

20 FEB 2019

P.O. BOX 213, CAUSEWAY
ASSOCIATION 798634/5

REPORTABLE (2)

- (1) ZIMBABWE LAW OFFICERS ASSOCIATION
(2) DERECK CHARAMBA
v
(1) NATIONAL PROSECUTING AUTHORITY
(2) THE PROSECUTOR GENERAL N.O.
(3) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY
AFFAIRS N.O.
(4) COMMISSIONER GENERAL OF POLICE
(5) ATTORNEY GENERAL

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDY AUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, JANUARY 14, 2015 & FEBRUARY 19, 2019

T. Zhuwarara and *N. Chamisa*, for the applicants

S. Fero, for the first and second respondents

No appearance for the third, fourth and fifth respondents

GUVAVA JCC: This is an application brought in terms of s 85(1) of the Constitution of Zimbabwe (hereinafter called 'the Constitution'). The applicants seek an order declaring the employment of serving members of the security services, as prosecutors, to be unconstitutional.

The applicants allege that the engagement of serving members of security services as prosecutors is a breach of the right of accused persons to protection and benefit of the law under s 56(1) of the Constitution and their right to a fair trial under s 69 (1) of the Constitution.

The applicants also contend that the engagement of serving members of the security services is contrary to the provisions of s 208(4) of the Constitution. The section prohibits the engagement of serving members of security services in civilian institutions. They argue that the only exception granted in the Constitution for the employment of serving members of the security services in civilian institutions is during a period of public emergency.

The applicants accordingly pray for the following relief:

1. 'The engagement by the first Respondent of members of the security services to perform prosecution duties is a contravention of section 208(4) of the Constitution of Zimbabwe Amendment (No. 20) 2013.
2. The engagement by the 1st Respondent of members of the security services to perform prosecution duties interferes with the protection granted to accused persons and infringes on section 69 of the Constitution of Zimbabwe Amendment (No.20) 2013.
3. The engagement by the 1st Respondent of members of the security services to perform duties of public prosecutors violates the principle and spirit of sections 260 and 261 of the Constitution of Zimbabwe (No. 20) 2013.
4. The 1st and 2nd Respondents are directed to disengage all members of the security services within its ranks forthwith.

The 1st and 2nd respondents are hereby ordered to pay costs of this application jointly and severally one paying the other to be absolved.'

Background Facts

In the application, the applicants allege in the main that the rights of accused persons to a fair trial are infringed by the engagement of police prosecutors. They make the contention in

the final analysis, that in any event, the engagement of serving members of the security services as prosecutors is in contravention of s 208 (4) of the Constitution.

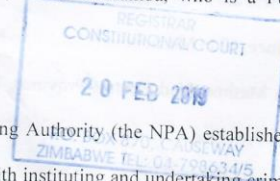
The first applicant is Zimbabwe Law Officers Association, an unincorporated voluntary organization, governed by its constitution (hereinafter referred to as the Association). The Association represents the interests of public prosecutors in Zimbabwe. The Association is represented in the application by its Secretary General, Derek Charamba, who is a Public Prosecutor. He is also the second applicant.

The first respondent is the National Prosecuting Authority (the NPA) established in terms of s 258 of the Constitution. It is the body tasked with instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions necessary or incidental to such prosecutions.

The second respondent is the Prosecutor General who is the head of the first respondent. He is cited in his official capacity.

The third respondent is the Minister of Justice, Legal and Parliamentary Affairs. He is also cited in his official capacity.

The fourth respondent is the Commissioner General of the Zimbabwe Republic Police, cited in his official capacity, as the head of the police force.



The third, fourth and fifth respondents did not oppose the application.

The first and second respondents do not dispute that a number of serving members of the security services are employed as prosecutors by the first respondent. At the time of the hearing of the application, not less than 100 serving members of the security forces were employed as prosecutors throughout the country. Statistics given in the applicants' founding affidavit state that there are 27 in Harare, 23 in the Midlands Province, 29 in Bulawayo and Matebeleland North Province, 12 in Mashonaland East Province, 11 in Manicaland Province, 11 in Masvingo Province, 10 in Mashonaland Central Province, 8 in Mashonaland West Province and 6 in Matebeleland South Province.

Section 85(1) of the Constitution in terms of which the applicants brought this application provides as follows:

“85 Enforcement of fundamental human rights and freedoms

Any of the following persons, namely:-

- (a) any person acting in their own interests;
- (b) any person acting on behalf of another person who cannot act for themselves;
- (c) any person acting as a member, or in the interests, of a group or class of persons;
- (d) any person acting in the public interest;
- (e) any association acting in the interests of its members

is entitled to approach a court alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.”

Although counsel for the respondents had raised as a point *in limine* that the applicants were not properly before the Court, they conceded that the matter is of public importance calling for resolution on the merits. I agree with this approach.

In this respect I find comfort in *Herkpoort Environmental Preservation Society & Another v Minister of Land Affairs* 1998 (1) SA 349 (CC) where the Constitutional Court of South Africa held that there may be cases where the circumstances are so exceptional and in the public interest, or good governance, or are of such overriding importance that the Court may decide not to be detained by procedural irregularities and grant access to the parties. Although the court in the *Herkpoort Environmental Preservation Society's* case *supra* was dealing with a question of disputes of facts, I am of the view that the basic principle is applicable to the facts of this case. A similar approach was adopted in the Kenyan case of *Westmond Power (K) Ltd v Commissioner of Income Tax Nairobi (Nairobi Civil Appeal No. 28/06)*

I have also taken into account the fact that there would be no prejudice as both parties were in agreement that the matter of the alleged unconstitutionality of the engagement of serving members of security forces as prosecutors should be determined on the merits. The issue was argued fully before the Court.

The applicant's case.

The applicants argue that a high degree of impartiality and professional independence is required of public prosecutors. They allege that the training that members of the Defence Forces, Police Service and Prisons and Correctional Services undergo is different from that given to civilian prosecutors in that the training causes them to maintain a distinct culture and discipline not primarily predicated on impartiality and independence. It was argued that members of security services are trained to take orders from superiors which they must execute without question as questioning is regarded as insubordination. It was further alleged that as a consequence of

undergoing and receiving this type of training, serving members of security services are unable to attain the high degree of impartiality and independence required of a public prosecutor.

The applicants proceeded to argue that whilst the culture of obedience and subordination in the security services is necessary for the efficient administration of the security sector, it is of no significance to the functions of a public prosecutor whose most important attributes should be professional independence and impartiality. It was thus contended on this basis that the appointment as prosecutors of serving members of the security services, impedes the due administration of justice.

The applicants thus submit that the employment of serving members of security services as prosecutors is a threat to the right of accused persons to a fair trial as the independence of the officers is not guaranteed. To buttress their argument, the applicants attached two annexures to their founding affidavit. Annexure "DC2" is a summary jurisdiction and state outline of a case against a "police prosecutor". The police prosecutor was charged with criminal abuse of duty as a public officer under s 175(1) (a) of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. He was said to have demanded and received ZAR900 to withdraw the charges against the accused person. In the second annexure, one Bruce Muparuri deposes to an affidavit challenging the validity of his prosecution by a law student who had been granted prosecutorial authority. The student had been under the tutorship of a police prosecutor. Mr Muparuri argued that the student was not a member of the first respondent and that the prosecutor was a serving member of the Zimbabwe Republic Police.

The contents of these documents were used by the applicants to illustrate the point that the engagement of serving members of the security services poses a threat to the right of accused persons to a fair trial.

The applicants further alleged that in any event the employment of serving member of the security services as prosecutors was contrary to s 208 (4) of the Constitution.

The respondents' case.

The first and second respondents opposed the application. They submit in the main that the applicants have not shown how the employment of serving members of the security services is an infringement of their rights under ss 56(1) and 69 (1) of the Constitution. They allege that as public prosecutors the applicants cannot represent the interests of accused persons.

They also submit that the provisions of s 208 (4) of the Constitution do not apply to the first respondent as it is an institution that is *sui generis*. They argue that it cannot be categorized as being strictly civilian and is thus not prohibited from engaging serving security officers in terms of s 208(4) of the Constitution.

They therefore pray that the application must be dismissed.

The issue before the court

It seems to me that, even though the applicants had made a two pronged argument before the court and argued that their fundamental rights had been infringed, I am of the view that

for the purpose of disposing of the application it is not necessary to delve into the question of whether or not the applicant's rights have been violated. I take this view as it is apparent from the facts of this case that the applicants have not shown that their fundamental rights have been infringed. The first applicant does not represent rights of accused persons as it is an association to protect the interests of prosecutors. The second applicant is a public prosecutor not an accused person. He does not have the mandate to represent accused persons.

In my view however, the crux of the matter is whether or not the employment of serving members of the security services as public prosecutors violates s 208 (4) of the Constitution. I will thus proceed to deal with the matter on this limited basis.

Whether the employment of serving members of the security services as prosecutors violates s 208(4) Of the Constitution

Section 208(4) of the Constitution provides:

'(4) Serving members of the security services must not be employed or engaged in civilian institutions except in periods of public emergency.'

The applicants have alleged that the employment of members of the security services is contrary to the above provision. The respondents have argued that they are not acting in contravention of the Constitution as the office of the Prosecutor General is *sui generis* and therefore does not fall under the above prohibition.

In order to determine the issue it is necessary to examine the following provisions.

Security services are defined in s 207 of the Constitution as:

“207 Security Services

- (1) The security services of Zimbabwe consist of-
- a) the Defence Forces;
 - b) the Police Service;
 - c) the intelligence services;
 - d) the Prisons and Correctional Service; and
 - e) any other security service established by Act of Parliament¹

The Respondents seek to rely on the exclusion of the second respondent from the Civil Service in s 259(2) of the Constitution which provides:

“259 Prosecutor General and other officers

- (1) ...
(2) The office of the Prosecutor General is a public office but does not form part of the Civil Service”

The Constitution does not define a “civilian institution” but it provides a starting point as it defines the “Civil Service” in s 199 which reads as follows:

“199 Civil Service

- (1) There is a single Civil Service, which is responsible for the administration of Zimbabwe.
- (2) The Civil Service consists of persons employed by the State other than—
- (a) members of the security services and any other security service that may be established;
 - (b) judges, magistrates and persons presiding over courts established by an Act of Parliament;
 - (c) members of Commissions established by this Constitution;
 - (d) the staff of Parliament; and
 - (e) any other person whose office or post is stated, by this Constitution or an Act of Parliament, not to form part of the Civil Service.”

The “Civil Service” is defined by the Dictionary of Legal Words and Phrases¹ as that branch of the public service that is not the military or the navy. Wharton’s Law Lexicon Third Edition² defines the Civil Service as a term properly used to include all services under the Crown

¹ Compiled by CT Glaasen, Durban Butterworths 1975

² A S Oppe of the Inner Temple, Barrister-at-law, London Law Publisher

except the naval, military and air services. Section 199(2) (a) of the Constitution is a proper exclusion of the security service from the Civil Service flowing from the definitions given above. However, the rest of the exceptions in s 199(2) are an exclusion created by the Constitution itself which do not necessarily follow the ordinary definition of the “Civil Service.”

Thus going by the above, it is clear that the term “Civil Service” as used in the Constitution, is tailored for the purposes of this country and is not a definition to go by as a synonym of “civilian”. It is therefore important to define the word “civilian”. The applicants relied on the Oxford Concise English Dictionary 11th Edition which defines ‘civilian’ as a noun describing a person not in the armed services or the police force. To buttress their case, the applicants have cited a number of cases that may assist in reaching a conclusion on the definition of the word ‘civilian’.

In the case of *Minister of Finance v Bacher Aron and Company (Rhodesia) Limited* 1956 (1) SA 63 (SR) and *S v X* 1974 (1) SA 344 (RA) there is discussion of a person changing from his regalia in the latter case and from army clothes into civilian clothes in the former case. In the case of *S v Mavunga* 1982 (1) ZLR 63 (SC) the court discussed civilian clothes specifically with reference to ordinary clothes. In the case of *Commercial Union Fire, Marine and General Insurance Company Limited v Fawcett Security Organisation Bulawayo (Private) Limited* 1985(2) ZLR 31 (SC) the court identified a man who was not in the army as a civilian.

The Constitution does not define the term ‘civilian’. Michael Barnett and Raymond Duvall, in “Power in Global Governance”, grapple with the definition of “a civilian” and do

concede on page 257 that the term can be used to refer to an 'unmilitary man or official'. It is therefore necessary to examine how other dictionaries define the word 'civilian'.

The Cambridge Dictionary defines 'civilian' as relating to a person who is not a member of the police, the armed forces or a fire department. The Longman Dictionary of Contemporary English defines the same word as being anyone who is not a member of the military forces or the police. The Merriam-Webster Dictionary defines a civilian as a person who is not a member of the military or police or fire-fighting force. Black's Law Dictionary³ describes a civilian to be of a private citizen as distinguished from such as belonging to the army and navy or in England the church. Webster's 1913 Dictionary defines a civilian as one whose pursuits are those of civil life, not military or clerical.

What can be gleaned from these definitions by the various dictionaries is that a person who is not in the army, navy, cleric or police force is a civilian. Clearly the ordinary dictionary meaning is what was intended by the Legislature as it did not define the term in the Constitution. The word "civilian" is an English word which the Constitution has not defined but used.

The Prosecutor General defined in s 159 (1) is the head of the NPA. He is not in the army, navy, police force or clergy. It follows therefore that the NPA is a civilian institution and the Prosecutor General who heads it, is a civilian as he or she is not a member of the security service.

³ Free Online Legal Dictionary 2nd Edition

Of primary importance is the supremacy of the Constitution in this case. Section 2 provides:

“2. Supremacy of Constitution

(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”

The applicants are alleging that the conduct of the first respondent in employing serving members of the security services is unconstitutional as the Constitution itself prohibits such conduct in s 208(4).

From the foregoing, it can be seen that the ‘Civil Service’ properly defined excludes the military, navy and air service. The Civil Service in Zimbabwe is defined differently by the Constitution. The failure by the Constitution to define the word “civilian” leads to the conclusion that the ordinary grammatical meaning of the word is intended. The ordinary meaning shows that the first respondent is a civilian institution. Thus the security services and the prosecution department must be kept separate and distinct, except during times of public emergency.

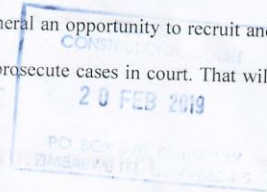
DISPOSITION

Having come to the conclusion that serving members of the security service cannot be employed in civilian institutions one cannot escape the conclusion that the Constitution prohibits the conduct that the applicants have complained of.

In *casu*, the principles of constitutionalism and constitutional supremacy must prevail. Clearly the conduct of engaging serving members of the security services in civilian institutions is

inconsistent with s 208(4) of the Constitution. The President has not declared a public emergency and until that happens, the employment of such officers in a civilian institution such as the first respondent is unconstitutional.

Although the applicants have sought an order that serving members of the security service must be withdrawn forthwith, such an order would inevitably lead to chaos. In several areas of the country, especially the more remote parts, these are the officers who prosecute cases. In the event that they are removed without giving the Prosecutor General an opportunity to recruit and replace them some areas will find themselves with no one to prosecute cases in court. That will lead to further injustice.



It seems to me that it is appropriate for the order of invalidity to be amended to give the Prosecutor General sufficient time to replace the serving members of the security services engaged by the NPA as public prosecutors. Section 175 (6) (b) allows the Court to grant "appropriate relief" in any case that has been placed before it and to suspend the condition of invalidity for any period to allow the competent authority to correct the defect.

In respect to costs the proper order is that each party should pay its own costs.

In the result I make the following order.

It is declared that:

1. The engagement by the first respondent of serving members of the security services to perform prosecutorial duties is in contravention of s 208 (4) of Constitution of Zimbabwe Amendment (No. 20) 2013;

2. It is hereby ordered as follows:

- (i) The first and second respondents are directed to disengage all serving members of the security services within its employment within twenty four (24) months from the date of this order.
- (ii) Each party is to pay its own costs.

CHIDYAUSIKU CJ: I agree

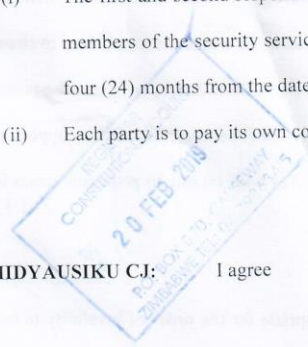
MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree



HLATSHWAYO JCC: I agree

MAVANGIRA AJCC: I agree

Mupanga Bhatasara Attorneys, applicants' legal practitioners

National Prosecuting Authority, respondents' legal practitioners

