

OBEY SHAVA  
versus  
MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS  
and  
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE  
and  
THE PARLIAMENT OF ZIMBABWE  
and  
THE ZIMBABWE HUMAN RIGHTS COMMISSION

HIGH COURT OF ZIMBABWE  
**MHURI J**  
HARARE; 23 September & 29 October 2024

***Opposed Application***

Mr *T. Biti*, for the applicant  
Ms *J. Shumba*, for the first and second respondent  
Mr *S. Hoko*, for the third respondent  
No appearance for the fourth respondent

MHURI J:

This is a Court application for constitutional relief in terms of sec 175(6) of the Constitution of Zimbabwe. As per his Draft Order, applicant is seeking the following: -

1. that second Respondent's failure to sign and accede to the Convention Against Torture (CAT) and his failure to bring the same for ratification by Parliament is a breach of applicant's right to equal protection and benefit of the law.
2. that first (sic) Respondent must within six months of the date of this Order accede to, and deposit the necessary instruments of accession to the Convention Against Torture with the United Nations.
3. That first and second Respondents, within 12 months from the date of this Order must ensure that the Convention Against Torture so acceded to by second respondent is brought to Parliament for ratification.
4. that there shall be no order as to costs. (as orally submitted by applicant).

The factual background of this matter is that applicant a legal practitioner, practising with Shava Law Chambers felt strongly aggrieved by an incident that happened to him on the 5<sup>th</sup> July 2023 which then prompted him to file this application. According to him, a certain

person known as Tinashe Mazodze called at his Law Chambers where he indicated he wanted to consult him on some legal issues. Applicant was not present at the office, but that notwithstanding the said Tinashe insisted that it is applicant and no other legal practitioner whom he wanted to see. It was then that a meeting was scheduled for the 5<sup>th</sup> July 2023 at 10:00am. At around 5:30pm he told Tinashe to come to his office, which Tinashe refused to do on the basis that he did not feel safe to drive anymore as he had driven from Bindura. Tinashe suggested that they meet at Energy Park at the Show Grounds where upon arrival he found Tinashe in an unmarked silver Mercedes Benz which was parked in a dimly lit area. In the said motor vehicle were four gentlemen including Tinashe. Three of them joined him in his car and two introduced themselves to the applicant as Tatenda and Spencer. He asked the gentlemen, who among them had visited his Law Chambers and had a file opened, he was told it was Tatenda. He enquired why the file had been opened under Tinashe's name and he was told that it could be that his Personal Assistant (PA) had got the pronouncement of his name wrong.

He then requested that the other gentleman joins them but they insisted that it was not safe to leave their motor vehicle unattended. Thereafter he told them that he wanted to leave some keys at a colleague's place (Mbidzo Muchadehama Makoni Legal Practitioners) and he drove there while the Mercedes Benz being driven by the other gentleman followed behind. He then parked his motor vehicle at Selbourne Routledge School and so did the other motor vehicle. Then two other vehicles, a pick-up truck and a Range Rover arrived and parked close by. The two vehicles then left and he was left with his potential clients. He then asked them to tell him their story and they told him that they were being accused of stealing US\$250 000 at Kefalos and the police were on their case. Whilst he was in the process of assuring them that he could accompany them to the Police Station they suddenly pounced on him, tripped him and he fell down. He was kicked on the head and when he tried to block, he was hit with an iron bar and he lost power to resist the attack. They continued to assault him using the iron bar until he passed out.

When he regained consciousness, he called for help and was taken to the hospital for treatment of the injuries sustained. He doesn't know what could have happened to him if members of the public had not prevented him from being abducted.

He averred that he has been a victim of torture, cruel and degrading treatment.

To bolster his case, applicant also referred to other people's incidences that he alleged happened some years before, and were victims of torture. He mentioned:

1. Tonderai Ndira who he alleged was abducted on 13 May 2008 from his home in Mabvuku by 10 men.
2. James Chidakwa who he alleged on 23 October 2023 was bundled by 6 men into a Toyota Fortuner which had no number plates.
3. Takudzwa Ngadziore who he alleged was on 4 November 2023 abducted by some unknown assailants and taken to Mazowe where he was tortured.
4. Tinashe Chitsunge whom he alleged was brutally assaulted and tortured by unknown assailants and died on the spot.
5. Bisho Tapfumaneyi Masaya whom he alleged was on 11 November 2023 abducted and bundled in a Toyota Fortuner in Tafara Mabvuku.
6. Doctor Peter Mugombeyi whom he alleged was on 14 September 2019 abducted and tortured.

He also referred to what is termed Gukurahundi, the formation of the MDC party in 2000, 2018 election incidences of violence.

He averred that the victims' cases are never investigated no one is prosecuted, the victims suffer reprisals, defamation suits, prosecution and detention.

The application is opposed by first and second respondents. The third respondent indicated will abide by the court's decision. Fourth respondent did not file any papers and neither did it appear for the hearing. Ms *Shumba* for the first and second respondents indicated that they are abandoning the points *in limine* they had raised.

They however averred on the merits that the averments by applicant where he joins several issues concerning different allegations of torture by different individuals, principles of public international law, the United Nations Treaty Reporting framework and other alleged and historical violations are irrelevant, immaterial or superfluous to his cause of action. They denied that torture and violence are widespread in Zimbabwe as alleged by applicant. It was averred that the law has adequate remedies for such infringements and that the majority of cases referred to by applicant have been dealt with by the courts and that sec 53 of the Constitution affords adequate protection from torture, cruel, inhuman and degrading treatment or punishment.

They further averred that whilst some indications for considering the signing and ratification of CAT may have been made at some forum, that show of interest to accede does not in any way create a basis for compelling the respondents to accede to CAT, neither does it

create an obligation for respondents to accede and ratify CAT. No sovereign state is compelled to accede to the Convention.

It was respondents' position that the court cannot therefore compel the respondents to do that which they are not in law mandated to do.

It prayed that the application be dismissed with costs for being devoid of any merit.

Section 175(b) of the Constitution in terms of which applicant bases his application provides as follows: -

- “(6) when deciding a constitutional matter within its jurisdiction a court may –
- (a) declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of the inconsistency.
  - (b) make any order that is just and equitable including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.”

Applicant avers that his approach to this Court is for a mandamus order in which he seeks the relief as stated earlier, that the second Respondent's failure to sign and accede to CAT and his failure to bring the same for ratification by third Respondent is a breach of applicant's rights to equal protection and benefit of the law.

It is common cause that indeed second Respondent has not acceded to CAT.

The question therefore is, does the failure by second Respondent infringe applicant's rights to equal protection and benefit of the law?

Section 56 of the Constitution which applicant avers is breached by second Respondent provides: -

- “Equality and non – discrimination
- (1) all persons are equal before the law and have the right to equal protection and benefit of the law.
  - (2) .....
  - (3) .....
  - (4) .....
  - (5) .....
  - (6) .....

This provision is couched in clear and unambiguous terms. The provision entails that all persons are equal before the law. They all have the same rights and are to be protected by those laws and similarly benefit from the same law. If there is a deviation from or an infringement of this right occurs, it can rightly be said that there is derogation from this law, meaning there is no equal protection and benefit of the law. As aptly stated by ZIYAMBI JCC

the right contemplated in sec 56(1) envisages a law which provides equal protection and benefit for persons affected by it. It includes the right not to be subjected to treatment to which other persons similarly situated are not subjected to. The test to assess an infringement of a right to equal protection of the law as provided in sec 56(1) above, was aptly articulated by the Constitutional Court in the case of: -

*SAMUEL SIPEPA NKOMO vs MINISTER OF LOCAL GOVERNMENT, RURAL and URBAN DEVELOPMENT*

*and*

*2. MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS*

*and*

*3. THE GOVERNMENT OF THE REPUBLIC OF ZIMBABWE*

CCZ 6/2016

ZIYAMBI JCC went further and stated that, “*in order to found his reliance on this provision, the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted to him and that he is entitled to the same or equal treatment as those persons.*”

She further referred to the remarks made in the case of *SARRAHWITZ vs MARTIZ N.O & ANOR* (CCT 93/14) (2015) ZACC 14 2015 (4) SA 491 to the effect that;

“This subsection guarantees everyone the right to equal protection and benefit of the law. The concept of “equal protection and benefit of the law” suggests that purchasers who are equally vulnerable must enjoy the same legal endowments irrespective of their method of payment.”

She emphasized that the guarantee provided by sec 56(1) is that of equality under the law.

The Constitutional Court again had an occasion to interpret sec 56 in the case of;

*MARX MUPUNGU*

*versus*

*1. MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS*

*and*

*2. JUDICIAL SERVICE COMMISSION*

*and*

*3. MUSA KIKA*

*and*

*4. YOUNG LAWYERS ASSOCIATION OF ZIMBABWE*

*and*

*5. FREDRICK CHARLES MUTANDA*

*and*

6. *THE ATTORNEY GENERAL*

*and*

7. *THE PRESIDENT OF ZIMBABWE*

CCZ 07/21

At page 54 of the cyclostyled judgement, the court had this to say about sec 56(1):

“The use of the word “equal” does indeed qualify the protection and benefit of the law, but it does so by restricting rather than broadening the scope of sec 56(1). What this provision means is that all persons in a similar position must be afforded equality before the law and the same protection and benefit of the law.

In essence, s 56(1) is a non-discrimination clause that guarantees equality under the law.”

Similarly, in the case of;

*INNOCENT GONESE*

versus

*THE PRESIDENT OF THE SENATE & OTHERS*

CCZ 2/23 at page 28

the court remarked;

“according to the above body of case law, a person alleging a violation of s 56(1) must demonstrate that he was denied the protection of the law while others similarly positioned were afforded such protection. Put differently, he must show that the law in question operated to discriminate against him in favour of others in the same or similar position. ....”

Clear from the above cited cases is the position that sec 56 requires a party who alleges an infringement of it to prove that others who were in his situation were treated differently from him. Applicant in *casu*, named other people whom he alleged were victims of torture but he did not show or prove how they were treated differently from him. Save to mention them and their circumstances, he did not, and therefore he failed to prove the allegation of sec 56(1) infringement. I find, in the result that applicant’s relief based on the sec 56(1) infringement cannot be granted.

The second question to be determined is whether this court can compel second Respondent to sign CAT.

Sec 2 of the Constitution (supremacy clause) provides;

“(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.

(2) The obligation imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.”

Clear from the above section is the position that any conduct which is not consistent with the Constitution is invalid. It is applicant's argument that second Respondent's failure to accede to CAT is conduct which is inconsistent with the Constitution and therefore in terms of sec 175(6) of the Constitution must be declared invalid and order that second Respondent accede to CAT.

Sec 53 of the Constitution, Freedom from torture or cruel, inhuman or degrading treatment or punishment, provides;

"No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment."

It has not been disputed that torture as specified in sec 53 has not been codified as an offence in an act of Parliament (CP&E Act or Criminal Law Codification & Reform) Act.

Applicant argued that in terms of sec 44 of the Constitution which obliges second Respondent to respect, protect, promote and fulfil the rights and freedoms, second Respondent's failure to accede to CAT is a failure to promote the rights and freedoms, as provided in sec 53.

Sec 327 International conventions, treaties and agreements defines in subsection (1) international treaty to mean;

"a convention, treaty protocol or agreement between one or more foreign States or governments or international organisations."

Subsection 2 provides: -

"an international treaty which has been concluded or executed by the President or under the President's authority: -

- (a) does not bind Zimbabwe until it has been approved by Parliament; and
- (b) does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament."

Also clear from the above is that CAT can only be part of the laws of Zimbabwe after it had been executed by the President or under his authority. This is the conduct applicant is alleging must be done expeditiously in compliance with sec 324, which section provides: -

"all constitutional obligations must be performed diligently and without delay."

Section 110 – Executive Functions of President and Cabinet, provides: -

"(1) The President has the powers conferred by this Constitution and by any Act of Parliament or other law, including those necessary to exercise the functions of Head of State.

- (2) .....
  - (3) .....
  - (4) Subject to this Constitution, the President may conclude or execute conventions, treaties and agreements with foreign states and governments and international organisations.
  - (5) .....
  - (6) .....”
- (underlining is my own)

The above subsection (4) confers a discretion on the President to conclude or execute conventions. It does not impose a mandate on second Respondent to sign or accede to a convention. The word may gives second Respondent that discretion. A submission was made that Zimbabwe has taken steps to consider the accession and ratification of CAT and that in its Universal Periodic Review (UPR) report this issue is considered. Another submission was made that Zimbabwe is one of the only two countries that has not acceded to and ratified CAT. Be that as it may, it is my considered view that this Court cannot compel the second Respondent to do what it is by law not compelled to do, to wit sign a convention. Here then kicks in the doctrine of separation of powers. *“Courts must be conscious of the vital limits on judicial authority and the Constitution’s decision to leave certain matters to other branches of government. They too must observe the Constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.”* per *DOCTORS FOR LIFE INTERNATIONAL vs. SPEAKER OF NATIONAL ASSEMBLY & OTHERS* 2006 (6) SA 416 (CC)

I associate myself with the above remarks and reiterate that this Court cannot compel second Respondent to do what he is not compelled by law to do.

Consequently, I cannot grant the mandamus order sought by applicant.

In the result, the application is hereby dismissed with no order as to costs.

**MHURI J:** .....

*Biti Law*, applicant’s legal practitioners  
*The Attorney General’s Office*, first and second respondents’ legal practitioners  
*Chihambakwe & Partners*, third respondent’s legal practitioners.