MORGAN RICHARD TSVANGIRAI

(in his official capacity as the Prime Minister

of the Republic of Zimbabwe and in his personal capacity)

versus

THE PRESIDENT OF ZIMBABWE, ROBERT GABRIEL MUGABE

(in his official capacity)

and

DAVID KARIMANZIRA

and

CAIN MATHEMA

and

MARTIN DINHA

and

AENEAS CHIGWEDERE

and

FABER CHIDARIKIRE

and

JAISON MAX KOKERAI MACHAYA

and

CHRISTOPHER MUSHOWE

and

ANGELINE MASUKU

and

TOKOZILE MATHUTHU

and

TITUS MALULEKE

and

THE MINISTER OF LOCAL GOVERNMENT, RURAL AND

URBAN DEVELOPMENT

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 24 May 2012, 11 June 2012 & 27 June 2012

Advocate *T. Mpofu*, for the applicant

Mr *T. Hussein*, for the respondents

CHIWESHE JP: In this application the applicant seeks a declaratur nullifying the appointment of second to tenth respondents as provincial governors on the grounds that such appointments are ultra vires and or in contravention of the Constitution of Zimbabwe. The applicant also seeks such consequential declarations as may become necessary in the event that this court nullifies the appointments.

The respondents have raised a point *in limine*, namely that in filing this application the respondents have not complied with the provisions of r 18 of the High Court Rules which reads:

“No summons or other civil process of the court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application being made for that purpose.”

The respondents have argued that the provisions of this Rule are peremptory citing, in support of that contention, the case of *National Constitutional Assembly v The President and others* 2005 (2) ZLR 310 (H). At p 314 A of that judgment, GUVAVA J ruled as follows:

“No court application was made for such leave in this matter as required by this rule. In my view the first respondent has thus been improperly cited as no leave from this court was granted for the President to be sued. Accordingly, the application against the first respondent is dismissed on that basis.”

The learned judge nonetheless proceeded to deal with the application in so far as it related to the rest of the respondents. It must be pointed that in that case the respondents had *inter alia* opposed the application on the grounds that it was frivolous and vexatious, a fact alluded to by the learned judge when considering the question of costs. She had this to say at p 317 C – “This application was in my view clearly misguided, as there was no legal basis for bringing such an application.” In the instant case the respondents have not argued that the application *per se* is frivolous and vexatious. In my view this application is of national significance. For that reason I believe that it must be heard on the merits notwithstanding the provisions of Rule 18. I am inclined to invoke the provisions of Rule 4C which read:

“The court or a judge may, in relation to a particular case before it or him, as the case may be –

1. direct, athorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interest of justice,
2. give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient.”

This rule, argue the respondents “was inserted to cater for minor departures from the Rule such as a failure to comply with a form in the rules or a failure to file documents on a certain date. Rule 4C was not enacted to confer on this Honourable Court the power to ignore a Rule entirely.” In my view however the wording of the provisions of r 4C suggests a much wider construction than the respondents would admit. The rule empowers the court to “direct, authorise or condone a departure from any provision of these rules, including any extension of any period specified therein………..” (my underlining).

Rule 18 is intended to afford the President and judges protection against frivolous actions that may be brought against them. The respondents have not argued that the present application is frivolous and vexatious, save for aspersions to that effect in their heads of argument. No argument has been mounted as to why the present application should be considered frivolous and vexatious. On the contrary, the respondents are yet to file their papers on the merits of this application. In the absence of such submissions on the merits the respondents cannot raise and sustain an argument rooted on frivolity.

In my view, procedural expediency requires that where r 18 has not been complied with but on the papers filed it can be shown *prima facie* that the applicant has presented an arguable case, devoid of frivolity or vexation, the court exercises the discretion conferred on it in terms of s 4C of the Rules. In other words, if the question “Would a reasonable court adjudicating an application for leave to sue out process in terms of r18 have granted the application?” is answered in the affirmative, the court may in my view properly exercise the discretion conferred on it in terms of r 4 and condone the failure to abide by r 18 in the first place. The alternative procedure would be to dismiss the application for failure to comply with that rule. The applicant would then be at liberty to apply for leave to sue out process, which leave would then be granted allowing him to issue process on the merits of the matter. This alternative is circuitous and unnecessary in the present case. I am satisfied that it is in the interest of justice that I condone this omission on the part of the applicant. I am also satisfied that no prejudice would be suffered by either party if the court were to adopt that course of action.

The mischief sought to be suppressed by the provisions of r 18 was aptly stated in the case of *Gluck vs The Governor* 1947 SR 143 where it was stated at p 146 as follows:

“……..it may be assumed that the rule was not intended to deny a hearing to anyone who has a substantial cause of action. It was simply intended to avoid the possibility that the Governor might be harassed by frivolous or vexatious claims or unnecessarily made the nominal defendant in matters which could equally well be ventilated in some other way.” This position was confirmed by the Supreme Court in the case of

*Zimbabwe Lawyers for Human Rights (ZLHR) and Another vs President of the Republic of Zimbabwe* 2000 (1) ZLR 274 (S).

In the instant application it is clear to me that on paper the applicant has a substantial cause of action. The application involves the interpretation of constitutional provisions of significance to the governance of the country under the Global Political Agreement. Both parties agree that the matter is of immense public interest. Such an application cannot be relegated to the dustbin of frivolity and vexation. The relief sought can only be obtained by citing the office of the President. The executive decisions complained of were taken by that office. It would be folly to cite any other office or authority to the exclusion of the President.

In any event in the ZLHR case *supra*, the Supreme Court, at pages 278 and 279, held that s 4 of the state Liabilities Act permits the citation of the President or any other officer in any action or other proceedings in his official capacity. For that reason the Supreme Court held that “s 4 permits of an absolute right to bring proceedings against the President in his official capacity provided he is cited by his official capacity and not by name. That is the sole restriction, Had the legislature intended that the institution of any such action or process be preceded by the grant of leave from the High Court or Supreme Court, it surely would have said so. Certainly there is no justification for reading such a requirement into the section. Needless to state, anything in r 18 of the Rules of the High Court cannot be understood to override either s 4 of the State Liabilities Act, or any other provision of the Constitution, which exhibits a contrary intention.” (My own underlining)

I am inclined to agree with counsel for the applicant that indeed r 18 no longer has any place in our legal system. It has been superseded by superior legislation, a fact confirmed by the highest court of the land. Yet it is trite that the office of the President should not be harassed by frivolous and vexatious proceedings. This court has inherent jurisdiction to determine, without the aid or hindrance of r 18, whether any process issued against the office of the President is frivolous and vexatious and whether it ought to be dismissed on that basis.

The issue of the applicability of r 18 has thus been settled by the Supreme Court in the ZLHR case *supra*. Four issues were settled in that case.

1. The president can be sued in his official capacity.
2. The purpose of r 18 is to prevent the President (and judges) from being harassed by frivolous or vexatious claims.
3. Rule 18 was not created to preclude persons with substantial causes of action from instituting legal proceedings against the President.
4. Rule 18 is inconsistent with the provisions of s 31 K of the Constitution or section 4 of the State Liabilities Act [*Cap 8:14*] which permit proceedings to be instituted against the President in his official capacity.

In conclusion it is evident that the objection *in limine* raised by the respondents cannot be sustained because, assuming r 18 is still part of our law, this court has the discretion in terms of r 4C to depart from its provisions in the interests of justice. However, the Supreme Court has ruled that the Rule falls foul of constitutional and statutory provisions. For this reason the Rule automatically falls away. I would respectfully bring the attention of the Rules Committee to this fact.

It was for these reasons that I dismissed the application and ordered as follows:

**IT IS ORDERED THAT:**

1. The point “in limine” raised by the respondents be and is hereby dismissed.
2. The respondents be and are hereby granted leave to file and serve their opposing papers within 10 days from the date of this order.

Thereafter the parties shall proceed in terms of the Rules of Court.

1. The matter shall be heard on the merits on 10 July 2012 at 1000 hours.
2. Costs to be costs in the cause.
3. Reasons shall be contained in the main judgment.

*Dube Manikai & Hwacha,* applicant’s legal practitioners

*Hussein Ranchhod & Co,* respondents’ legal practitioners