

**Case note on *Zimbabwe Law Officers Association & Anor v
National Prosecuting Authorities & Ors CCZ -1-19***

By Takudzwa T. Mutevedzi

In this judgement the Constitutional Court dealt with an application from the Zimbabwe Law Officers Association represented by its Secretary General, who was the second applicant. The National Prosecuting Authority (NPA) was the first respondent. The NPA is a body established in terms of section 258 of the Constitution of Zimbabwe, 2013 ("the Constitution"). It is tasked with instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions necessary and incidental to such prosecutions.

The applicants sought an order declaring the employment of serving members of security services as prosecutors in the NPA to be a violation of accused persons' right to a fair trial. They also argued, in any event, that the recruitment of these security service members in such manner is unconstitutional and an infringement of section 208 (4) of the Constitution. The court did not address the applicants' main argument and the issue effectively became whether the engagement of serving security forces members into the NPA is a violation of section 208(4) of the Constitution. In my view that the court should have addressed both arguments as the employment of serving security services members as prosecutors has a bearing on the accused's right to a fair trial.

The court ordered that the application be heard on the merits as it was a matter of public importance. In doing so the court established a commendable constitutional law principle to the effect that, where an issue is of public importance or good governance, with exceptional circumstances of overriding essence there is need to abandon procedural irregularities that may cause it not to be heard on the merits. This is good law as the Constitutional Court has a duty to protect the constitutional rights of Zimbabweans. It would be a travesty of justice if matters of fundamental importance are thrown out simply because of procedural irregularities despite the fact that the issue can nevertheless be decided on the papers before the court.

It is an undisputed fact that the National Prosecuting Authority employs serving security services members as prosecutors. These security services members are employed by way of secondment and appear in criminal courts across the country where they prosecute matters on behalf of the Prosecutor-General (the second Respondent). They have since assumed civilian duties and the applicants in their founding affidavit showed that not less than a hundred serving security forces members are employed as prosecutors across the country.

Section 208 (4) of the Constitution is unambiguous on this matter. It clearly provides that serving members of security services must not be employed or engaged in civilian institutions except in periods of public emergency. The peremptory nature that the provision is couched in is evidence of the draftsmen's intention to bar security forces from civilian institutions.

The case hinged on defining key terms in the relevant provision, section 208(4). It was key to define who the security services were, what a "civilian institution" and to put the situation within the NPA in that ambit. Once that was done the conclusion became inevitable.

The Constitution in section 207 clearly mentions who the security services are. It provides as follows:

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 Parliament

Therefore the employment of serving members of any of the above establishments in a civilian institution is contrary to the Constitution.

The Constitution does not define what a "civilian institution" is but it does tell what a "civil service" is. The Respondents sought to argue their way out on this basis. Section 259 of the Constitution provides that the Prosecutor-General who is the head of the NPA does not form part of the civil service. The civil service is defined in section 199 as consisting persons employed by the State other than the following:

- (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 Respondents' argument was that if security services are not part of the civil service then it should follow that they are not civilian institutions too. Therefore they are free to employ and engage serving members of security services. Going by this argument would mean that judges and magistrates are not in civilian institutions as they do not form part of the civil service. This would be an absurd conclusion. A referral to the ordinary dictionary meaning of "civil service" by the court showed that a civil service is a branch of public service that is not the military or navy. Members of security services were clearly excluded as is proper but the other exclusions were intentional as they do not follow the ordinary meaning of a civil service. I submit that the Constitution deliberately excluded these classes of people from the scope of the civil service but did not intend on excluding them from being in civilian institutions. It is a creation of our own Constitution. It therefore became necessary to define a "civilian" by its ordinary meaning.

The *Oxford Concise English Dictionary* 11th Edition defines "civilian" as a noun describing a person not in the armed services or the police force. This is the classic definition of a civilian. A civilian is a non-military or navy individual. This ordinary meaning of the word civilian is clear even in judicial proceedings. The cases of *Minister of Finance v Bacher Aron and Company (Rhodesia) Limited* 1956 (1) SA 63 (SR), *S v X* 1974 (1) SA 344 (RA) and *S v Mavunga* 1982 (1) ZLR 63 (S) discussed what is known as civilian clothing and army clothing. The conclusion from these cases is that army regalia is no ordinary clothing and civilian clothing is indeed ordinary clothing. In the case of *Commercial Union Fire, Marine and General Insurance Company Limited v Fawcett Security Organisation Bulawayo (Private) Limited* 1985 (2) ZLR 31 (S) the court also identified a man who was not in the army as a civilian.

The court on page 11 of the judgment referred to other dictionaries to find out what the ordinary meaning of the word "civilian" is and realised that 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* has the same word as being anyone who is not a member of the military forces or the police. According to the *Merriam-Webster Dictionary* a civilian is a person who is not a member of the military or police or fire-fighting force. *Black's Law Dictionary* describes a civilian as 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. Therefore a visit of case law and the dictionaries clearly showed that a civilian in the ordinary meaning of the word is a person who is not in the army, navy, clergy or police force.

The court resorted to the ordinary grammatical meaning of the word "civilian". This is an accepted principle of statutory interpretation. It is trite that where the plain and ordinary meaning of the words in an enactment is clear and unambiguous, then there should not be

any need to resort to a secondary meaning. That grammatical and ordinary sense of the words is to be adhered to unless if it would lead to some absurdity or inconsistency with the rest of the instrument. (See *Zimbabwe Revenue Authority & Anor v Murowa Diamonds* 2009 (2) ZLR 213 (S), *Registrar of Elections & Ors v Tsvangirai* 2002 (1) ZLR 204 (S) and *Madoda v Tanganda Tea Company Limited* 1999 (1) ZLR 374 (S).

This means that the Prosecutor-General and head of the NPA is a civilian as he is not a member of the army, navy, clergy or police force. This conclusion also makes the NPA which is led by a civilian in the form of the Prosecutor-General a civilian institution.

Once this was established the words “must not” in the Constitution became key. There is a difference between a provision that is couched with the term “may not” and one that says “must not” at statutory interpretation. The former is permissive while the latter is peremptory. The effect is that where a term is peremptory failure to abide by its dictates makes the action null and void.¹ This action by the NPA of employing serving members of security services as prosecutors despite being a civilian institution is unconstitutional as it is a violation of section 208(4) of the Constitution. The President of Zimbabwe has not declared a state of public emergency in terms of section 113 of the Constitution, hence serving security services members should not be engaged or employed in civilian institutions.

The Constitutional Court thus found the employment of serving members of security services to be unconstitutional. A period of twenty-four months from the date of the order was given to the NPA and the Prosecutor General to disengage all serving members of security services from their employment.

This is a good judgment in terms of aligning the practice of State institutions with the Constitution. However it is my submission that the court could have done even more in expounding the rationale behind section 208 (4) apart from just its ordinary grammatical meaning. Engaging serving members of security services in civilian institutions has a negative bearing on the administration of justice, the rights of an accused to a fair trial and the independence of such institutions. The National Prosecuting Authority being the Prosecutor-General's office is a key institution of the State and whose independence is paramount. Section 260 of the Constitution is unflinching in this regard. It states that the Prosecutor-General should not be under the direction or control of anyone. The applicants argued 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 their training causes them to maintain a distinct culture and discipline not primarily predicated on impartiality and

¹ *Messenger of the Magistrates Court, Durban v Pillay* 1952 (3) SA 678 (A)

independence. I agree with this position. These are men and women who are also trained to take instructions from their superiors. They are trained to follow a chain of command. They are called “disciplined forces” for the reason that they should adhere to a set of rules and conduct without question. This training makes them vulnerable to external influence. They cannot be the ideal impartial prosecutors who were described in *Smyth v Ushewokunze & Anor* 1997 (2) ZLR 544 (S) due to their connection with the investigating agency. An independent application of their own ideas which is contrary to instruction is regarded as an act of insubordination. The duties of a public prosecutor require an independent application of the law. This is necessary for the administration of criminal justice. Ideally a policeman should investigate crime and hand over a docket to a civilian for court proceedings.

This judgment should lead to its application to other civilian institutions in Zimbabwe and liberate them from security services. This would be a major step in upholding the Constitution and its principles of separation of powers and independence of civilian institutions. In this regard it is a good precedent.

It may also be argued that the twenty-four month period is too long, especially when one bears in mind that the case was originally argued in January 2015 but the judgment was only delivered on 19th February 2019. What it means is that for two years police serving police officers and defence personnel will continue to prosecute accused persons in court and lead evidence from their own police colleagues who are investigating officers contrary to the Constitution, among other abnormalities. This is detrimental to the administration of justice when weighed against the chaos that the court anticipated had they been released forthwith. In that period they will continue to exert their influence on that office which the Constitution desired to be independent of control from anyone.