REPORTABLE: (13)

(1) HILTON CHIRONGA (2) RASHID MAHIYA
v
(1) MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS (2) MINISTER OF HOME AFFAIRS (3) MINISTER OF DEFENCE (4) THE GOVERNMENT OF THE REPUBLIC OF ZIMBABWE

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC, GOWORA JCC, HLATHSWAYO JCC, PATEL JCC, BHUNU JCC & UCHENA JCC
HARARE: JANUARY 13, 2016 & SEPTEMBER 23, 2020

T Biti, for the Applicant

F Chimbaru, for the Respondent

HLATSHWAYO JCC: One of the crucial elements of the new constitutional dispension ushered in by the 2013 Constitution is to make a decisive break from turning a blind eye to constitutional obligations. To achieve this goal, the drafters of the Zimbabwean Constitution Amendment (No.20) Act, 2013 ("the Constitution") adopted the rule of law and supremacy of the Constitution as some of the core founding values and principles of our constitutional democracy. For this reason, public office bearers ignore their constitutional obligations at their own peril. Left unchecked those clothed with state authority or public power may quite often find the temptation to abuse such powers irresistible, as Lord Acton[1] famously remarked: "Power tends to corrupt, and absolute power corrupts absolutely!"

[1] John Emerich Dalberg-Acton, 1st Baron Acton, coined the proverbial saying in 1857, using similar ideas expressed by several of his contemporaries. The fuller expression reads: "Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority; still more when you superadd the tendency of the certainty of corruption by authority".

Mechanisms to oversee how public power and state authority is exercised by those so entrusted must be tightened and strengthened. More importantly, if such mechanisms are by command of the supreme law of the land, "the constitution", they must be put in place within a reasonable time to actualise the constitution as a living document. To this end, the State, its organs and functionaries cannot, without consequence, be allowed to adopt a lackadaisical attitude, at the expense of the public interest, in bringing into operation institutions and mechanisms commanded by the supreme law. *See* the case of *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) at para 25.

However, this case also illustrates the need on the part of the litigants to move away from old fashioned private law habits when it comes to constitutional law litigation. While constitutional litigation may entail the vindication of a private right, it differs from private law litigation in that over and above that it seeks to entrench legality and the deepening of the constitutional order for the benefit of the broader public. This is why it has been said that "where a matter concerns the constitutionality of a law…the need for certainty may require the court to decide the matter irrespective of whether or not the party advancing the challenge had standing": Max du Plessis et all, *Constitutional Litigation*, Juta, 2013 quoting the South African cases of *Lawyers for Human Rights v Minister of Home Affairs* 2004(4)SA 125 (CC)para 24 and *South African Liquor Traders Association v Chairperson, Gauteng Liquor Board* 2006(8)BCLR 901 (CC) para 6.

This application seeks to enforce the enactment of the law envisioned in s 210 of the Constitution to provide for "an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct". It also seeks

a declarator that the respondents have breached the Constitution by failing to enact such a law timeously after the coming into operation of the new Constitution and a *mandamus* for the respondents to gazette the Bill envisioned in s 210 thereof within forty five days.

At the time of hearing of the application, a period of two years and four, five months had lapsed from the time of coming into operation of the rest of the Constitution on 22 August 2013, when the President-elect under the Constitution assumed office. That delay of less than two and a half years might not have been sufficient to satisfy a finding of violation of the Constitution and the application might have failed on that score, with a period of, say, three being deemed to be the sufficient one. However, post hearing, intimations or overtures that the matter might be settled by consent of the parties were made necessitating the holding of three Court-presided meetings of the parties over time on the basis that both sides were agreed that the envisaged legislation had to be enacted. And indeed both sides agreed that the application was essentially not opposed, but differed slightly on the appropriate timelines for the enactment of the law. Herein lies the nub of this matter. Had the constitutional legality principle been put above all else, the application could have been granted immediately with immense public benefit. However, the private law litigation habit of "winner takes all", of wanting the other side to be declared a violator of the Constitution stood in the way as did the attitude on the other side of not wanting to make any move unless so ordered. Had the Court appreciated then how deeply entrenched these arcane positions were – relics of private law litigation habits – a different approach could have been adopted of immediately issuing the order, with reasons to follow. It is regretted that this approach was not followed.

FACTUAL BACKGROUND

The applicants are citizens of Zimbabwe who have taken it upon themselves to see to it that the respondents adhere to the constitutionally created obligations imposed on them by s 210 of the Constitution. The applicants submit that the respondents have done nothing to fulfil their constitutional obligations clearly outlined in the supreme law. Section 210 of the Constitution requires the enactment of a law to provide for an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct. The applicants aver that it has been over two years since the inception of the Constitution and the Act required in terms of s 210 of the Constitution has not been put in place. It is further the applicant's contention that the failure by the respondent's to enact the law in terms of s 210 is a breach of the Constitution. The right to equal protection of the law under s 56 (1) of the Constitution is under threat, according to the applicants, due to failure or delay in enacting the law directed by s 210 of the Constitution. The application is opposed. The respondents submit that the law-making process cannot be carried out overnight. Respondents further submitted that they are working on making sure that the Act is in place and filed of record a working document they are allegedly focused on as a roadmap towards the eventual enactment of the law in question.

The timeline within which the Act envisaged by s 210 of the Constitution should be enacted sits at the heart of this application. The applicants in their final submission to this Court are seeking the following relief:

(1) The respondents' failure, to enact the law, provided for in terms of s 210 of the Constitution of Zimbabwe, is in breach of the Constitution of Zimbabwe.

(2) The failure by the respondents, to enact the law to bring into effect s 210 of the Constitution of Zimbabwe is a violation of the applicant's right to equal protection and benefit of the law as defined by s 56(1) of the Constitution.

(3) The respondents must gazette the Bill envisaged by s 210 of the Constitution of Zimbabwe within 45 days from the date of this order.

(4) The respondents jointly and severally each paying the other to be absolved pay costs of suit.

ISSUES

The first question this Court is seized with is whether or not the applicants have *locus standi* to bring this matter before this Court. This question shall be disposed of first before delving into questions arising from the merits of the application.

On the merits of the application, three questions arise and they are the following:

(1) Whether or not the respondent's delay in enacting the law, provided for in terms of s 210 of the Constitution of Zimbabwe, constitutes an unreasonable delay in fulfilling constitutional obligations in terms the Constitution of Zimbabwe.

(2) Whether or not the requirements for a mandamus have been satisfied to order the respondents to gazette the Bill envisaged by s 210 of the Constitution of Zimbabwe with forty five days from the date of this order.

The aforementioned questions on merit will be disposed of separately hereunder after addressing preliminary and standing issues.

PRELIMINARY ISSUES

Before proceeding to deal with the merits, there are a number of preliminary issues that call for the Court's attention, although not raised by the parties, but being questions of law. Their determination is paramount in clarifying what really is before this Court as opposed to what is purportedly so.

THE APPLICANTS' FOUNDING AFFIDAVIT IS DEFECTIVE

The founding affidavit in this application is replete with anomalies which render it defective. It is deposed to by the first applicant. He is the one who under oath swears to and undertakes to depose to the founding statement forming the basis of the suit. Thereafter, the very same affidavit identifies the second applicant by naming him and states that the second applicant brings the application 'in his own right'. It is pertinent to note that the second applicant does not at any point take the oath or undertake to depose to the founding affidavit. Neither does he sign the affidavit which is signed by the first applicant.

It does not end there. The founding affidavit of the first applicant then purports to tell the story of both the applicants. This it does in the most unusual way. The first applicant appears to be the author of the first to fifth paragraphs of the founding affidavit. He refers to himself in the first person where he states thus: "I am the Applicant herein." and refers to the second applicant in the second person were he states: "The Second Applicant is Rashid Stuart Mahiya."

It is not clear at what stage the second applicant takes over the reins of authorship to the first applicant's founding affidavit, but it appears to be possibly at about the sixth paragraph of the founding affidavit. At para 6.2 the first applicant is referred to in the second person where it says:

> "In my line of work I have witnessed the agonies of the violence perpetrated against our citizens in unmitigated proportions, in particular the first applicant, by the State and its agents."

It appears from the above remarks that it is the second applicant who now puts forth his own story through the first applicant's founding affidavit.

From the above, it is clear that apart from being mentioned by the first applicant, there is no affidavit before the court that can be attributed to the second applicant. Therefore, the founding affidavit before the court is that of the first applicant. The second applicant, in a strange and unusual manner, 'infuses' his own averments in an affidavit sworn to and signed by the first applicant. Thus, effectively there is no affidavit placed before this Court by the second applicant.

The founding affidavit also only identifies two respondents, the first and second respondents. The third and fourth respondents are not identified as respondents save for their citation on the face of the application.

Further to that, at para 8.1 of the founding affidavit, the authorship appears to have reverted back to the first applicant were it is stated that "The Applicant and I are ordinary citizens of Zimbabwe and Human rights activists" Such back and forth approach is unacceptable. It leaves the facts muddled, not being clear which averments are to be attributed to which applicant. Such breadth-taking bundling is unacceptable, embarrassing and an unworthy handiwork of one who is a senior legal practitioner.

Further to that, and more seriously, the applicant's affidavit also makes serious allegations against persons who are not cited as parties to the application. Neither were they

served with the application to enable them to answer to the allegations made therein. The founding affidavit at paras 8.4 to 8.12 (inclusive) alleges that certain individuals believed to be members of the security sector terrorised the first applicant and his family. It alleges vicious assaults and intimidation which resulted in the death of some of the first applicant's` family members. It is now well established at law that, in the face of such serious allegations, the persons whose conduct is impugned ought be cited and afforded a chance to put across their own case. In view of the fact that this has not been done, the allegations should be struck out and paras 8.4 to 8.12 inclusive are accordingly struck off the record.

The second applicant then purports to affirm the first applicant's affidavit through a supporting affidavit that merely states that the second applicant confirms the first applicant's averments and makes them his own. In addition, the second applicant deposes to an answering affidavit in circumstances where he has not deposed to a proper affidavit. That cannot be. This Court ought not to consider it the answering affidavit of the second applicant as it stands on nothing.

It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herbstein & van Winsen the Civil Practice of the Superior Courts in South Africa 3rd ed (*hereinafter 'Herbstein &Van Winsen or the Authors'*)* p 80 where the authors stated that:

> "The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out."

From the above remarks, it is clear that the second applicant's replying affidavit out to be struck out as well. It is pertinent to note that the second applicant's answering affidavit of five pages purports to answer to a number of issues that include *locus standi* and a substantial portion of it relates to s 210 of the Constitution. Therefore if struck out, in addition to other anomalies identified, this Court is left with very little on which the application is premised and from which this Court ought to be informed.

However, because the application raises the issue of legality, the court would want to be slow in dismissing such an application offhand even in the face of these glaringly gross technical glitches, notwithstanding the invidious position which the few remaining valid threadbare averments place the court in. The application seeks to enforce the constitutional obligations as set out in s 210 of the Constitution, and this Court as the apex court on constitutional matters is equally obligated to see to it that constitutional obligations are fulfilled.

RESPONDENTS NOTICE OF OPPOSITION

There is no real objection by the respondents to the applicants` claim. The respondents' objection in varying language is to the effect that there has not been a violation of the applicants' rights by the respondents. The respondents' argument is that the gazetting of the Bill envisaged by s 210 of the Constitution takes time and that due diligence requires the process not to be rushed.

Therefore, the respondents in substance are not opposed to the gazetting of the Bill. If anything they affirm the need to honour constitutionally created obligations such as s 210 of the Constitution. On the other hand the applicants insist on the need for prompt adherence to

constitutionally created obligations by the respondents in line with the Constitution. This means the enactment and promulgation by the respondents of the Act envisioned by s 210 of the Constitution within a reasonable time.

LOCUS STANDI AND DIRECT ACCESS

There was ultimately no debate in relation to standing. The applicants averred that they had standing and the right to directly approach the Court under s 167 (5) as read with s 85(1) (a) and (d) of the Constitution. Ordinarily, the applicant would have required leave to approach the court directly, but since the rules were promulgated only in June 2016, this requirement cannot be taken against him. At any rate, the applicant does satisfy the requirements for direct access.

Section 167 (5) of the Constitution confers to any person a right to bring a constitutional application directly to this Court in the interest of justice.

The applicant (because in essence there is only one who is properly before the court) as a citizen of Zimbabwe does qualify as "any person" identified in s 167(5) of the Constitution authorized to bring a matter to the Constitutional Court. What has been brought before the court is a constitutional matter and the application is being brought in the interest of justice.

With regard to the constitutionality of the matter, s 332 of the Constitution defines a constitutional matter as:

> " … a matter in which there is an issue involving the interpretation, protection or enforcement of this constitution;"

Clearly the application brings to this Court a constitutional matter by seeking to enforce compliance with s 210 of the Constitution. It is also in the interest of justice for the applicant to seek to uphold the constitution by compelling the realisation of constitutionally created obligation.

The applicant therefore has the right to approach the Court directly in terms of s 167 (5) of the Constitution and his *locus standi* is not in doubt nor is it challenged.

(1)WHETHER THE DELAY IN ENACTING THE LAW IS UNREASONABLE

Section 210 of the Constitution quoted *verbatim* reads as follows,

> "210 Independent complaints mechanisms
> An Act of Parliament must provide an effective and independent mechanism for receiving and investigating complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct."

The section is in clear and unambiguous language couched in peremptory language. The provision of an effective and independent mechanism for receiving and investigating complaints from members of the of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct must be empowered by an Act of Parliament. Section 210 of the Constitution does not specify the time frame within which the Act must be enacted and promulgated. Section 324 of the Constitution, however, requires that all constitutional obligations must be performed diligently and without delay.

The South African Constitution contains a similar provision which was subject to interpretation in the case of *Minister of Justice and Constitutional Development v Chonco and*

Others 2010 (4) SA 82 (CC). The South African Constitutional Court in interpreting the equivalent to s 324 of the Zimbabwe Constitution had this to say:

> "... good governance and social trust are premised at least partly on reasonable responsive decision making." my underlining.

Reasonable and responsive decision making is therefore what is contemplated in s 324 of the Constitution. The question arising is whether a reasonable time frame has been exceeded since the inception of the Constitution. Section 210 of the Constitution came into effect on the day the President elected under the Constitution in the first elections assumed office. *See* para 32 of the Sixth Schedule of the Constitution. The President of the Republic of Zimbabwe assumed office on 22 August 2013. If one is to calculate the time from 22 August to date of filing of this application, on 15 October 2015, a period of twenty seven months two weeks had elapsed, or slightly over two years. And if the time taken into reckoning is the hearing date, then, as already noted, the period would be less than two years and a half – hardly sufficient to support a finding of undue delay. However, one must be alive to the fact that up to date, more than seven years later, the Act in question has not been enacted.

The Constitution is clear on the point that all constitutional obligations must be performed diligently and without delay. In answering the question whether or not the respondents have failed in discharging their constitutional obligation without delay, regard must be had to the process of the origination of Bills.

Public Bills generally go through preliminary stages before they are brought to Parliament. The responsible Minister first presents proposals to cabinet. Once cabinet is satisfied that the proposals are in line with government policy the responsible Minister is directed to prepare a draft Bill along agreed lines. The Legal Drafting Department in the

Attorney General's office prepares a draft bill for consideration by the Cabinet Committee on Legislation. Once the Bill has been approved by Cabinet it is then published in the Government Gazette about fourteen days before its introduction in Parliament. The process described above relates only to Bills introduced by members of the Executive. Private members' Bills have to be brought in by motion. If that motion is approved by the House the Bill is then printed and introduced in Parliament.

One should also note that a Bill can also be introduced in Parliament by a Minister responsible for a particular Ministry. The first respondent is one such Minister who may introduce a Bill in Parliament. The Bill envisaged in s 210 of the Constitution has not yet been introduced in Parliament let alone gazetted. What has been filed of record is what the respondents term a "working document" which *ex facie* are notes on the alignment of laws to the constitution focusing on s 210 of the Constitution. Although the process of how proposals become Bills is largely shrouded in secrecy, L Madhuku *Introduction to Zimbabwean Law* enumerates stages of a Bill before it is gazetted and introduced in Parliament. The stages are stated hereunder:

> "1. Cabinet makes a policy decision that a certain law is to be made.
> 2. The decision is communicated to the relevant government department by the relevant Minister. It must in turn prepare a set of detailed principles to govern the legislation.
> 3. These principles are sent to the Cabinet Committee on Legislation (CCL). This is a sub-committee of cabinet tasked with supervising legislative drafting. Its function is to debate and approve the principles in the light of policy spelt out by the full cabinet.
> 4. From the CCL, the principles are sent to the Attorney General's Office, where a drafts person is appointed and assigned the role of drafting the piece of legislation. He or she must work in constant consultation with the relevant government department.
> 5. When the department is satisfied with the draft, it sends a draft Bill together with an accompanying memorandum to the CCL, which must scrutinize it in light of the principles and the policy articulated by the full cabinet.
> 6. After approval by the CCL, the Bill may either be sent to the full cabinet, in case of important or controversial Bill, or to parliament, if the CCL has been mandated to follow that route."

Subsequently to the above noted stages, the Bill is then introduced to Parliament by the relevant minister after it is gazetted. Paragraph 3 (c) of the fifth schedule to the Constitution mentions who may introduce a Bill to Parliament. The section provides that,

> "any Vice-President, Minister or Deputy Minister may introduce into motion for debate in or present any petition to either the Senate or the National Assembly."

After the introduction of the Bill to Parliament, the Constitution and Standing Rules and Orders of Parliament provides the procedure to be followed until a Bill is assented to by the President to become law. Paragraph 5 of the fifth schedule of the Constitution sets out how the transmission of Bills between Houses happens after their introduction to Parliament.

What is pertinent to note is that the process starting from when a Bill is introduced in Parliament is beyond the control of the respondents. The respondents do not have powers to control what happens in Parliament. It is the lack of diligence during the pre-Bill stage that the applicants take issue with.

Although the Constitution is silent on the exact timelines within which the Act envisaged in s 210 of the Constitution should be enacted, the same constitution requires all constitutional obligations to be performed diligently and without delay. A period of over seven years has passed since the coming into force of the constitution. That period of time in my view exceeds reasonable time within which the respondents should have discharged their constitutional obligation. Good governance and social trust are premised at least partly on reasonable, responsive and forthright decision making. The crafting of s 210 of the Constitution is peremptory. The constitution is the conscience of the nation and the courts are its guardians or custodians. See case of *South African Revenue Authority v Commissioner for Conciliation, Mediation and Arbitration and Others* [2016] ZACC 38. On this Court's shoulder rests the

very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised and protected.

Whilst the court remains alive to the fact that coming up with Bills or legislation does not happen overnight, one can take judicial notice of the shortest timelines within which a Bill can take from its formulation to it becoming an Act. The Labour Amendment Act of 2015, for example, took less than thirty days from its formulation to its promulgation. The respondents' failure, to present a Bill before Parliament for a period in excess of seven years therefore constitutes an unreasonable delay.

(2)WHETHER THE REQUIREMENTS FOR A MANDAMUS HAVE BEEN SATISFIED

The applicant in his draft order is also seeking a mandamus to the effect that the respondents be ordered to gazette the Bill envisaged by s 210 of the Constitution of Zimbabwe within forty five days from the date of this order.

A mandamus is a judicial remedy available to enforce the performance of a specific statutory duty or remedy the effect of an unlawful action already taken. *See*, the case of *Oil Blending Enterprises (Pvt) Ltd v Minister of Labour* 2001 (2) ZLR 446 (H) at 450. The Court in *Nkomo & Anor v Minister of Local Government*,*supra*,at page 9 stated:

> "… it was within the powers of a court before which a constitutional matter is argued to grant, in an appropriate case, a mandatory interdict or *mandamus*. While not necessarily bound by them, the Court is generally guided by common law principles relating to interdicts."

The requirements to access the judicial remedy were spelt out in the case of *Setlogelo v Setlogelo* 1914 AD at 227.The Supreme Court of Zimbabwe noted with approval the requirements of *mandamus* in the case of *Tribatic (Pvt) Ltd v Tobacco Marketing Board*

1996 (2) ZLR 52 (S) at p56. The requirements the applicants must prove for a *mandamus* are that:

(1) A clear or define right –this is matter of substantive law.
(2) An injury actually committed or reasonable apprehended- an infringement of the right established and resultant prejudice.
(3) The absence of a similar protection by any other ordinary remedy.

With regard to the first requirement, according to *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5th Edition*, at p 1457, whether the applicant has a right is a matter of substantive law. The authors state that one has to prove a clear and definite right in terms of substantive law, a right which can be protected, a right existing at common law or statutory law. The applicants' right is derived from constitutional law. Section 167(5) of the Constitution gives the applicants a right to enforce compliance with s 210 to ensure that the Act contemplated by the section is enacted. The applicant's rights also arise automatically in law, through s 210. According to the authors, it is unnecessary for the applicant to allege any facts in order to establish the rights, when a right arises automatically at law, more so in the case of constitutional rights. In that regard, the first requirement for a constitutional *mandamus* has been established.

The second requirement as noted earlier is that injury must actually have been committed or reasonably apprehended. The authors *Herbstein &Vanwinsen* at p 1464 state that injury must be understood in the wide sense. According to them, the harm must be caused by the respondent; alternatively the prevention of the harm must be within the respondent's power. It is pertinent to note that the respondents are in a position to enact and promulgate the Act envisaged by s 210 of the Constitution. The perceived injury or harm for the purpose of the *mandamus* being sought is to curtail the further delay by the respondents and to compel them

to put in motion and complete its part in the formulation of a Bill to satisfy s 210 of the Constitution. The continued delay by the respondents to formulate a Bill for consideration by Parliament constitutes the reasonable apprehension on the part of the applicant that the delay may persist.

The third requirement to granting a *mandamus* is that there must be no other remedy affording the same protection. There is no other remedy to move the respondents to give effect to s 210 of the Constitution.

The requirement for granting a *mandamus* have been satisfied and this Court is satisfied that the legal remedy sought must be granted. There been no dispute as to the need to comply with s 210 of the Constitution in order to fulfil the constitutional obligations, but given the delay already experienced, it is fair and reasonable to order that the respondents comply with the order in a period of forty five days as originally prayed, the challenges of the COVID 19 pandemic notwithstanding.

In the light of the foregoing, I am satisfied that the application has merit.

Accordingly, it is hereby ordered as follows:

1) Paragraphs 8.4 to 8.12 inclusive of the applicant's founding affidavit are struck out as they make serious allegations against persons who were not made part of these proceedings through citation and service.
2) The application is granted with costs.

3) The respondents' failure to formulate within a reasonable time a Bill to give effect to the Act envisaged in s 210 of the Constitution is in breach of the Constitution of Zimbabwe.

4) The respondents are ordered to gazette the Bill envisaged by s 210 of the Constitution of Zimbabwe within forty five days from the date of this order.

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

PATEL JCC: I agree

BHUNU JCC: I agree

UCHENA JCC: I agree

Tendai Biti, applicant's legal practitioners

Civil Division of the Attorney General's Office, respondent's legal practitioners