

FUNGAYI JESSIE MAJOME

v

- (1) **ZIMBABWE BROADCASTING CORPORATION**
- (2) **MINISTER OF MEDIA, INFORMATION AND PUBLICITY**
- (3) **THE ATTORNEY GENERAL OF ZIMBABWE**

CONSTITUTIONAL COURT OF ZIMBABWE
MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, NOVEMBER 14, 2014 & NOVEMBER 9, 2016

R Goba, for the applicant

TTG Musarurwa with him *A Mambosasa*, for the respondents

MALABA DCJ: This is an application for relief made in terms of s 85(1)(a) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (“the Constitution”). The applicant is acting in her own interests although she also invokes the alleged violation of the rights of Movement for Democratic Change-Tsvangirai (“MDC-T”), a political party of which she is a member.

The application is for an order declaring in the first part that certain provisions of the Broadcasting Services Act [*Cap. 12:06*] (“the Act”) are invalid for alleged infringement of the applicant’s fundamental right not to be compulsorily deprived of property except in terms of a law of general application complying with the requirements prescribed under s 71(3)(b)i) & (ii) of the Constitution. The second part of the order seeks to direct the respondents to obey their

constitutional obligations to respect, protect and promote the applicant's fundamental rights and freedoms enshrined in ss 56(3), 58(1) & (2), 60(1a)&(4b) and 67(1)(b)(2) of the Constitution.

The court holds that the applicant has invoked a wrong remedy for the protection of the fundamental rights and freedoms she alleges have been infringed. The application has to be dismissed. The following are the reasons for the decision.

The applicant is a Member of Parliament representing the Harare West Constituency on the MDC-T political party ticket. It is common cause that she premised the application and the relief sought on the allegation that the first respondent has shown bias towards the ZANU-PF political party in the selection and presentation of television and radio programmes on political matters.

It is also common cause that as a result of the alleged bias towards ZANU-PF in the broadcasting of political programmes levelled against the first respondent ("the ZBC"), the applicant has been refusing to pay the licence fee payable by every person in possession of an apparatus capable of receiving broadcasting services in terms of s 38B(1) of the Act.

On 1 July 2013 a licence inspector employed by the ZBC in terms of s 38D(a1) of the Act arrived at applicant's residence and asked her to produce a television licence as she was suspected on reasonable cause to be in possession of a television set at home. When the applicant failed to produce the licence, the inspector issued her with a notice in terms of s 38D(2) of the Act requiring her to produce the licence at a police station within seven days from the date

of service of the notice. The applicant had as far back as 15 September 2012 resolved to disobey the law and not pay the licence fee for the television and radio sets she possessed.

In para. 15 and 16 of the founding affidavit, the applicant reveals her resolve not to obey the law. She said:

“15. I did not produce the television licences at the police station and I will not do so. This means therefore that I am in contravention of s 356(1)(a) of the Criminal Procedure and Evidence Act [Chapter 7:09] and am liable for prosecution in terms of this particular Act.

16. I hasten to submit that my non-compliance with the afore-mentioned statutes is indeed purposeful but it is by no means wilful and contemptuous of the law.”

A study of the founding affidavit shows that the cause of action on the basis of which relief is sought is the alleged bias exhibited by the ZBC in favour of ZANU-PF in the selection and presentation of television and radio programmes of political issues of national importance. The applicant accepts the fact that the ZBC is a public broadcaster with a mandate under the Act to provide a balanced and neutral broadcasting service to the public.

She accused the ZBC of partiality in broadcasting political events. She produced as evidence of the alleged bias by the ZBC in favour of ZANU-PF in the selection and presentation of programmes on political matters documentary reports produced by an organization called Media Monitoring Project of Zimbabwe (MMPZ).

In para. 20 of the founding affidavit the applicant said:

“20. The evidence of 1st respondent’s bias towards ZANU-PF is overwhelming and self-evident to even the ordinary reasonable viewer. Evidence of the bias is adduced hereto

by way of copies of reports conducted systematically and scientifically over the past five years by the Media Monitoring Project of Zimbabwe (MMPZ). The MMPZ is an independent organization which monitors and analyses data and statistics pertaining to media content and coverage by media houses in Zimbabwe.

21. Firstly, 1st respondent is without doubt quite clearly a propaganda and advocacy tool for ZANU-PF. It operates as a public mouthpiece for ZANU-PF's commonly known political campaign positions and philosophies that are exclusively associated with that political party. Through various documentary, current affairs and news programmes 1st respondent promotes ZANU-PF's political agenda with overt and covert messages that are quintessentially ZANU-PF in content, ideology and form."

The first respondent denied being biased in favour of ZANU-PF and against MDC-T in the selection and presentation of programmes on television and radio. It challenged the accuracy and correctness of the information contained in the documentary reports produced by MMPZ. It alleged that MMPZ did not even attempt to summarise a quarter of its entire programming on television and radio.

What is of relevance for the purposes of the determination of the issues raised is the fact that the applicant has based the allegations of infringement of her fundamental rights and freedoms on the alleged bias in favour of ZANU-PF exhibited by the ZBC, in the selection and presentation of programmes on political matters on television and radio. It is the alleged conduct of the ZBC which the applicant says caused her to refuse to pay the licence fee for the television and radio sets in her possession. It is the same conduct of the alleged biased selection and presentation of programmes in favour of ZANU-PF on political matters which founded the allegation of infringement of the applicant's fundamental rights and freedoms.

The nature of the relief sought by the applicant is telling. It is concerned with the prevention of the alleged bias the ZBC is accused of exhibiting in favour of ZANU-PF in broadcasting programmes on political matters on television and radio. The order sought is in the following terms:

“IT IS DECLARED THAT;

1. Sections 38B2, 38C and 38D1-4 of the Broadcasting Services Act Chapter 12:06 are constitutionally invalid in that they are *ultra vires* section 71(3)(b)(i) and (ii).
2. There shall be urgent enforcement of applicant’s rights which are being infringed in that 1st respondent ceases forthwith to be biased in favour of ZANU-PF or any other political party in its programming and gives coverage equally to the applicant’s and other political parties.
3. THEREFORE IT IS ORDERED THAT:
 - (i) 3rd respondent permanently stays prosecution proceedings against applicant in terms of the Criminal Procedure and Evidence Act [Chapter 9:07].
 - (ii) 1st, 2nd, 3rd respondents forthwith respect, protect, promote and fulfil applicant’s rights and freedoms as set out in section 44 and 45 of the Constitution and comply with sections 56(3), 58(1)(2), 60(1)(b), 61(1a)(4b)(4c), 67(1)(b) & (2), 71(3)(b)(i) & (ii) and 155(2)(d) which guarantee rights not to be unfairly discriminated against on the grounds of political affiliation, freedom of association and assembly, freedom of expression and freedom of the media, political freedom and participation and the guarantee from unlawful deprivation of property rights.
 - (iii) 1st, 2nd, 3rd respondents specifically and forthwith cease the bias and partiality in 1st respondent’s programming by according equal coverage to applicant’s political party and others as it accords ZANU-PF.
 - (iv) In the alternative 1st respondent is to encrypt its signal to be received on subscription basis by those who wish to associate with it and ZANU(PF) programming content.
 - (v) 1st and 2nd respondents bear applicant’s legal costs.”

With the exception of para. 1 of the relief sought which relates to the constitutional invalidity of the specified provisions of the Act, there is no declaration sought to the effect that the conduct of the ZBC is unconstitutional in that it infringes any of the fundamental rights and freedoms listed. The Constitution confers power on a court under s 85(1) to grant appropriate relief to an injured person who has approached it for relief. It is not the

business of a court to grant relief to an applicant whose fundamental rights or freedoms have not been violated. He or she would be an uninjured applicant. A court does not grant relief to an uninjured applicant.

A relief that does not contain a declaration of a finding of infringement of a fundamental right or freedom and *ipso facto* constitutional invalidity of the conduct or legislation under attack has no legal justification. The substance of the relief sought by the applicant is the exhortation by the court to the respondents to discharge their constitutional obligation to respect, protect, promote and fulfil the applicant's fundamental rights and freedom. It is not the duty of a court to remind other duty-bearers to observe their duties in the absence of proven infringement of a fundamental human right or freedom.

The court has proceeded to examine the matter further on the basis of the principle that an application falls or stands on the founding affidavit and that "appropriate relief" under s 85(1) of the Constitution gives a court wide discretionary power to grant relief that is different from that claimed. The determination of appropriate relief calls for the balancing of various interests that might be affected by the remedy. The balancing must at least be guided by the objective, first to address the wrong occasioned by the infringement of the constitutional right, secondly to deter future violations, third to make an order that can be complied with and fourth achieve the objective of fairness to all who might be affected by the relief. The nature of the infringement will invariably provide guidance as to the appropriate relief.

In this case no infringement of a fundamental right or freedom was established because the applicant adopted a wrong remedy for the protection of the rights she alleges were infringed. The principles of supremacy of the Constitution and one-system-of-law require that in the choice of the law and appropriate remedy for the protection of a fundamental right or freedom allegedly infringed by any conduct, consideration must be given to the question whether there is in existence a law of general application governing the conduct complained of and if there is, whether the constitutionality of that law is being impugned.

The threshold test of law of general application excludes instances in which the party whose conduct has been found to limit a fundamental right cannot rely upon an existing rule of law as a justification for the limitation. There cannot be justification of conduct for which no legal authorization exists. The question of the validity of conduct which falls within the ambit of a law of general application cannot be determined by reference to the Constitution. It must be determined by reference to the provisions of the law of general application unless the constitutionality of that law is itself being attacked.

Woolman and Bishop – “*Constitutional Law of South Africa*” 2 ed Juta Vol. 2 at pp 34-47-34-48 comment as follows:

“To say that only “law of general application” may justify the impairment of a fundamental right means that conduct – public or private – that limits a fundamental right but which is not sourced in a law of general application cannot be justified.”

In *August v Electoral Commission and Others* 1999(3) SA 1(CC) para. 23 it was held that in the absence of a disqualifying legislative provision it was not possible for

respondents to seek to justify the threatened infringement of prisoners' rights to register as voters in an election as there was no law of general application upon which they could rely to do so.

In *Minister of Safety and Security and Another v Xaba* 2003(2) SA 103(D), police officers compelled a suspect to have surgery to remove a bullet that they believed would provide evidence connecting the suspect to a crime he was alleged to have committed. Neither the Criminal Procedure Act nor any other law authorizes surgery without consent. As a result, the exercise of State power to compel surgery of a suspect in the absence of legal authority failed to satisfy the law leg of the test for law of general application. See also: *Woolman and Bishop supra* p 34-59, *De Lille and Anor v Speaker of National Assembly* 1998(3) SA 430 (C), *Pretoria City Council v Walker* 1998(2) SA 363.

The conduct complained of in this case is the alleged biased selection and presentation of television and radio programmes by the public broadcaster in favour of ZANU-PF political party. There is a law of general application prohibiting specifically such conduct by a public broadcaster. Part 1 of the Seventh Schedule to s 11(1)(b1) of the Act on programming by Public Broadcasters provides:

“REQUIREMENTS FOR PUBLIC BROADCASTERS:

The broadcasting service operated by a public broadcaster shall,

- (a)
- (b) ...
- (c) ...
- (d) Provide news and public affairs programming which meets the highest standards of journalism which is fair and unbiased and independent from government, commercial or other interests.”

The Act provides in s 2A(1)(e) and (f) that its purpose is to regulate broadcasting services to attain, amongst others, the following objectives:

- “1(e) to promote public broadcasting services in the interest of the public;
- (e) to ensure the independence, impartiality and viability of public broadcasting services.”

Section 160G of the Electoral Act [*Cap. 2:13*] requires a public broadcaster to afford all political parties contesting an election such free access to its broadcasting services as may be prescribed. The regulations by which free access to broadcasting services is prescribed are required to make provision for the total time to be allocated to each political party, the duration of each broadcast and the areas to which broadcasts made by political parties are to be transmitted. The regulations must ensure a fair and balanced allocation of time between each political party. They must ensure that each political party is allowed a reasonable opportunity to present a case through the broadcasting service concerned. Section 160J which deals with conduct of news media during an election period, requires all broadcasters to ensure that all political parties are treated equitably in their news media in regard to the extent, timing and prominence of the coverage accorded to them.

Not only is institutional and editorial independence guaranteed to the ZBC, the public broadcaster is required to act in an independent and unbiased manner in the selection and presentation of television and radio programmes. There is a provision prohibiting the ZBC as a public broadcaster from acting in a manner that favours the viewpoints of one political party whilst shutting out, as a matter of policy, view points of other political parties on matters of

national interest. If the ZBC is biased towards ZANU-PF in its programming as alleged by the applicant, it commits conduct which is in breach of its statutory obligations.

The conduct complained of does not give rise to a constitutional matter at all. Where a law of general application prohibits conduct, the commission of such conduct does not give rise to a constitutional question. The question of the legality of the conduct is determined on the basis of the interpretation and application of the statutory provision prohibiting the conduct unless the constitutionality of the statutory provision itself is challenged. Bias is a well-known ground for review of administrative conduct in administrative law. The Administrative Justice Act [*Cap. 10:28*] provides effective procedural and substantive remedies for the protection of the applicant's rights. Under the Administrative Justice Act, an applicant would be entitled to administrative conduct on the part of the ZBC which gives effect to the right to unbiased selection and presentation of programmes on news and current affairs as required by para. (d) of Part 1 of the Seventh Schedule to the Act.

The applicant challenged the constitutional validity of ss 38B(2), 38C and 38D(1)-(4) of the Act on the ground that the provisions authorize the ZBC to compulsorily deprive her of property in the form of money paid as a licence fee not for a public purpose but for the purpose of funding ZANU-PF propaganda through programmes broadcast on television and radio.

Section 38B(1) of the Act is the root provision as it imposes the obligation to pay the tax on every person who is in possession of a gadget capable of receiving a broadcasting

service. The constitutionality of s 38B(1) of the Act is not challenged by the applicant. The constitutional validity of s 38B(1) and the other provisions of the Act on the collection of the licence fee was upheld in *Bernard Wekare v The State and Others* CCZ 9/2016.

The provisions the validity of which is impugned are executory in that they provide for a mechanism for the fixing, collection and payment of the value of the obligation imposed by s 38B(1) of the Act. The provisions in question provide the means which are appropriate for the achievement of the public purpose for which the obligation to pay tax was imposed by s 38B(1). The purpose is to create a fund to guarantee, to the public broadcaster, institutional and editorial independence in the selection and presentation of programmes on television and radio. The deprivation of property in the form of the money collected as tax is incidental to the main purpose. Compulsory deprivation of property is not the primary purpose of the provisions.

The content and purpose of the programmes the ZBC is enabled to produce, select and broadcast and the manner in which it must perform its functions are not matters for the provisions the validity of which is impugned. They are matters provided for under the requirements of Part 1 of the Seventh Schedule to the Act.

It is clear from the provisions of para. (d) of Part 1 of the Seventh Schedule to the Act that in selecting and presenting the programmes the ZBC is required to act in an unbiased manner. Its conduct must be independent of government, commercial or any other interest. It must be viewpoint neutral. By specifically prohibiting programmes that are biased in favour of

one viewpoint whilst shutting out other viewpoints on matters of national interest Part 1 of the Seventh Schedule to the Act places biased conduct in programming within the ambit of a law of general application.

The applicant was bound by the principle of subsidiarity in the choice of the law on which to found the cause of action. According to the principle of subsidiarity litigants who aver that a right protected by the Constitution has been infringed must rely on legislation enacted to protect that right and may not rely on the underlying constitutional provision directly when bringing action to protect the right, unless they want to attack the constitutional validity or efficacy of the legislation itself. See AJ van der Walt: *“Constitutional Property Law” 3 ed Juta p 66, MEC for Education: KwaZulu Natal v Pillay 2008(1)SA 474(CC) paras 39-40, Chirwa v Transet Ltd 2008(2)SA 24(CC) paras. 59, 69.*

The cause of the alleged violation of the fundamental right not to be compulsorily deprived of property except by a law of general application satisfying the conditions set out in s71(3)(b)(i) or (ii) of the Constitution is the alleged bias in favour of ZANU-PF exhibited by the public broadcaster in the selection and presentation of programmes on political matters on television and radio. Part 1 of the Seventh Schedule prohibits specifically biased programming by the public broadcaster. The applicant did not impugn the constitutional validity of para. (d) of Part 1 of the Seventh Schedule. The applicant was required on the principle of subsidiarity to rely on the provisions of the Seventh Schedule to the Act to protect the rights she alleged were infringed. Reliance on the provisions of the Act the validity of which was impugned was a

misplaced remedy because those provisions had no direct relationship with the bias in the programme by the ZBC which she is complaining about.

As a law of general application, the provisions the validity of which is impugned limit the applicant's right not to be compulsorily deprived of property except by a law which meets the conditions set out in s 71(3)(b)(i) or (ii) of the Constitution. They do so only for the reason that as a law of taxation they cannot contain the terms required under s 71(3)(c)-(e) of the Constitution as no compensation is payable for taxation.

Disguising an attack on the validity of conduct as an attack on the constitutionality of legislation governing that conduct cannot save the applicant from the requirements of the principle of subsidiarity. What the applicant is complaining about is the alleged violation of the right to fair and unbiased administrative conduct by the ZBC. That right is protected by para. (d) of Part 1 of the Seventh Schedule as read with s 3 of the Administrative Justice Act. The Administrative Justice Act provides the remedy for the enforcement of the protection of the right in question.

It must be said that the applicant's conduct of deliberately refusing to pay the licence fee for possessing a television set remains a criminal offence notwithstanding the attempt to justify the offence on account of the alleged biased programming by the public broadcaster in favour of ZANU-PF. Wrongful conduct on the part of the public broadcaster cannot justify her own criminal conduct. Two wrongs never make a right. Both conducts infringe the law. There is no doubt that a person who deliberately refuses to fulfil an obligation backed by criminal law

the validity of which is not impugned commits a criminal offence irrespective of his or her reasons for doing so. It is also of interest to note that whilst the applicant steadfastly refused to pay the tax in conformity with her social responsibility, she continued to watch television programmes on ZTV to be aware of the nature of the alleged bias in favour of ZANU-PF in the selection and presentation of the programmes by ZBC. The conduct of the applicant in seeking to use court process to provide justification for criminal conduct in a case in which the constitutionality of the provisions of the law creating the offence is not impugned deserves censure by an order of costs.

The application is dismissed with costs.

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Gonese, Jessie Majome & Co., applicant's legal practitioners

Mambosasa, respondent's legal practitioners