

Big Saturday Read: The crocodile does not give safe lifts

Alex T. Magaisa



May 9, 2020

In the beginning

Ten years ago, Douglas Mwonzora and I had a conversation on the sidelines of a conference at the Elephant Hills Hotel in Victoria Falls. He asked whether I might be available for the constitution-making process, which was by then already underway. Mwonzora was the Co-Chairperson of COPAC, the parliamentary committee that was leading the constitution-making process. I said I would be honoured to serve my country.

It was in that setting, a few miles from one of the seven wonders of the natural world, Mosi-a-Tunya that to my mind, a beautiful bond of brotherhood was born. It blossomed during the trench warfare of constitutional negotiations in the months that followed. In 2011, I joined COPAC and together, we formed a tag team along with a wonderful supporting cast.

Morgan Komichi was there too, a permanent presence in the meetings. The political eye of the party president, Morgan Tsvangirai, he sat quietly, intervening occasionally to assert political muscle when things got difficult.

Negotiations require different skills and from time to time you need the rottweilers to come in and show some bite. I have to say, working in that process has been one of the most fulfilling tasks for me, both professionally as a lawyer and as an intellectual in the struggle for a better society. I got to know these men very well and mutual respect grew between us as we went toe to toe with ZANU PF on the other end of the table.

Sometimes things got very heated and talks broke down. We carried each other in those low moments, believing very firmly that we were on the right side of history and that we were doing what was best for the people of Zimbabwe. The ZANU PF team was arrogant, stubborn and intransigent but we refused to give in. When you have been through such struggles; when you have shielded each other, giving each other strength, plotting strategy and celebrating wins together, something is built that becomes indelible. But it also suffers greatly because it is vulnerable to betrayal.

The president's call

It was also during that constitution-making process that the party leader, Morgan Tsvangirai noticed my presence. By this, I do not mean my physical presence, as he already knew me. The presence I refer to is getting a better sense of what I could offer to the movement and him. To this day, I have no idea who shared a good word with him. I only remember Mwonzora calling me one evening after a hard day of negotiations and advising me that the president wanted to see me the next day at his home.

When I went to his home in Strathaven, that is when he asked if I could join him as his adviser and chief of staff in his office. It was an offer that I could not refuse. I like to think Mwonzora and Komichi were among those who may have shared a kind word about me with the president. But I do not doubt that it was another step of the journey that had begun during that conversation on the sidelines of the conference in Victoria Falls.

I like to think we formed a formidable partnership during the constitution-making process. We fought many battles against our opposite numbers in ZANU PF. I was there as the technical hand and Mwonzora provided the political hand, which was especially useful when Paul Mangwana of ZANU PF tried to be aggressive. One of the strong points, I think, is that we maintained our calm even under extreme provocation. If I sound a tad nostalgic, it is because the current scenario is a cause of great personal pain and wonderment. What happened? It's a question that eludes easy answers.

That relationship which was solidified in those trenches of negotiating the 2013 Constitution remains, at least on my end, circumstances notwithstanding. Indeed, some of the most trusted people I have met during the struggle are those I have met through Mwonzora during the constitution-making process. Some of them became family. They protected me like a brother and I suspect their hearts must carry some burden too. Many times during the last couple of years I have put in a word of support when others in the movement were growing suspicious. I have encouraged unity, asking everyone to look at the bigger picture. I do not regret it because I genuinely believed it was the right thing to do.

I am not in agreement with the political course that he and others in the movement have taken at this juncture. I believe that they are making a gross error of judgment; embarking on a course that detracts from much they have fought for and for which they suffered grievously at the hands of ZANU PF. I do not believe ZANU PF is capable of kissing an opponent in good faith. I would not be true to myself if I did not say this. If I am wrong, and I have sufficient humility to concede that I may be wrong, history will be the judge and I will raise my hands and, if need be, atone for it.

Nothing personal

I recounted this background to forestall any suspicion that my view on the political situation is personal. It is not. Indeed, if it were, in light of the background, I would not have taken a different political position. I would have chosen to support the cause of those with whom I have worked closely and fruitfully in the past. A mutual colleague from those years called and said, but this is your comrade. Yes, I said, but we have different views on this occasion.

Indeed, we are comrades. When I tragically lost my young uncle and friend, Eddie who was my trusted assistant and confidante during my time with Tsvangirai in 2013, Mwonzora was the most senior MDC leader who came to our village to mourn with us and bury him. It was not an official duty, no. It was personal.

He had known Eddie for a few years and he knew how close we were. For his part, Eddie had much respect for “Mukoma Dougie”, as he called him. Over the last few weeks, I have wondered how Eddie might have felt at this time. I know the situation would have troubled him greatly. Mwonzora was there with us for the final goodbyes seven years ago.

My fellow villagers felt honoured by his presence at the funeral. Unsurprisingly, they have been asking many questions lately, questions which are difficult to answer: Ko mukoma Dougie vaita sei futi? (What happened with mukoma Dougie?). They ask out of genuine concern. I say I do not know what has happened. Because I do not know.

He was the party’s spokesperson during the time that I was working with Tsvangirai. I was based at Charter House but I did not have an office at Harvest House and whenever I was there, I often made a pit-stop there. We had come a long way. He affectionately addressed me as “Zim 2”, in part a reflection of the deep sense of humour that he possesses. I don’t know if anyone apart from us two understood the meaning of that moniker!

And so you see why the current situation is a difficult one; why nothing makes sense at all.

Messy succession

I did not agree with how the succession of Morgan Tsvangirai was handled. I voiced my opinions on the matter. They were unpopular, but I have never shied away from expressing unpopular opinions. While I respect the wisdom of the crowds, I’m also all too aware that crowds possess a profound capacity for foolishness. I condemned the intimidation and acts of violence that ensued. I empathised with Khupe and Mwonzora over the treatment at Tsvangirai’s funeral in Buhera. I did so, not because I was partial, but because it was the right thing to do.

The succession episode was a dark moment for the democratic movement because it should have been more prepared for it. The deteriorating health of the great founding leader had given ample notice. I remember writing in January 2018 after the choreographed public visit by Mnangagwa and Chiwenga, that it was probably time to say goodbye to the reigns.

Constitutions are designed to cater for all eventualities, including the incapacitation of a leader. But the movement was held by the inertia of protocol and culture all of which meant that the succession issue was left until after his death when it could have been handled while he was alive if relevant provisions had been invoked. The movement was shy and the price for that shyness is still being paid. For in many ways, the current saga is a symptom of a failed succession process. That should never happen again.

So yes, I was not in agreement with the handling of the succession.

Nevertheless, I also recognised that the movement is a voluntary organisation with the ability to make and unmake its rules to advance its main political agenda, which is to win political power. Rules are meant to serve the party and not the other way round. A person who plunges into a flooded river because he is following unbending rules would be considered foolish. One must do whatever is necessary to avoid the plunge. It was necessary to take the best step towards the party’s political agenda.

I recognised that in all organisations, the principle of majority rule is paramount and that what the majority wills stands as long as it is done through the organs. No court or other body can usefully substitute its view for that of the majority because the majority can always return and make it redundant. I also recognised that the principle that in membership organisations the relevant organs can correct and ratify procedural irregularities. This is not only lawful but common sense.

In considering this, I also looked at the big picture. In that big picture, there was a general election which was due in a few months. Because of the coup a few months before, I had long been sceptical about the elections. I had wondered during a conversation with Nelson Chamisa, whether it was worth it, considering that the junta was unlikely to give up what it had taken by force.

Still, I thought if the movement was going to take part, it had to put its best foot forward and punch hard. In those heady days of succession, my misgivings of the succession saga notwithstanding, I recognised that of all the protagonists on show, it was Nelson Chamisa who had demonstrated sufficient political capital to represent the movement in the elections against a military-backed incumbent.

I also recognised that any continuation of disputation over the succession would cause a terrible wound to the movement going into the election. Indeed, an Extraordinary Congress pitting various protagonists so close to the election was bound to be exploited by the opponent and would probably split the opposition in the middle.

Finally, I recognised that the movement stood a better chance if it fought together with others as the MDC Alliance rather than on its own. Thokozani Khupe had never been enamoured with the idea of the MDC Alliance. I was aware of the deep old rivalries between her and some key members of the MDC Alliance which made it almost impossible and there was no time to heal those wounds before the elections.

On the other hand, Chamisa had already represented Tsvangirai in the alliance and was backed by the key players to lead the MDC Alliance. This might be said to be political expediency, but I still believe it was the right political decision and the performance vindicated it. I do not believe Khupe or other MDC politicians at the time could have posed as big a challenge to Mnangagwa as Chamisa did in 2018.

So no, my political disposition in this difficult moment is not because I was impressed by the handling of the succession. If that was the turning point, I would probably have walked away at that juncture. However, I appreciated that this was a membership organisation and that the majority had made a decision to govern their affairs and to define their leadership as they desired. Noone had imposed leadership upon them. They wanted the leadership they got. I also recognised that they had made an effort to rectify the irregularities.

The election

The election was in many ways a vindication of the position that the majority had taken, even though the outcome was once again characterised by controversy. Nelson Chamisa polled more than 2 million voters, more than the combined party vote in the parliamentary elections and more than any opposition votes in the past. The defeat as pronounced by ZEC was and remains a hotly contested affair. It seemed to me, all things considered, and notwithstanding my misgivings, that the majority had made the right political choice. After all, the business of a political party is to fight for and to win political power. That is what the movement had tried to do and it had very nearly achieved it.

I was not alone in coming to terms with that political reality. Douglas Mwonzora, Morgan Komichi and Elias Mudzuri all stood for Parliament under the MDC Alliance banner. Komichi was Nelson Chamisa's chief election agent in the presidential election. Many recall his daring announcement that the Zimbabwe Electoral Commission had just announced fake results. It was a heroic moment that got him into legal trouble which led to a conviction. They are all senators under the MDC Alliance led by Chamisa. Senators are elected on a party-list basis, that party being the MDC Alliance, led by Chamisa.

Besides, they contested for positions at the MDC Alliance Congress in 2019, another important step, if any was required, to take corrective measures of previous irregularities. These men campaigned for senior positions in the party but lost. If they had won, they would most probably be defending the MDC Alliance, not fighting it. It is possible, as some suspect that the course they have now taken is motivated by bitterness at the outcome of the Congress.

Indeed, a shared feature of the major characters is that they harbour some bitterness, either at losing elections or being sidelined, especially among the so-called old guard. In the circumstances, it increasingly has taken the complexion of a coalition of the bitter. Another defining feature of the group is the fear of being expelled from the party and Parliament, a circumstance which motivated them to strike first.

Elite theatres

It is important to understand that up to now, the political drama is happening in elite theatres, far away from the townships and villages, the people's theatres. These elite theatres are the courts of law, Parliament and law enforcement. The common denominator between these elite theatres is that they are by and large institutionally captured by ZANU PF, the ruling party.

I have argued in previous BSRs why the controversial decision of the Supreme Court concerning the MDC leadership issue is of dubious quality. I have also shown how the courts have been systematically selective in their handling of disputes involving ZANU PF and the MDC. I showed that where a member challenges decisions in ZANU PF, he is told to go back to the party to resolve the matters internally but where a member challenges decisions of the MDC, the courts have no problem intervening.

The selective application of the law extends to law enforcement where the police force always comes down heavily upon the opposition while treating ZANU PF with extreme leniency. This is so plain and common knowledge that it warrants no further discussion.

When goats seek the counsel of the hyena

As for Parliament, where ZANU PF has a two-thirds majority, the legislative body is also firmly captured. The Speaker of the National Assembly Jacob Mudenda, and the President of the Senate Mabel Chinomona, are members of ZANU PF's Central Committee, the ruling party's highest decision-making body outside Congress. Unlike other systems where the heads of Parliament relinquish their party membership, these officers still have active political roles within their parties. Where the individuals lack integrity, this leads to a conflation in the political and professional roles.

The Speaker and the President of the Senate are the key actors in the process of recalling MPs from Parliament, a role they executed this week when four MDC Alliance MPs were surprisingly recalled by

the MDC-T. More independent and impartial officers would have dealt with the matter differently given the apparent factual disputes over the recall. Effectively there were two members of ZANU PF's Central Committee deciding a key dispute involving their party's main opponent.

As I have always pointed out, whenever members of the opposition use the recall procedure, they are effectively approaching the ZANU PF Headquarters to ask their bitter rival to decide on their internal affairs. I have used the metaphor of goats approaching the hyena to judge concerning their affairs. It doesn't end well for both of them. This is why I was not in favour of previous recalls. It's politically unwise to subject your organisation to judgment by your opponent.

It's hardly surprising that ZANU PF has been quite happy to accept the invitation from the opposition to intervene and make a pronouncement on a matter that is critical to the leadership question in the MDC Alliance. I am surprised that men that I have held in high regard have reduced themselves to marionettes in the hands of ZANU PF. Surely, they know that ZANU PF is enjoying this show because it gives them an upper hand? I get the impression that we have reached a stage where the key motivation is not to dislodge ZANU PF from power but to prevent anyone from the MDC from winning power. If this is true, this is a sad circumstance.

Political asphyxiation

Another matter that is part of the elite theatres is political financing. Parties represented in Parliament are entitled to money from the State as long as they satisfy the minimum threshold. This is in terms of the Political Parties (Financing) Act.

So far ZANU PF and the MDC Alliance have received that funding because they meet the minimum threshold. However, money that is now due to the MDC Alliance (ZWL 7,5 Million) is under threat. This is because the Supreme Court judgment is being interpreted in a way that erases the existence of the MDC Alliance, substituting it with the MDC-T. The aim is to deprive the MDC Alliance of its main source of funding. It's the equivalent of removing the trap door, effectively executing the main opposition.

This is why the MDC Alliance approached the High Court. The party knows the courts are a difficult theatre, but it doesn't have a choice but to seek refuge. A High Court judge has granted a provisional order, stopping the Minister of Justice and the Minister of Finance from disbursing the money to any other party other than the MDC Alliance. However, at this stage, this interdict is a temporary victory. To extend the metaphor, it's a temporary stay of execution. The Government has an opportunity to challenge the provisional order. This may be a long-drawn legal process before the final order is confirmed. But what ZANU PF wants, ZANU PF usually gets and the courts will only serve to legitimise it, making it all look lawful.

As already observed, for ZANU PF, the political objective is to deprive the MDC Alliance of its funding. It's yet another stage in the political asphyxiation of the MDC Alliance. Already, the system has handed over leadership of the party to Khupe using the courts. It has also handed over the MDC Alliance MPs to Khupe using Parliament. The Minister of Local Government has bolstered Khupe by granting her group the right to reinstate Mayors who were previously suspended. Now the system through the Minister of Justice and Finance wants to hand over MDC Alliance money to Khupe. All this despite Khupe having her party which contested and won just two seats in Parliament. The police force will be used to take over MDC Alliance assets and hand them to Khupe. This is why I have referred to it as a process of political

asphyxiation. It's a slow and painful crushing of the MDC Alliance on the elite theatres which are controlled or influenced by ZANU PF.

What is the endgame?

The end game is to crush Chamisa and the MDC Alliance and thereafter create a Government of National Unity with a weak and compromised opposition. There is also an intention to suspend elections for 7 years. This is an attractive proposition for those in the opposition who see opportunities in the gravy train. In exchange, the regime hopes to get recognition from the international community.

However, this is a dangerous fantasy. How the regime is systematically and ruthlessly suffocating the opposition using a legal facade makes a bad situation far worse. No one is going to take a GNU seriously when it does not involve the main opposition leader and his party. Everyone who watches Zimbabwe seriously knows where the dispute is. ZANU PF cannot manufacture an outfit and pretend that they are stitching up a GNU.

ZANU PF MPs who agree to the suspension of by-elections would be opening a gap that will put them at risk. One faction in their party will start using that gap to expel other faction members and replace them with their own without the fear of elections.

People's theatre

As I have stated, so far these dramas have been playing out on elite theatres. They have not yet reached the theatre of the people in both urban and rural areas. So far they are just spectators as the political elites fight it out in the courts, in parliament and boardrooms. However, ultimately, any political party worth its salt must demonstrate that it commands the support of the ordinary people. Who will the MDC supporters back?

The choice, in my opinion, is not complicated and this is largely because of the steering role that ZANU PF is playing in the MDC saga. In the bigger picture, when you cut through the legal labyrinth, the ordinary MDC supporter is faced with a scenario in which there is ZANU PF on one hand and the MDC on the other. It's the continuation of the old binary by other means. It is a battle between ZANU PF and the MDC packaged as an internal squabble between MDC factions.

To be sure, ZANU PF did not create the mess. But it has found it convenient and in the MDC rebels, it has found willing instruments to achieve its objective of weakening and driving the opposition into the ground, maybe forever. This is why, when the High Court issued a judgment on the leadership question in 2019, the BSR which analysed it described it as an existential threat to the MDC. Sure enough, ZANU PF recognised the value it presented and it has made maximum use of it in its battles against the MDC Alliance.

Ordinary people must understand that this is a continuation of the old fight against the old enemy through the means of lawfare. ZANU PF is steering events and is in control of the elite theatres in which it is being played out - the courts, parliament, treasury, justice ministry, the police and other institutions. The danger posed by lawfare is that it is highly deceptive and can be hypnotising. It is hypnotising because when things are done through the prism of law, they assume a legitimacy that brute force can never achieve.

Law is a hypnotising fiction which makes even the most heinous assault look normal and legitimate. When something is pronounced as a lawful decision by the courts and parliament and it's enforced by police, it assumes a veneer of legitimacy. You can see that you are being annihilated, but you are told it's all lawful and proper.

It is worse when you participate in these hypnotic performances. So you go to court to challenge decisions and you might even get occasional, albeit temporary victories. You go to Parliament. You challenge the police and they seem to back off for a while. But in an authoritarian regime, these small wins are all part of lawfare - they confer legitimacy on the justice system. They say, look but they are approaching the courts. Look, they are also winning. But these are just detours. The destination doesn't change. The political agenda remains the same, which is to obliterate the opposition. It's like when the snake is asphyxiating its victim. It might relax for a brief moment and the victim might have a breather but that is no respite. In the end, the victim will be crushed to death unless the serpent is removed.

Conclusion

This is what the ordinary opposition supporter ought to know. This is not just an internal party squabble over irregularities concerning succession. The people had opportunities to deal with that and they did. Their opponent, ZANU PF, through its instrumentalities is now steering their movement back into the past.

ZANU PF wants to define the leadership of the opposition. It is telling MDC Alliance supporters that they did not vote for the MDC Alliance, but another party. It is telling MDC Alliance supporters that they voted for a party led by Khupe, not for a party led by Chamisa. For the ordinary person who voted for the MDC Alliance led by Chamisa and now being told that he voted for the MDC-T led by Khupe, the 2018 election is a political fraud of enormous proportions. It does not make sense and it is completely incapable of being supported.

When the matter eventually comes to the people's theatre, which is where all roads to true legitimacy must lead, it is the ordinary men and women who will pass judgment.

On this matter, opposition supporters have two choices: to go along with a group that is making ZANU PF comfortable or to remain with the movement that is causing ZANU PF sleepless nights, scheming how to exterminate it. It's a choice between meek capitulation and sustained resistance.

Experience over time has taught us a few laws of Zimbabwean politics: Any political party that makes ZANU PF comfortable is highly unlikely to be good for the ordinary people. Any political party that ZANU PF tolerates and supports is most probably a fake opposition. Any political party that ZANU PF hates with a passion and seeks to exterminate is probably the most genuine opposition.

One of my greatest concerns over this whole saga is the loss of public trust in political and legal processes. For how do you tell people that they voted for one party led by a specific leader but later you turn back and claim that in fact they voted for another party and they are now led by a rival leader? That the whole process was a sham, but it is legal because of a technicality? It makes no sense to the average voter. Some may claim that they are smart, but it's a terrible betrayal of public trust.

When you see a brother aboard a crocodile which promises safe passage to the other side of the river, it would be irresponsible if you did not warn him that it is not for love or benevolence that the crocodile makes such offers.

WaMagaisa

wamagaisa@me.com

<https://www.bigsr.co.uk/single-post/2020/05/09/Big-Saturday-Read-The-crocodile-does-not-give-safe-lift>

Dr Alex Magaisa holds a PhD in Law from University of Warwick in the U.K. He trained as a lawyer in Zimbabwe and the U.K and he currently teaches law at Kent Law School, the University of Kent. Alex has extensive experience in and knowledge of Zimbabwean law and politics. He has held positions which have given him a vantage view of Zimbabwean law and politics.

Between 2012 and 2013 he was the chief advisor to Morgan Tsvangirai, then Zimbabwe's Prime Minister in a coalition government and leader of the Movement for Democratic Change, the main opposition party. He oversaw the affairs of the Office of the Prime Minister and was closely involved in the campaign for the 2013 elections.

Between 2011 and 2012 he was part of the team that wrote the new Constitution of Zimbabwe which was adopted at a referendum in 2013. Having been a technical adviser, Alex has intimate knowledge of the new Constitution and its history. His views on law and politics are regularly sought after by Zimbabwean and international media. He has appeared on the BBC, Al Jazeera, Monocle Radio, Radio 702 in South Africa, SABC, and his views appear in several other international media. He has also been retained to offer professional and expert opinions on matters relating to Zimbabwean law and politics.

<https://www.bigsr.co.uk/about-author>