REPORTABLE: (14)

THABANI MPOFU
v
(1) THE ZIMBABWE ENERGY REGULATORY AUTHORITY (2) THE MINISTER OF ENERGY AND POWER DEVELOPMENT (3) GREEN FUELS (PRIVATE) LIMITED

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC GOWORA JCC, HLATSHWAYO JCC, PATEL JCC, GUVAVA JCC & MAVANGIRA JCC
HARARE: NOVEMEBER 5, 2014 & SEPTEMBER 23, 2020

Mr *T. Biti,* for the applicant

Mr Tsivanga, for the first respondent

Mr *Dodo,* for the second respondent

Mr *Adv Girach & Adv A. P. de Bourbon*, for the third respondent

HLATSHWAYO JCC: This is a court application made in terms of s 85 (1) of the Constitution of Zimbabwe (No. 20) Act, 2013 ('the Constitution'), which section provides for direct access to this Court in the pursuance of the protection of fundamental rights and freedoms as enshrined in Chapter 4 of the Constitution, and also, alternatively, direct access ostensibly motivated pursuant to s 167(5) of the Constitution.

The applicant seeks an order declaring the Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) Regulations S.I 17, 2013 (hereinafter referred to as 'the Petroleum Regulations') and the Petroleum (Mandatory Blending of Anhydrous Ethanol with Unleaded Petrol) Amendment Regulations (No.1) S.I 147A, 2013, hereinafter referred to as 'the Amendment Regulations') to be *ultra vires* the Constitution and that they be set aside.

> newspaper articles and/or press releases by the second respondent issued on 14, 17 and 24 January 2014, all of which occurred after the filing of the court application and the first and third respondents' opposing papers…The inclusion of this new information is, naturally, to deprive the respondents the opportunity to reply or comment thereon.
>
> 2. The applicant also attached to his answering affidavit supporting ones from two individuals who claim to have experienced problems with their vehicles as a result of using the second respondent's product…There is no reason why these documents were not made part of the founding affidavit. No reason is tendered for their inclusion in the answering papers, the effect of which, again, is to deprive the respondents the opportunity to reply or comment thereon.
> 3. The applicant also attaches (as annexure BB1) a position paper purportedly prepared by the Automobile Association of Zimbabwe in March 2014. Again, there is no way of verifying the document, let alone commenting on the averments made therein.
> 4. Annexure DD3 purports to be a letter (or unsworn statement) from Toyota Zimbabwe written on 30 September 2013. No explanation has been proffered for not attaching it to the court application."

It is trite that a claim or cause of action should be based on the founding affidavit and that new matters should not be raised in the answering affidavit. In the case of *Mangwizi v Ziumbe NO and Anor* 2000 (2) ZLR 489 (S) at 492 SANDURA JA quoted with approval the following by GARDINER JP in the case of *Coffee, Tea & Chocolate Co. Ltd v Cape Trading Company* 1930 CPD 81 at 82:

> "A very bad practice and one by no means uncommon is that of keeping evidence on affidavit until the replying stage, instead of putting it in support of the affidavit filed upon the notice of motion. The result of this practice is either that a fourth set of affidavits has to be allowed or that the respondent has not an opportunity of replying. Now, these affidavits…should in my opinion properly have been put in support of the notice of motion. They are not a reply to what has been said by the respondent, and I am not prepared to allow them to be put at this stage."

In view of the fact that virtually all the annexures attached to the answering affidavit and related averments therein should have formed part of the applicant's founding affidavit as they relate to the facts that the respondents would have wanted but cannot respond thereto, they are not properly before the court, have unduly wasted the court's precious time, and should be disregarded. Happily, though, for all concerned, the matter does not turn so much on the contents of the impugned documents, than on the narrow issue of *locus standi*.

> "In claiming locus standi under s 85(1) of the Constitution, a person should act in one capacity in approaching a court and not act in two or more capacities in one proceeding."

These sentiments were endorsed in the case of *Nkomo v Minister of Local Government, Rural & Urban Development & Ors* 2016 (1)ZLR 113(CC)at p. 118. Although this Court has suggested that one must act in one capacity only under s 85(1) of the Constitution, where the circumstances so dictate and one avers that he or she is acting in two or more capacities, that alone, it would appear to me, on the basis of a broad and generous approach to standing that s 85(1) portends, cannot be a basis for denying audience if at least one of the capacities does entitle the applicant to standing. As observed in Max du Plessis, et al, *Constitutional Litigation,* Juta, 2013:

> "A litigant may have standing both to act in the public interest…and to act in the interests of persons who cannot act in their own name…For example, in *Albutt v Centre for the Study of Violence and Reconciliation* 2010(3)SA 293 (CC) the (South African) Constitutional Court held that a group of non-governmental organisations had standing to interdict the President from granting presidential pardons without hearing victims on two grounds: in the public interest, and in the interests of victims."

Accordingly, I will examine each of the three claims to standing made in this application in turn below.

Infringement of a fundamental right or freedom

With regard to s 85(1) (a) of the Constitution, which premises *locus standi* on a personal interest in the matter, as with the other subparagraphs of s 85(1), it must be demonstrated that the infringement complained of by the affected party is that of a fundamental

Firstly, a reading of the provisions does not support such an argument. Section 47 of the Constitution reads:

> "This chapter does not preclude the existence of other rights and freedoms that may be recognised or conferred by law, to the extent that they are consistent with this Constitution." (emphasis added)

The meaning that is readily apparent from the foregoing is that the fundamental rights provided for in Chapter 4 of the Constitution do not exclude other rights that are conferred by law. That in itself does not mean that the rights envisaged by s 47 are fundamental rights in terms of the Bill of Rights as contained in Chapter 4 of the Constitution. Section 85 (1) of the Constitution provides for the "… fundamental right or freedom enshrined in this Chapter". This reference relates to express rights as provided for in Chapter 4 of the Constitution. It does not provide room for a "reading in" of new rights. At any rate, any "other rights and freedoms" must be such as are "recognized or conferred by law" and not inconsistent with the Constitution. The Chapter 4 fundamental rights and freedoms are specific and specialised, clearly divided into derogable and non-derogable rights and are strictly protected from easy amendment by the requirement of a super majority plus a referendum – features that cannot easily be transferable to "inferred" new rights. Therefore, the applicant's case does not meet the first leg of the test in terms of s 85 (1).

Secondly, the applicant has urged this Court to embrace a 'generous and purposive' interpretation that gives expression to the underlying values of the Constitution. In rejecting the applicant's attempt to read into the Constitution a general "freedom of choice" and an even more novel concept of "freedom of fairness", the Court takes the view that the practical application of that interpretive approach is not unrestrained as the applicant seems to suggest. As was pointed out in the case of *Kalla v The Master* 1995 (1) SA 261 (T):

privilege of declaring any product to be a controlled one and vesting in the GMB the exclusive privilege of granting any person permission to remove from or bring into, a prescribed area any controlled agricultural produce, or any product derived therefrom, as being inconsistent with the Constitution as it purportedly infringed the applicant's Constitutional rights or freedom of protection from deprivation of property and freedom of trade or economic activity (the latter being taken as a freedom of assembly and association). The Supreme Court found that since the right to engage in economic activity of one's choice is not specified in the Declaration of Rights it is not one of those guaranteed rights. Sandura JA (with the concurrence of Chidyausiku CJ, Cheda JA, Malaba JA and Gwaunza JA) said on p 102:

> "In my view the fact that the right freely to engage in economic activity of one's choice is not one of the fundamental rights and freedoms of the individual specified in the Declaration of Rights is significant. It must mean that the right is not one of those afforded protection by the Constitution.
> In addition, I do not believe that the submission made on behalf of the applicant, that 'the applicant's right to trade in maize commodity is properly within the meaning of and is guaranteed by s 16 (1) of the Constitution', has any validity. Such a right is not an absolute right."

The respondents urge this Court to follow the reasoning in the above matter, which is virtually on all fours with the present case and accords with common sense and justice. I agree.

See *JR 1013 Investments CC and Others v Minister of Safety & Security and Others* 1997 (7) BCCR 925 (E) which was quoted with approval in *Frontline Marketing Services (supra)*. Also compare with the South African case of *Park-Ross v Director, Office for Serious Economic Offences* 1995(2) SA 148 dealing with the right to silence.

Own-interest standing

Public interest standing

Finally, under s 85 the applicant claims *locus standi* before this Court in terms of s 85 (1) (d) of the Constitution. This provision confers *locus standi* to any person acting in the public interest. It is important to reiterate at this juncture that all *locus standi* situations envisaged in s 85 (1) are in relation to the infringement of fundamental rights and freedoms in Chapter 4 of the Constitution, and the applicant has not pointed to any infringed fundamental right in this Chapter or any recognized at law. According to the *M & Anor v Minister of Justice, supra*, s 85(1) (d) of the Constitution is founded on broad considerations. Its primary purpose is to ensure effective protection of any public interest shown to have been or to be adversely affected by the infringement of a fundamental right or freedom.

In the case of *Forum Party of Zimbabwe & Ors* v *Minister of Local Government, Rural and Urban Development & Ors* 1996(1) ZLR 461 (H) at p 464C-D it was held thus:

> "...general public interest does not mean that legislation must apply to everyone in the country; it would be permissible to hold that something was in the general public interest even if applied only to a section of the population"

The above position was affirmed in the following cases, albeit in different jurisdictions to ours: *Ferreira v Levi N O 1996(1) SA 984(CC)*. See also: *Lawyers for Human Rights & Anor v Minister of Home Affairs & Anor 2004(4) SA 125(CC; SP Gupta v The Union of India & Ors (1982) 2SCR 365.*

With regard to the second requirement, *Erasmus* **Superior Court Practice** 2nd (Ed) states as follows:

> "In terms of this subsection, Chapter 2 litigation may be undertaken by a person acting in the public interest. All an applicant under this paragraph need essentially establish is that (I) objectively speaking, the <u>challenged rule or conduct is in breach of a right enshrined in Chapter 2</u>, (II) the public has a

In order for one to found a claim in terms of s 56 (1), it must be demonstrated that the party concerned has received unfair treatment. The requisite considerations to be made were well canvassed in the case of *Nkomo v Minister of Local Government, Rural & Urban Development & Ors (supra)* at page 119A-B, wherein it was stated:

> "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 out to him and that he is entitled to the same or equal treatment as those persons."(Emphasis added)

The Court's interpretation of s 56 (1) of the Constitution above is in line with the interpretation of the right to equal protection of the law as articulated in the South African jurisdiction. In the case of *Sarrahwitz v Martiz N.O. & Anor* 2015 (4) SA 491 at page 510E the South African Constitutional Court interpreted the right in the following manner:

> "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."

The applicant has failed to prove the aforementioned requirements. Instead, he alleges that he has been treated unfairly as compared to the third respondent. The allegation is premised on the fact that the third respondent has established itself and enjoys unchallenged control in the supply of blended fuel in the country. However, the position adopted by the applicant is not conferred by law as envisioned in s 56 (1) of the Constitution. The Act and Petroleum Regulations set out the requirements for the blending and sale of blended fuel after one has obtained the requisite licence. The Act and Petroleum Regulations apply to the general citizenry of Zimbabwe and not to a specific individual or company. The third respondent cannot therefore be penalised for taking advantage of the provisions therein. The same opportunity is open to the applicant or any other interested party.

It is the applicant's contention that the Petroleum Regulations are in contravention of s 134 (b) and (c) of the Constitution. Section 134 of the Constitution reads as follows:

> "Parliament may, in an Act of Parliament, delegate power to make Statutory Instruments within the scope of and for the purposes laid out in that Act, but –
> (a) Parliament's primary law-making power must not be delegated;
> (b) Statutory Instruments must not infringe or limit any rights and freedoms set out in the Declaration of Rights;
> (c) Statutory Instruments must be consistent with the Act of Parliament under which they are made."

Since it has already been noted that the applicant has failed to make out a case for the infringement of fundamental rights, it is therefore not necessary to deal with s 134 (b). The issue that remains before this Court is whether the allegation that the Regulations are *ultra vires* the parent Act entitles the applicant to approach this Court directly in terms of s.134(c).

For a start, however, a *prima facie* case is not made that the Regulations are *ultra vires* the Act, to justify a direct approach to the court. The Petroleum Regulations were promulgated in terms of s 57 (1) of the Act which mandates the second respondent, being the responsible Minister, after consultation with the first respondent, to prescribe regulations, which in the opinion of the first respondent are convenient or necessary to give effect to the Act. The relevant section reads as follows:

> "The Minister may, after consultation with the authority make Regulations prescribing all matters which by the act are required to be prescribed or which in the opinion of the authority are necessary or convenient to be prescribed for carrying out or giving effect to this act."

The first mistake the applicant makes is a factual one. Through his founding affidavit, the applicant implies that the first respondent over extended his regulatory powers. The applicant is of the view that the first respondent was responsible for the enactment of the Petroleum Regulations. Evidently, that is not the case. It is necessary to point out that the second respondent acts in his executive capacity. Therefore, the applicant is in error when he

Instrument, is constitutional within the context, not of the Bill of Rights, but of section 134 of the Constitution…
On the second inquiry, this Court…is simply being asked to determine whether the Regulations are in breach of any human right as defined in Chapter 4 of the Constitution…
With the latter inquiry, the applicant has the right to approach the Court in terms of s 85 of the Constitution of Zimbabwe…
With the former, it can be argued that the Applicant's right to approach this Court is based on the common law. If that is the case, then the old common law principles which require an individual to show some legitimate Constitutional interest must be applied."

The latter inquiry has already been exhaustively dealt with in the discussion on *locus standi* in the context of s 85(1). With regard to the former, the so-called "common law-based" approach, it has been argued in this section that the applicant's position is akin to a request for direct access and that he should show it is in the interest of justice to grant access by firstly demonstrating at least a *prima facie* case, which he has failed to do as shown above, and, secondly, exhaustion of other remedies.

Now, as far as exhausting other remedies is concerned, s 167(1)(b) which the applicant urges this Court to rely on, provides that the Constitutional Court "decides only constitutional matters and issues connected with decisions on constitutional matters, ***in particular references and applications under section 131(8)(b) and paragraph 9(2) of the Fifth Schedule***." (emphasis added). The applicant does not purport to bring the application in terms of s 131(8)(b) or related provision and indeed would not be able to do so as this is a legislative function or prerogative. Paragraph 9(2) of the Fifth Schedule bears quoting in full:

(2) If, after considering a report of the Parliamentary Legal Committee that a provision of a statutory instrument contravenes this Constitution, the Senate or the National Assembly resolves that the provision does contravene this Constitution, the Clerk

The applicant having failed to establish *locus standi* for the matter to be heard by this Court, or direct access to be availed, the matter must be struck off the Roll. However, it is rare for this Court to order costs against a losing party in constitutional matters, unless the party concerned would have conducted itself in a particularly odious manner, which is not the case here where the applicant appears to have been motivated by commendable, albeit misplaced, public spiritedness. In the light of this outcome, it is unnecessary to make a determination on the applicant's belated access to information claim which, at any rate, was abandoned during the hearing.

Accordingly, this application is struck off the Roll with each party bearing its own costs.

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

Tendai Biti Law Chambers, applicant's legal practitioners

Sawyer & Mkushi, first respondent's legal practitioners