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".

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

(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

> "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

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

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*

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."

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*

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.

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