MOVEMENT FOR DEMOCRATIC CHANGE – ALLIANCE (MDC ALLIANCE)
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS (N.O)
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
MOVEMENT FOR DEMOCRATIC CHANGE – TSVANGIRAI (MDC-T)

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 17 March & 6 April 2021

Urgent Chamber Application

A. Muchadehama, for the applicant
D. Jaricha, for the 1st and 2nd respondents
L. Madhuku, for the 3rd respondent

MUZOFA J. In this urgent chamber application the applicant seeks a provisional order in the following terms:

'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. It be and is hereby declared that the monies due under the Political Parties Finance Act belong to the applicant, MDC Alliance led by Nelson Chamisa.
2. 1st and 2nd respondents be and are hereby ordered to pay all moneys due to the MDC Alliance led by Nelson Chamisa in terms of the Political Parties Finance Act through its Steward Bank Account Number 1036938297.
3. 1st and 2nd Respondents to pay costs of suit.

INTERIM RELIEF GRANTED

1. That 1st and 2nd Respondents be and are hereby interdicted, stopped and barred from disbursing the sum of ZWL $29970000,00 due to the MDC Alliance in terms of the Political Parties Finance Act [Chapter 2:11] to any party.
2. That this provisional order shall remain operative notwithstanding the noting of an appeal of the Respondents.

SERVICE OF THE PROVISIONAL ORDER

This order may be served by the sheriff or his lawful deputy or Applicant's Legal Practitioners.'

The applicant is a political party. It participated in the July 2018 harmonized elections. Its legal personality is disputed. The 1st respondent is the Minister responsible amongst other things for the oversight and administration of the Political Parties Finance Act [*Chapter 2:11]* as well as the Electoral Act [*Chapter 2:3*]. The 2nd Respondent is the Minister responsible for the administration of the Consolidated Revenue Fund. The 3rd respondent is a political party.

Although the applicant seeks an order as against the 1st and the 2nd respondents, the real dispute is between the applicant and the 3rd respondent. These parties have been in and out of court on several occasions on varied causes of action. As such the 3rd respondent is opposed to the application. The 1st and 2nd respondents do not oppose the granting of the interim relief.

In its notice of opposition the 3rd respondent raised four preliminary points which must be determined before addressing the merits of this case. The four points raise the following issues:-

I. Whether the applicant is a legal persona capable of suing or being sued.
II. Non urgency
III. Whether the deponent to the founding affidavit has *locus standi* to depose to the affidavit
IV. Whether there are clear disputes of fact
V. Whether the application is frivolous and vexatious that this court should just decline its jurisdiction.

Whether the applicant is a legal persona.

The gist of the 3rd respondent's submissions is that the applicant has no legal capacity to sue or to be sued as determined by this court in *MDC Alliance and 2 others* v *Douglas Mwonzora and 5 others*[1]. The judgment is extant. Although the applicant has appealed against the judgment, it has failed to prosecute its appeal. The appeal has since been struck off. The judgement binds the parties in that case. This court should therefore decline to hear the applicant.

To contextualize his point, Mr *Madhuku* set out the brief background as follows. The MDC Alliance is a coalition of parties that contested in the 2018 harmonised elections. The 3rd respondent is the dominant party. The court should take judicial notice of the many cases before

[1]HH 346/ 20

the courts between the parties or wherein the applicant and the 3rd respondent are part of the litigation particularly *MDC Alliance and 2 others* v *Douglas Mwonzora and 5 others* (supra) in which the issue on the applicant's legal personality was determined ,*Lillian Timveos & Another* v *Douglas Mwonzora and 5 others*[2] and *MDC Alliance* v *Minister of Justice Legal and Parliamentary Affairs and 2 others*[3] where orbiter statements were made in respect of the applicant's legal personality.

It was further submitted that, in its founding affidavit the applicant described itself as a legal persona with the capacity to sue and be sued. A constitution was attached to confirm the position stated in the founding affidavit. The constitution is undated. The party that contested in the 2018 elections had no constitution and it is the party that appeared before the court in *MDC Alliance and 2 others* v *Douglas Mwonzora and 5 others* (supra).No constitution was produced before that court. If this applicant has a constitution, then it is not the party that contested in the 2018 harmonised elections and is out of court.

In response *Mr Muchadehama* confirmed that the judgement pronouncing on the applicant's legal personality is extant, he argued that this court is not bound by it.The judgment is of persuasive value only. This court can therefore make its independent decision based on the submissions before it. According to him the issue maybe the same but the facts placed before the two courts are different. In JUSTICE CHITAPI's judgment the issue was dismissed on account of the applicant's failure to specifically plead that it is a legal persona. In this case the applicant has specifically pleaded so and it has attached its constitution that clothes it with such legal personality. He confirmed that the said constitution was not in existence at the time of the elections. The court was urged to take note that in *Lillian Timveos & Another* v *Douglas Mwonzora and 5 others (*supra*)* and *MDC Alliance* v *Minister of Justice Legal and Parliamentary Affairs and 2 others* (supra) the applicant was recognised as a legal persona. In view of the seemingly conflicting judgements on this issue, this court should make its own determination based on the facts before it.

Further to that, it was submitted that the applicant is recognised as a political party as defined in the Electoral Act[4], the Political Parties Finance Act[5] and the Broadcasting Services Act[6]. It exists separately apart of its members. It is recognised as a political party by the

[2] HH 370/20
[3] HC 2199/20
[4] S4 of the Electoral Act
[5] S2 of the Political Parties Finance Act
[6] S2 of the Broadcasting Services Act.

Zimbabwe Electoral Commission (ZEC), Parliament and the Government of Zimbabwe. It is therefore a legal persona *sui generis.*

The issue for determination in this case is whether issue estoppel is applicable in this case. My understanding of the preliminary point taken is that the applicant is bound by the determination made by JUSTICE CHITAPI on its legal personality. The applicant, being so bound, it is estopped from assuming legal personality as long as that judgement is still extant.

The Law

Estoppel is a judicial device in common law legal systems which precludes a person from asserting something contrary to what is implied by a previous action or statement by that person or by a previous pertinent judicial determination. It can be divided into four categories estoppel by record which is by court judgment, estoppel by deed, estoppel by conduct and estoppel *in pais*[7].It is the estoppel by record that is relevant in this case.

Issue estoppel has been embraced in our jurisdiction under the public policy that there should be finality to litigation. See *Willowvale Mazda Motor Industry Pvt Ltd v Sunshine Rent -a- Car Ltd*[8] . The court in that case considered the applicability of the principle and cited with approval the concise requirements of the principle that,

I. The same issue must have been decided
II. That the judicial decision which is said to create the estoppel was final
III. That the parties to the judicial decision or their privies were the same person as the parties to the proceedings in which the estoppel is raised.[9]

And in the same case the court referred to *Mills* v *Cooper*[10] at page 468 that,

> " A party to civil proceedings is not entitled to make , as against the other party an assertion, whether fact or of legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a Court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by the party in the previous proceedings has since become available to him"

It would seem from Lord Diplock's expression of the effect of the principle set out in the *Mills v Cooper* case (*supra*) another court can only revisit the issue where there is further

[7] Mozley and Whiteleys's Law Dictionary,8th Ed , Butterworths ,1970
[8] 1996 (1) ZLR 415 (SC)

[9] Carl Zeiss Stiftung v Rayner & Keeler {1967} AC 853
[10] [1967] 2 QB 459

material relevant to the correctness or incorrectness of the assertion. There must be evidence that, that evidence could not be adduced in the previous proceedings.

Analysis

With all due respect, it seems counsel for the applicant completely missed the essence of the issue raised for the 3rd respondent. The issue is not whether or not this court is bound by the decision already made. The point taken is that the applicant cannot, as a matter of law assert a position contrary to the decision already made. It is bound by that decision. This is known as estoppel in legal parlance.

I have no doubt in my mind that the requirements of issue estoppel have been satisfied .The same parties were before the court and the same issue on legal personality was determined in a final judgment. Although issue estoppel is a complete bar. The bar can be uplifted where the equities require. The equities are determined by a consideration of whether there is further material that could justify a reconsideration of the issue.

Although *Mr Muchadehama* did not address this court directly on whether the constitution is further material that could not, with reasonable diligence be placed before JUSTICE CHITAPI, I take it that the constitution is new evidence. The details in that case require a revisit for me to determine whether the constitution is evidence that can fall within the exception to enable me to determine the issue again. As a starting point, the issue of the applicant's legal personality was not determined on the simple omission of an averment as submitted by *Mr Muchadehama*.

Mr *Muchadehama* appeared for the applicant in that case. As is the normal procedure, when the preliminary point on the applicant's legal personality was raised, he was given the opportunity to respond. His response was primarily as submitted *in casu*, that the applicant is a political party and it is recognised as such by Acts of Parliament and other Constitutional bodies as already set out in this judgment. He did not rely on the applicant's constitution. It boggles the mind why he could not just refer the court to the constitution.

The court considered the document that 'birthed' the applicant, the "MDC Political Corporation Agreement". This document was confirmed to be dead as it was hard of implementation. It was also submitted at page 9 of the judgment that there was no subsequent written document executed by the parties. The *ratio decidendi* in that case is that a political party, even though recognised as such has no legal capacity for the purposes of litigation in the absence of a legally recognised instrument giving it such juridical standing.

I need not overemphasize the point, but it is clear that the constitution relied upon by the applicant was not in existence at the time the parties appeared before JUSTICE CHITAPI.

There is a high likelihood that the constitution was drafted after the disposal of the matter. It is therefore not evidence that *'could not by reasonable diligence have been adduced by the party in the previous proceedings has since become available to him"*. What is envisaged by that statement is that the evidence should be in existence but for some reason the party could not place it before the court. This could arise in circumstances where the evidence was unknown to the party but was later made available. It does not contemplate a situation where a party blunders, goes back to the drawing board, creates the evidence and then place it before the court to make a determination on the same issue albeit now on the 'new' evidence. Certainly this is the rationale behind the principle of finality to litigation, there would certainly be no end to litigation if courts would allow litigants to conduct themselves as such.

This is a matter that satisfies the requirements of issue estoppel. The issue on the legal capacity of the applicant having been determined between the parties before JUSTICE CHITAPI, the determination raises issue estoppel. There has been no demonstration before me that the evidence relied upon now could not, with reasonable diligence be placed by the applicant before the court. A similar view was expressed in *Galante v Galante*[11] in which the court noted,

> 'That issue having been determined between the same parties by the community court, the determination of it by that court raises an issue estoppel. The parties are estopped from disputing an issue decided by a judgment of a court of competent jurisdiction.

It is trite that an order of court is binding on the parties. The party against whom the order is made cannot competently raise the same issue or action which has been definitively disposed. The only recourse available to that party is to seek the setting aside of that judgement or order. A party against whom an order is made is estopped from approaching the court on the same issue or cause of action.

I do not agree that there are seemingly conflicting judgments of this court on the applicant's legal capacity. The term judgment was certainly used loosely by *Mr Muchadehama*. I recognise that in the two cases[12] that I was referred to, no determination on the applicant's legal personality on the merits was made. In both cases *obite*r statements on the applicant's legal capacity were made. An *orbiter dictum* simply put, is an observation by a court on some point of law not directly relevant to the case before it and needs no decision by it thus it does not serve as a precedent . In general, it is any comment, remark or observation made in passing. In the *Lillian Timveos* case (supra) the applicant was not even

[11](2) 2002 ZLR (1) 144

[12]Lillian Timveos & Another v Douglas Mwonzora and 5 others HH 370/20 and MDC Alliance v Minister of Justice Legal and Parliamentary Affairs and 2 others HC 2199/20

before the court. For the purposes of issue estoppel an *orbiter dictum* would certainly not be a final judgment.

An issue was raised that, if the applicant has a constitution it is not the party that contested in the 2018 harmonized elections. It cannot therefore seek the order sought herein and is out of court. There was no response on this issue from the applicant. I am not inclined to take the failure to respond as an admission. I leave the question open since there was no proper argument on it. The finding on issue estoppel disposes of the matter.

Disposal

By virtue of the judgment already made that the applicant lacks legal capacity, the applicant cannot appear in court and claim that it has legal capacity. The preliminary point is upheld, there is no applicant before the court. This finding disposes of the matter, it becomes unnecessary to deal with the rest of the preliminary points and the merits of the case. Since my decision is based on a preliminary point and not on the merits, the following order is made.

The application is struck off with costs.

Mbidzo, Muchadehama & Makoni, Applicant's legal practitioners
Civil Division of Attorney General's Office, 1st & 2nd respondents' legal practitioners
Chatsanga & Partners, 3rd respondent's legal practitioners