NYASHA CHIRAMBA
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
ATTORNEY GENERAL

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 8 June & 2 September 2022

Opposed Matter

Mr *D Marange*, for the applicant
Ms *A Magunde*, for the respondent

MANGOTA J: The people of this country repose their trust in persons whom they elect into Parliament and, in particular, those whom the President of Zimbabwe appoints to the office(s) of Vice-President, Minister or Deputy-Minister. It is for such persons who are collectively known as public officers that the people enacted section 106(3) of the Constitution of Zimbabwe Amendment (NO. 20) Act, 2013 ("the constitution") during the constitution-making process which culminated in a referendum which Zimbabwe held in 2013. In enacting section 106(3) as they did, the people intended to have these public office bearers work in a transparent manner so that they remain accountable in their conduct to the President who appoints them into such offices and, through him, to the people of Zimbabwe as a whole.

Section 106(3) of the constitution has remained on the drawing board for eight (8) consecutive years. It has not been breathed life into from 2013 to date. It is therefore in the spirit of the observed and stated matter that the applicant filed this application which is one for a mandamus order. His aim and object are to move me to compel the first and second respondents who are respectively the Minister of Justice, Legal & Parliamentary Affairs and the Attorney-General for Zimbabwe to initiate legislation which will lead to the actualization of section 106 (3) of the constitution. He insists that the responsibility of giving birth to the legislation which will

serve as a yardstick *vis-à-vis* the conduct of public officers who are mentioned in the section lies on the shoulders of the respondents.

The respondents agree that the legislation which is envisaged in section 106(3) of the constitution may be overdue. They, however, deny that they have the obligation to birth the Bill which will actualize section 106(3) of the constitution. They throw that responsibility on Cabinet and/or Parliament whom they insist should have been joined to the application. They state, as a preliminary point, that the non-joinder of Cabinet and/or Parliament makes the application fatally defective. They move me, on the mentioned basis, to dismiss the application with costs.

Issues which arise, from a reading of the above-stated expose' center on whether or not:

i) the respondents have the obligation to actualize section 106(3) of the constitution;
ii) the obligation to actualize the section lies on Cabinet or Parliament as the respondents contend- and/or
iii) some person or authority who/which is outside the abovementioned institutions or natural persons bears the duty to actualize section 106(3) of the constitution.

The probabilities, in my view, are that the ball lies in the court of the respondents.

A collorary question which exercised my mind on a reading of the application centered on the applicant's *locus* to sue as he did. I wondered if he had such. I also wondered if he was not one of those busy-bodies who intended to swell the roll of the court with matters which had no bearing on the business of the court. I wondered if he had the *bona fide* intention to fill in the gaps which are, for one reason or the other, inherently unfulfilled in the constitution.

On the issue which relates to the applicant's *locus*, I observed that the respondents did not challenge his right to apply as he did. He describes himself as a student of law at Ezekiel Guti University which is in Zimbabwe. He claims that he is a firm believer in human rights. He asserts that he has an interest to enforce constitutional compliance with the supreme law of Zimbabwe. For him to succeed, therefore, he must, I opined, satisfy me on the requirements which relate to his cause of action. The cause, as he puts it, is that the respondents should gazette the Bill which is envisaged in section 106(3) of the constitution. The requirements which he must meet were stated in *Setlogelo* v *Setlogelo*, 1914 AD 227. They are:

1. a clear right
2. an injury actually committed or reasonably apprehended- and

3. absence of a similar protection by any other ordinary remedy.

The applicant states, and I agree, that he has the right to sue as he did. He claims that he has the *locus*. *Locus*, simply defined, refers to a person's right to approach the court on a matter which is of interest to him in his capacity as a plaintiff or an applicant. One which has no interest cannot sue. He cannot approach the court, as plaintiff or applicant. He has no *locus*.

The applicant, in my view, has the requisite *locus*. He would not have ploughed through the provisions of the constitution if he did not have a direct and substantial interest in the subject-matter of his application. He would not have dug into the constitution if he did not have a direct and substantial interest in the matter which constitutes the subject of his inquiry.

Section 106(3) of the constitution is thirty-two (32) pages from the Preamble of the same. It could easily have escaped his eye if he was not interested in the contents of the Constitution of Zimbabwe Amendment (NO. 20) Act of 2013. He, no doubt, ploughed through the provisions of the constitution for him to fix his eyes on the section which he read, digested and compared with the evidence which he filed in paragraph 12 of his founding affidavit. He, in the process, saw the need to have section 106(3) breathed life into. The interest which makes him to stand a shoulder higher than the rest of the people of Zimbabwe confers the requisite *locus* upon him. He does not have a mere interest of a person who just runs his eyes through the provisions of the constitution. He has the interest of a person who has the mind of reading and understanding the constitution with the eye of a hawk, if a comparison may be favoured. His view, as he reads it, is to pick on gaps which are inherent in the constitution and make every effort to have such filled.

The fact that section 106(3) of the constitution has remained on the drawing board for eight (8) years running without anyone picking on it until the applicant did so only serves to confirm his *locus*. The application which he filed further confirms his *locus*. His engagement of counsel for this application removes him from the conduct of a mere mischief-maker who is of a nuisance value. It places him into the category of a *bona fide* applicant who desires nothing but transparency and accountability on the part of public office bearers who are referred to in section 106 (3) of the constitution.

The *in limine* matter which the respondents raised in their Heads of Argument is, in my view, of no meaningful value to their case let alone to the court. They raised it at the tail end of the case. They, in the process, made it practically impossible for the applicant to respond to it.

They are, however, correct in raising it as they did. That is so because points of law, which the preliminary matter is, can be raised at any stage of the proceedings before judgment is delivered.

The issue of non-joinder of Cabinet or Parliament cannot derail the application as the respondents seem to suggest. Sub-rule (11) of Rule 32 of the High Court Rules, 2021 makes the preliminary point of the respondents irrelevant. It reads:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

It follows from a reading of the above-cited sub-rule of the rules of court that non-citing of Cabinet or Parliament has no adverse effect at all on the application which the applicant placed before me. The same, it is evident, will be decided on the basis of the evidence and issues which the parties placed before me. The *in limine* matter which the respondents raised is without merit. It is therefore dismissed.

On the merits, it is pertinent for me to quote section 106 (3) of the constitution. The quotation places it into context. It is, after all, the foundation of this application. Its contents are, therefore, of paramount importance. They read:

> "An Act of Parliament must prescribe a code of conduct for Vice-Presidents, Ministers and Deputy-Ministers".

Section 106 (3) of the constitution ("the section") falls under Chapter 5 of the constitution. The Chapter makes reference to the Executive Authority which, the constitution stipulates, derives from the people of Zimbabwe and must therefore be exercised in accordance with the same. All sections which precede the section, it is observed, refer to such public office bearers as the President and his/her duties, the President and Vice-Presidents, functions of Vice- Presidents, among other matters.

I discuss the contents of Chapter 5 of the Constitution with a view to placing section 106(3) of the same into further and better context. Subsection (1) of the section, for instance, exhorts Vice-Presidents, Ministers and Deputy-Ministers to act in accordance with the constitution. Subsection (2) of the same spells out what each of the above-mentioned public officers may, or may not, do during his or her tenure of office. It is in the context of the subsections which precede subsection (3) of the section that this application shall be considered. Its letter and spirit are clear as well as

succinct. Its intention is to have an Act of Parliament which serves as a check on the conduct of the mentioned public office bearers given birth to.

It will, in my view, make a mockery of the law-making process for the first respondent to suggest, as he is doing, that such a Bill as is envisaged in the section can be brought into Parliament by way of motion. The Bill which the section contemplates cannot be a private member's Bill. It can only be a Public Bill.

The first respondent's averments which are to the effect that both the Senate and the National Assembly of the Parliament of Zimbabwe have the power to initiate, prepare, consider or reject any legislation in terms of section 130(1) of the constitution is not only misplaced. It also portrays the opinion of a respondent who either made up his mind to mislead the court or one who has not applied his mind to what he was putting across when he put pen to paper to prepare as well as file his notice of opposition. It is inconceivable that a member of Parliament who is not a member of Cabinet can introduce into the august House a Bill which deals with, as well as defines, the conduct of such public office holders as Vice-Presidents, Ministers and Deputy-Ministers.

Common-sense and simply logic dictate that the Bill which is envisaged in the section cannot be a private member's Bill. It is, in short, a public Bill which only a member of Cabinet can introduce into Parliament for debate. Such a Bill necessarily has to follow the stages which Professor L. Madhuku outlined in his Introduction to Zimbabwean Law. It, in short, finds its way into Parliament at the initiation of Cabinet in which both respondents are members.

The question which begs the answer is upon which member of Cabinet is thrust the responsibility of introducing into the Parliament the Bill which is envisaged in the section. The applicant's statement on the same is that the duty to perform the stated task lies on the first respondent who must work in consultation with the second respondent to introduce the Bill into Parliament. In consultation with the second respondent because his drafting skills are a *sine qua non* aspect for the drafting of:

i) principles which will govern the intended legislation- and
ii) the draft of the Bill itself.

Annexure I which the applicant attached to his answering affidavit is not only relevant. It is also very revealing. It was attached in response to the respondents' denial of their responsibility to introduce the Bill into Parliament. The annexure appears at page 61 of the record. It was/is an

extract of the website of the Ministry of Justice, Legal & Parliamentary Affairs on which the first respondent plays an oversight role. Amongst the overall functions of the Ministry, as gleaned from its website, are the following:

a) revise, reform and review the laws of Zimbabwe;
b) undertake legal research and formulate policies- and
c) promote the Constitution.

The above-stated matters show, in a clear and direct manner, that no one other than the first respondent has the duty to introduce the Bill which will actualize section 106(3) of the constitution into Parliament. He cannot be assigned the responsibility of promoting the constitution and be deprived of the role to actualize section 106(3) which is a provision of the constitution. He cannot, in short, have what was given to him by one hand taken away from him by the other hand. Deductive logic dictates that the responsibility to actualize the section falls upon the first respondent and no one else but him.

The above-observed matter finds support from the position which the first respondent took in his opposition to the application. He does not, for instance, deny in so many words that he has the said duty which the constitution and the President cast upon him. Reference is made in the mentioned regard to paragraph 18.3 of the founding affidavit as read with paragraph 13 of his notice of opposition. It is pertinent for me to quote the two paragraphs *verbatim* so that the issue which relates to both of them becomes evident. The paragraphs respectively appear at pages 9 and 51 of the record. They read, in part, as follows:

> "18.3…….The nature of the matters that the Bill would deal with fall under the portfolio of the first respondent, and as such, he has the responsibility of introducing it in Parliament and taking charge of its promotion in Parliament."

In his response to the above statement of the applicant, the first respondent states at page 51 that:

> "I aver that the responsibility to prepare and initiate national legislation lies squarely with Cabinet in terms of section 110 of the constitution which deals with the executive functions of the President and Cabinet".

It is evident that the first respondent avoided to deal directly with the clear statement of the applicant. He, as it were, confessed and avoided the same. He did not deny that the responsibility to introduce the Bill into Parliament is one of his functions. All he did was to state the obvious

which is that Cabinet bears the stated responsibility. Cabinet, as defined in section 105(1) of the constitution consists of the President, who is head of the same, the Vice-Presidents and such Ministers as the President appoints to the Cabinet.

The first respondent is not having me believe that Cabinet which comprises the President, his Vice-Presidents and Ministers appointed by the President can, on its own, initiate any legislation. Ministers who are members of Cabinet initiate Bills, as the applicant correctly states, on the basis of which Cabinet takes a policy position and instructs the Minister who is responsible for the intended Bill to prepare a set of detailed principles which will govern the legislation which Cabinet contemplates to birth. The first respondent was hiding behind a finger, as it were, when he alleged, as he did, that the duty to prepare national legislation lies on Cabinet.

It is a trite position of the law that what is not denied in affidavits is taken as having been admitted: *Fawcett Security Operations* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC); *DD Transport (Pvt) Limited* v *Abbot*, 1988 (2) ZLR 92. Because the first respondent did not deny, in so many words, that he bears the duty to introduce the Bill into Parliament, the finding which I make is that he bears the same.

The second respondent who is the Attorney-General for Zimbabwe moves me not to order any relief against him. He claims that he is under no constitutional obligation to enact the law which is the subject of this application. The source of the words which he quoted in paragraph 2 of his notice of opposition remains not only blurred but also very obscure. It is totally unclear. He ascribes the words in question to paragraph 3 of the founding affidavit. But paragraph 3 of the same does not refer to him at all. It refers to the first respondent. Paragraph 4, and not paragraph 3, refers to him. Paragraph 4 does not contain the words which he made emphasis of in paragraph 2 of his opposing papers.

The second respondent who, in terms of section 114(4) (a) and (b) of the Constitution, acts as principal legal advisor to the Government and drafts legislation for the Government cannot, in my view, be treated differently from the first respondent. He plays a critical role in birthing the Bill which is the subject of this application. By virtue of his advisory role to the Government, he should have picked upon the section and rendered necessary advice to Government on the same. He should, in short, have advised Government to actualize the section. He is therefore as much bound to the relief which the applicant is moving me to grant to him as the first respondent is.

Both respondents stand convicted of serious dereliction of duty in so far as the actualization of the section is concerned. Given their respective roles of revising, reforming reviewing the laws of Zimbabwe, on the one hand, and promoting, protecting and upholding the rule of law as well as defending public interest, on the other the respondents cannot have me believe that the section and its contents escaped their attention until this application was served upon them. Their conduct, it is my view, is *in sync* with what the Constitutional Court of Zimbabwe expressed when it remarked in *Chironga & Anor* v *Minister of Justice & Ors*, CCZ 14/20 that:

> " One of the crucial elements of the new constitutional dispensation 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 Zimbabwe Constitution Amendment (No.20) Act,….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."

In stating as it did, the Constitutional Court was but only lamenting such conduct as the respondents displayed *in casu.* They turned a blind eye to their constitutional obligation. They refused to uphold the rule of law which is one of their main functions. They refused to revise and review the laws of Zimbabwe which is also a function of them. They have no defence to the application which was filed against them.

The applicant proved his case on a balance of probabilities. The application is, in the result, granted as prayed.

Zimbabwe Human Rights NGO, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners