. The applicants as already noted were not party to case No. HC 2922/20. Even though the relief sought by the applicants in Case No. HC 2922/20 would have an impact upon the applicants herein, still that did not make them part of Case No. HC 2922/20. The purpose of a provisional order is to regulate the subject matter of the dispute in the main matter. In other words, an applicant in the main matter seeks on an urgent basis, an interim order to regulate and safeguard process in the main matter. In granting a provisional order the judge may give directions to the parties on the conduct of the main matter. *In casu,* the respondents are strangers to the main matter. They cannot prosecute nor defend the matter. They did not seek a joinder nor did they indicate their intention to apply for joinder. It would be anomalous for the court to grant the relief as prayed for where the applicants are not party to case No. HC 2922/20. For example the applicants in Case No. HC 2922/20 can just withdraw the application or not prosecute it as has happened whereby no further action has been taken since June 202 when the respondents filed their opposing affidavits. The relief sought by the applicants is therefore incompetent. They do not have a *lis* to protect and the provisional order cannot be granted. Case No. HC 2922/10 has not been progressed and remains an addition to the court's backlog of pending cases. The respondents have not applied for the dismissal of Case No. HC 2922/20 for want of prosecution. The non-prosecution of the application speaks to the lack of *bona fides* of this and the application HC 2922/20. To the extent that the applicants herein seek to rely on the existence of HC 2922/20 as the premise on which the relief sought is predicated their application is bad at law and must be dismissed.

Under the circumstances, this application had no legal merit and must be dismissed. Costs must follow the event. The application suffered from predictable procedural failures which must have been apparent to a discerning legal mind. The application is disposed as follows-

IT IS ORDERED THAT:

The application be and it is hereby dismissed with costs.

Mbidzo, Muchadehama & Makoni, applicant's legal practitioners
Chihambakwe, Mutizwa and Partners, respondent's legal practitioners