ZIMBABWE LAWYERS FOR HUMAN RIGHTS
versus
MINISTER OF TRANSPORT,COMMUNICATIONS AND INFRASTRUCTURAL DEVELOPMENT N.O.
and
ZIMBABWE NATIONAL ROAD ADMINISTRATION
and
ATTORNEY – GENERAL OF ZIMBABWE N. O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 11 July 2014 and 14 July 2014

Urgent chamber application

Adv. L. Uriri, with him *Mr J. Shekede* and *Mr D. Chimbga,* for the applicant
Ms K. Warinda, with her *Ms K. Murefu*, for the first respondent
Mr. F. Mutamangira, with him *Mr. I. Ndudzo*, and *Mr Mutevedzi*, for the second respondent

MAFUSIRE J: The Toll Roads Act, *Cap 13:13*, ("***TORA***") empowers the Minister of Transport (hereafter referred to as "***the Minister"*** or "***the Minister of Transport***") to declare, by regulation, any road to be a toll-road. In terms thereof a toll-road is a road declared to be a toll-road in terms of the regulations made by the Minister. By statutory instrument 39 of 2009, namely the Road Tolls (Regional Trunk Road Network) (Amendment) Regulations, 2009 ("***SI 39/2009***"), the Minister declared every route along the City to City Trunk Road Network as specified therein to be a toll road. The City to City Trunk Road Network, in terms of those regulations, are roads of the Regional Trunk Road Network that link cities within Zimbabwe. The Regional Trunk Road Network are roads linking countries within the Southern African Region.

Section 3 of TORA empowers the Minister to specify any person and to authorise them to levy and collect tolls on vehicles using any toll-road. The authorised person is empowered to establish and erect on toll-roads toll-bars, toll-gates and other structures to facilitate the levying and collection of tolls. The Minister may fix the amount of any toll after consulting the Minister responsible for finance (hereafter referred to as "***the Minister of Finance***").

In terms of SI 39/2009 the amounts fixed by the Minister as tolls at any tolling point were US$1 for motor cycles; US$2 for light motor-vehicles, US$3 for minibuses, US$5 for buses; US$7 for heavy vehicles and US$10 for haulage trucks. These amounts seem to have been revised from time to time. As at 4 July 2014 there was no toll for motor cycles. As for the rest of the other motor vehicles the amounts were US$1 for light motor-vehicles, US$2 for minibuses, US$3 for buses; US$4 for heavy vehicles and US$5 for haulage trucks.

On 4 July 2014 the Minister published statutory instrument 106 of 2014 namely Toll Roads (Regional Trunk Road Network) (Amendment) Regulations, 2014 (No. 5) (hereafter referred to as "***SI 106/2014***" or "***the regulation***"). It increased the toll fees across the board. In United States dollar terms the amounts went up to US$2 for light motor-vehicles, US$3 for minibuses, US$4 for buses; US$5 for heavy vehicles and US$10 for haulage trucks. In a notice published on 6 July 2014 in a weekly newspaper, ***The Sunday Mail***, (hereafter referred to as "***the public notice***") it was announced that the new toll fees would become effective from 11 July 2014.

It is SI 106/2014 that has sparked the litigation in this matter. On 9 July 2014 the applicant filed an urgent chamber application for an interdict. For interim relief the applicant sought the order that pending the determination of its application for the setting aside of SI 106/2014, the second respondent (hereafter referred to as "***ZINARA***"), its officers, agents, employees or all such other persons acting for or through it be interdicted from implementing SI 106/2014. It was also sought as an interim relief the order that the public notice be suspended. As final relief the applicant sought the setting aside of SI 106/2014.

The applicant is a not for profit human rights organisation duly established in terms of its constitution and capable of suing and being sued. Its core object is the fostering of a culture of human rights in Zimbabwe through the observance of the rule of law. Its members are legal practitioners and law students. As for its *locus standi* to bring these proceedings the applicant relied on its direct and substantial interest in the matter. As owner of a number of motor vehicles in its own right, the applicant said SI 106/2014 equally applied to it as it does to all the other owners of motor vehicles in Zimbabwe. It said it is also an aggrieved person within the meaning of s 4(1) of the Administrative Justice Act, *Cap 10:28* ("***AJA***"). This section gives power to apply to this court for relief to any person who is aggrieved by the failure of an administrative authority to comply with AJA.

The applicant also relied on s 85 of the Constitution of Zimbabwe ("***the Constitution***"). That section permits any person to approach a court for relief in respect of an infringement of any of the fundamental rights or freedoms enshrined in the Constitution. Such a person can do so acting in their own interest. They can also do so acting in a representative capacity such as in the interests of a group; a class of persons; in the public interest or in the interest of its members.

The applicant's case was this. The Minister is an administrative authority within the meaning of AJA. ZINARA is that person specified and authorised by the Minister in terms of TORA, *inter alia*, to levy and collect tolls in respect of vehicles along toll-roads. The applicant said the Minister fixed the new toll in terms SI 106/2014 without first having consulted the Minister of Finance and that this was contrary to the provisions of s 3(1)(c) of TORA. The applicant accused the Minister allegedly for abusing the discretion and power bestowed on him by charging exorbitant tolls. This was said to be contrary to public policy.

The gravamen of applicant's case is aptly captured in paragraph 23.3 of the founding affidavit that was deposed to by one of its board members and chairman of its finance committee, one Selby Vunganai Hwacha, a practising legal practitioner. He wrote:

> "The margin of the increase in the toll fees is so unreasonable that no reasonable decision maker properly applying his mind could have arrived at such margin. In this regard, it is pertinent to highlight that the national economy has not been performing well. There are fears that deflation may set in. There has been a record number of company closures. Public entities are struggling to pay salaries. The economy is illiquid. Where are the members of the public expected to get the money to fund these ambitious toll fees?"

The applicant argued that toll gates and tolls were incepted in 2009. Five years on there has not been any meaningful improvement to the road system in the country. On 24 June 2014, the applicant, reacting to press reports on his intention to increase the tolls, had written to the Minister, citing the Access to Information and Protection of Privacy Act, *Cap 10:27*, basically demanding an account of the toll collections to date. Among other things, the applicant sought information on the total collections; a breakdown of the use to which those collections had been put; the names of the contractors engaged for the installation and rehabilitation of the road infrastructure and network, and such other similar information. Applicant said there was no response to its letter.

Evidently, wishing to highlight the unreasonableness, oppressive and burdensome nature of the toll increase the applicant picked one toll-gate along the Harare – Mazoe Road. Beyond it are many families driving past it every day on their way to and from work in Harare. With the new increase a motorist would need US$4 per day or US$120 per month or US$1 440 per year in toll-gate fees for a light motor vehicle. A haulage truck driver, at US$20 per day, would need US$600 per month or US$7 200 per year. These motorists would still need to maintain, fuel and licence their vehicles. Yet apart from tolls the government does have numerous other sources of income to fund road construction and maintenance such as fuel levies, vehicle licencing fees, transit fees and several fines.

The applicant said SI 106/2014 was null and void for want of compliance with s 68 of the Constitution as read with s 3 of AJA. Section 68 of the Constitution reads:

"**68 Right to administrative justice**

(1) Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantially and procedurally fair.
(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reason for that conduct.
(3) An Act of Parliament must give effect to these rights, and must-
    (a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
    (b) impose a duty on the State to give effect to the rights in subsection (1) and (2); and
    (c) Promote an efficient administration."

Section 3 of the AJA reads:

"**3 Duty of administrative authority**

(1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectation of any person shall –
    (a) act lawfully, reasonably and in a fair manner; and
    (b) act within the relevant period specified by law, or if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
    (c) where it has taken the action, supply written reasons therefor within a reasonable period after being requested to supply reasons by the person concerned.
(2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –
    (a) adequate notice of the nature and purpose of the proposed action; and
    (b) a reasonable opportunity to make adequate representations; and

(c) adequate notice of any right of review or appeal where applicable."

Subsection (3) provides instances when an administrative authority may depart from the requirements of subsections (1) and (2). Section 4 provides for the relief against administrative authorities for breach of the Act. An aggrieved person may apply to this court for relief. The relief includes, *inter alia*, the right to have the decision concerned set aside. The court can refer the matter back to the administrative authority for consideration or reconsideration. It can also give several other directions.

I heard the urgent chamber application on 11 July 2014. I was advised that SI 106/2014 had already become operational from mid-night on that day. The respondents took two points *in limine*. I reserved judgment on them. I proceeded to hear argument on the merits. I also reserved judgment. This now is my judgment on both the points *in limine* and on the merits.

The respondents' first point *in limine* was that the application was not urgent. Mr *Mutamangira*, for ZINARA, said by 24 June 2014 the applicant had written to the Minister objecting to his intention to increase the toll. Thus, the applicant had become aware of the pending legislation by then. That should have been the time for it to have acted. It had not.

Mr *Mutamangira* also argued that SI 106/2014 had been published in the Government Gazette on 4 July 2014. Thus, it had automatically come into force at mid-night on that day. The public notice in the *Sunday Mail* on 6 July 2014 deferring the coming into operation of the regulation to 11 July 2014 had merely been an administrative action that did not detract from the fact that the regulation was already in force. Furthermore, and at any rate, even in terms of the public notice the implementation of the regulation had started on mid-night on 11 July 2014, i.e. the day of the hearing. Therefore, the applicant's intended injunction had come too late. The horse had already bolted. To try and suspend it now would cause confusion and uncertainty to the public at large.

In response to the respondents' first point *in limine* aforesaid, Mr *Uriri*, for the applicant, countered that the clock on urgency could not possibly have started to tick on 24 June 2014 when the applicant had written to the Minister. Nothing had been promulgated by then. Even after its promulgation on 4 July 2014, the Minister had, on 6 July 2014, consciously taken an administrative decision to defer the coming into operation of the regulation to 11 July2014. 4 July 2014 had been a Friday. There had been a supervening

weekend. 6 July 2014 had been a Sunday. The application had been filed on 9 July 2014. There had been no significant delay. Among other things, it had been necessary for the applicant to collate the information and to prepare and present it properly.

Mr *Uriri* argued that it could not be said the horse had bolted. The harm complained of was of a continuing nature. He said each minute that the regulation was in force would give rise to a new cause of action.

I hereby dismiss the respondents' first point *in limine*. It amounts to nit picking on a matter of such public importance. I agree with applicant's contention. It cannot be said the clock for urgency had started to tick around the time it had written to the Minister. The application is not about the Minister's failure or refusal to respond to the applicant's letter. It is about the subsidiary legislation that the Minister had subsequently promulgated and brought into force. At the time the applicant had written to him, the Minister had not yet acted, or at least his action in the form of the regulation had not yet come into the public domain. It would have been premature for the applicant to have rushed to court at that stage to attack what was no more than a mere intention.

When the Minister did eventually act by publishing the regulation it was on the eve of a weekend. But even before that weekend was up, ZINARA, with the Minister's blessing, had already published the public notice to defer by one week the operation of the regulation. That was precious more time for the applicant. It then launched its application on 9 July 2014. The delay was only two working days. In such circumstances it would be unreasonable and cruel to declare the applicant non-suited.

Nor is it a case of the horse having bolted. Every day that the regulation is in force the horse is bolting. Or it is a question of more of them bolting. The regulation may have become a *fait accompli* on paper. But its effect on the ground is not. If the regulation was the kind of harm against which the law invented the remedy of an interdict, then it is a continuing harm. For as long as it is a continuing harm the applicant can invoke the assistance of the court.

The respondents' second point *in limine* was that there was no cause of action for me to sit in judgment. The argument was twofold. It ran like this. Firstly, the applicant was, in effect, seeking a review of the regulation. Such a review would have to be in the form of a court application on Form 29 as prescribed by the High Court rules. The true nature of the present urgent chamber application was that it was one for an interdict *pendete lite*. An application *pendete lite* is an interlocutory application. It is one pending something, or a *lite*.

But for the applicant, there was no other *lite* pending. It had filed no review application. The applicant was in effect seeking the overturning of a law that was valid on the face of it. SI 106/2014 was valid until set aside. It is unprocedural for a court to overturn a valid law in summary fashion.

For the second leg of their second point *in limine*, the respondents said, as I understood them, and in my own words, there was no cause of action for me to sit in judgment because whilst the court has the power to review the legislative function of the executive arm of government, really what the applicant was urging the court to do was to impugn something that was squarely within the exclusive domain of the executive. The court lacks the necessary knowledge, the necessary training, the necessary expertise or the necessary information to challenge or judge such a function. The Minister's action in fixing or raising toll tariffs was an executive and polycentric function. Mr *Mutamangira* said that this was more than a mere "**administrative action**" of the type contemplated by AJA. It was a legislative function. He said available jurisprudence in this jurisdiction and beyond suggests that the matter is still an open question. It is debatable whether the court's traditional function of judicial review extends to the legislative function of the legislature.

Mr *Mutamangira* contended that the traditional test for an interlocutory interdict as set out in the *locus classicus Setlogelo v Setlogelo*[1] over 100 years ago and which has been followed in numerous subsequent cases is in respect of interdicts between private individuals. It is not wholly applicable where the other party is the State and where the challenge is in respect of its legislative power. Different considerations apply. He referred to the South African e-tolling cases[2] and the yet to be reported *Blair Athol* case[3]. The latter case was decided in the South African North Gauteng High Court in April this year. It was in respect of the power of a municipality to levy charges on homeowners in a township under the jurisdiction of the municipality.

Ms *Warinda* was more bullish. She would take no prisoners on this. There was no cause of action for the court to decide, she argued. It was **impossible** for this court to sit to review a legislative function of the executive arm of government. What the Minister had done

[1] 1914 AD 221
[2] *National Treasury and Ors v Opposition to Urban Tolling Alliance & Ors* 2012 (6) SA 229; *Opposition to Urban Tolling Alliance & Ors v South African National Roads Agency Limited* 2013 (4) All SALR 639 (Judgment No 90/2013 of the Supreme Court of Appeal of South Africa)
[3] *Blair Atholl Homeowners Association & Ors v The City of Tshwane Metropolitan Municipality* Case No. 63280/11

in promulgating SI 106/2014 was an exercise of a legislative function. This is a function different from the Minister's other administrative functions. She gave an example. A dispute over mining concessions or mining claims first goes to the mining commissioner for determination. From there an appeal lies to the Minister of Mines. In determining the appeal the Minister of Mines is exercising a purely administrative function. That is reviewable by the courts exercising their ordinary review powers. Not when the Minister is making regulations. He is now exercising delegated authority to make law. The courts have no jurisdiction to review such a function.

To quash the respondents' second leg of their second point *in limine*, Mr *Uriri*, for the applicant, sprung an argument that neither formed part of its grounds of impeachment in the founding affidavit nor about which any notice had been given. He argued that it was a point of law which he could raise for the first time at any time. It was also an argument meant to bury the respondents' objection on urgency which I have already dealt with. It was a point that appeared *ex facie* the documents. It was this: SI 106/2014 was titled "**Toll Roads (Regional Trunk Roads Network) (Amendment) Regulations, 2014 (No. 5**)". Subsidiary legislation such as statutory instruments cites the author and the enabling Act under which they are promulgated. SI 106/2014 said:

> "IT is hereby notified that the Minister of Transport, Communication and Infrastructural Development has, in terms of section 6 of the **Road Motor Transportation Act [Chapter 13: 13]** made the following regulations –
> 1. ……..."
> 2. ……"

The reference to the Road Motor Transportation Act ("***ROMTRA***") was a patent error. The Minister's power to fix toll fees by regulations is prescribed by TORA, not ROMTRA. ROMTRA is not Chapter 13:13. It is Chapter 13:***15***. It is TORA that is Chapter 13:13. Mr *Uriri* said that this was unforgivable. The regulations were void *ipso jure*. The Minister had purported to act under a non-existent law. Under such circumstances there could be no presumption of validity. Both the purported legislative action of the Minister in coming up with SI 106/2014 and his administrative function to postpone the start date of the regulation drew their life blood from a non-existent law. The court has an inherent power to remedy such an obvious illegality, Mr *Uriri* charged.

Regarding the argument that there was no review application, Mr *Uriri* contended that what was before me was a hybrid. It was, on the one hand, an application for review which

would be ventilated more fully on the return date. On the other, it was an application for an interim order on an urgent basis pending the return date. The interim relief sought the **suspension** of the regulation because of the patent irregularity in its making and the unreasonableness of its effect. The final order sought the **setting aside**, permanently, of that regulation. There was no need to bring a separate review application. In terms of Order 32 of the High Court Rules one had a choice of procedure. One could bring an ordinary court application in Form 29 in non-urgent matters. In urgent matters such as this, one could bring an urgent chamber application for interim relief.

The respondents' two-legged second point *in limine* also touched on the merits of the application. Disposal of that point would virtually dispose of the whole case. The parties seemed to concur. Much time and effort had been spent arguing the points *in limine,* particularly the second one. For the merits the parties were content to abide by their papers and their submissions on the points *in limine*.

The nub of the matter is, in my view, the extent to which the legislative function of the executive arm of government is reviewable by the judicial arm of government under the doctrine of the separation of powers. But before I deal with this point as it relates to this particular matter I have to blow away the smoke that purports to screen off the real issue. Part of this smoke or cloud was the respondents' argument or insinuation that there always ought to be some *lite* pending before one can bring an urgent chamber application for interim relief. It seems true that in the majority of urgent chamber applications the interim relief is sought pending the determination of some main dispute. An obvious example is where a provisional order is sought to stay the execution of a judgment pending the determination of an application for the setting aside of that judgment.

However, in my view, the granting of relief on an interim basis cannot always be pending something. It cannot always be predicated on some other application having been filed of record first. There is no such requirement in the Rules. Rule 226 of Order 32 only provides as follows:

> "**226. Nature of applications**
> (1) Subject to this rule, all applications **made for whatever purpose** in terms of these rules or any other law, other than applications made orally during the course of a hearing, shall be made –
> (a) as a court application, that is to say, in writing to the court on notice to all interested parties; or
> (b) **as a chamber application, that is to say, in writing to a judge**.

(2) An application shall not be made as a chamber application unless –
   (a) the matter is urgent and cannot wait to be resolved through a court application; or
   (b) these rules or any other enactment so provides; or
   (c) the relief sought is procedural or for a provisional order where no interim relief is sought ***only***; or
   (d) the relief sough is for a default judgment or a final order where -
      (i) ……..
      (ii) …….
      (iii) ……..
   (e) there are special circumstances which are set out in the application justifying the application." (emphasis added)

In the present matter I have accepted the applicant's argument that what it placed before me was both the review application and the urgent application for interim relief. In terms of Order 32 an urgent chamber application must be accompanied by, *inter alia*, a certificate of urgency. Except for a *mandament van spolie* which is itself a final order[4], where relief is granted in an urgent chamber application it is invariably of a temporary or interim nature because there would not have been enough time to canvass and ventilate the issues. At this stage the court is being asked to consider the matter in summary fashion. If it is satisfied that the applicant has made out a *prima facie* case, the court can grant the interim relief. But it is not uncommon for that interim relief to be discharged on the return date when the matter has been considered more extensively and the issues canvassed and ventilated more properly. Therefore, I dismiss the first leg of the respondents' second point *in limine* for lack of merit.

Ms *Warinda's* argument that it is **impossible** for a court to review the legislative function of government is a ghost. It was buried in 1985 in the *PF-ZAPU* case[5]. A three judge Bench of the Supreme Court headed by DUMBUTSHENA CJ held that the exercise of an executive prerogative is not necessarily an act the validity of which is beyond the jurisdiction of the court. It is only those acts of State in respect of which the jurisdiction of the court is ousted that the court may not review. Such executive prerogatives are now very few and far between. Whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectation of the citizens, the jurisdiction of the courts is not ousted. Acts of state that may be exercised by the President, in terms of the Constitution in respect of which

[4] See *Mankowitz v Loewenthal* 1982 (3) SA 758, at p 767F – H, and my recent judgment in *Trustees of the S.O.S. Children's Village v Bindura University & Ors* HH349-14, at p 6
[5] *PF-ZAPU v Minister of Justice* 1985 (2) ZLR 305 (SC)

the jurisdiction of the court is ousted include the appointment, accreditation, reception and recognition of diplomatic agents; the conclusion and ratification of international conventions, treaties or agreements; the proclamation or declaration of martial law or war, etc. Others include the granting of a pardon to convicted persons or the remission or suspension of their sentences, etc. Even then, the superior court said, should the exercise of these prerogatives be done under unlawful conditions or be performed outside the law the courts have a duty to review them.

That now brings me to the nub of the matter. The applicant says its application is both a Constitutional application and one for review of the Minister's action under AJA. As a Constitutional application the applicant says in terms of s 68 of the Constitution it has a right to administrative conduct that is lawful, reasonable and proportionate and that is both substantively and procedurally fair. Mr *Uriri* submitted that by referring to a non-existent law when promulgating SI 106/2014, the Minister had subjected it to conduct that was unlawful. Given the state of the economy, SI 106/2014 was unreasonable. The margin of the toll increase was disproportionate.

Under AJA the applicant's case was basically that the Minister had failed to consult the Minister of Finance in fixing the new toll tariff. He also is said to have failed to consult all the stakeholders.

In my view, a great deal of the applicant's submissions on the main point was wool over the eyes. As the respondents contended, there was nothing constitutional about the application. That any person who thinks that their freedoms as enshrined in the Constitution have been infringed upon is entitled to approach the court for relief as provided for by s 85 of the Constitution was not the issue. That any person is entitled to administrative justice as spelt out in s 68 of the Constitution and s 3 of AJA was also not the point. The respondents did not contest the applicant's right to approach the court as provided for in the Constitution and AJA. What they contested, on the merits, was a finding that the Minister's action in enacting SI 106/2014 was unlawful, unreasonable and substantively and procedurally unfair. They also contested a finding that the Minister had not consulted the Minister of Finance or that he was obliged to consult anyone else other than that minister.

In casu, Mr *Uriri's* argument that SI 106/2014 is unlawful because it refers to a wrong Act of Parliament is illusory. Whilst the error is patently obvious, it is so infinitesimal as to be inconsequential. It practically was a typing error, a slip of the pen by the typist, or of the

tongue by whoever may have dictated the contents. A law cannot be knocked down for such a minor mistake. There is no question that the Minister does have the power under TORA to fix toll tariffs. There is no question that it is s 6 of TORA that empowers the Minister to make subsidiary legislation. TORA is Chapter 13:13 in the statute books. All the other provisions of SI 106/2014 seem perfect except the erroneous reference to ROMOTRA.

It is not every mistake that affects the validity of a law. Even some far more serious mistakes or omissions than in the present matter have failed to upset an existing law. In the *Blair Atholl* case, *supra*, MURPHY J said, in para 36, of the judgment:

> "Even though the notice might have been invalid for want of compliance with the time period, such procedural invalidity, in the face of substantial compliance and no notable prejudice, does not justify a declaration of invalidity with retrospective effect. Illegal acts can have factual consequences which in all other respects are lawful and have no on-going or prospective illegal effect. Sometimes invalid administrative action, in this case the non-compliance with statutory procedure, must be allowed to stand in the interests of finality, pragmatism and practicality, especially when non-compliance is not material or prejudicial – *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA (SCA) para 28. In such circumstances, a court in its discretion may decline to set aside the invalid action, ……"

On this particular point the Minister is not being impugned for any procedural impropriety. He is being impeached for a typing error. This ground must fail.

The next ground of attack must also fail. Section 3 (1)(c) provides that the Minister may fix the amount of any toll after consulting the minister responsible for finance. The applicant says the Minister did not consult the Minister of Finance. The respondents say he did. Not only that, but also that he brought the whole matter to Cabinet for approval. The court is none the wiser. The law says he who alleges must prove. Furthermore, the presumption of validity operates. An act regular on the face of it is valid until the contrary is proved. The applicant just makes a bald allegation in paragraph 23.1 of the founding affidavit that there is no evidence that the Minister followed the procedures set out in s 3(1)(c) of TORA and that his failure to consult the Minister of Finance is fatal to the validity of SI 106/2014. But where is the evidence of non-compliance in the first place? The court cannot upset a law on mere conjecture.

One of the applicant's complaints on lack of consultation was that the Minister, without consulting the general motoring public, promulgated SI 106/2014 which imposed punitive toll increases. But the law does not make it obligatory for the Minister to consult

anyone else other than the Minister of Finance. Therefore, there is no valid complaint on this point.

The gravamen of the applicant's complaint is that against the dismal performance of the national economy the toll increase is unreasonable, disproportionate and punitive. The complaint is also that instead of looking to tolls for road construction, rehabilitation and maintenance the Minister should have considered other sources of funding like fuel levies. This argument brings squarely to the fore the doctrine of the separation of powers and the extent to which it may operate.

In my view, the doctrine of the separation of powers in a Constitutional democracy is such that the three arms of government, namely the legislature, the judiciary and the executive, have each exclusive domains of operation. They apply their training, if any, their experience, the information available to them and all the other resources at their disposal to put out the best for the nation. One arm may not interfere with the other arms. But our Constitutional democracy has a system of checks and balances. One arm may pry into and poke its nose in the other's domain. For example, the prerogative to sentence a convicted person to an appropriate term of imprisonment is that for the judiciary. What would amount to an appropriate sentence is for the court to decide in its own discretion. But it is not always like that. The legislature can "interfere" with the exercise of that discretion by imposing, through legislation, minimum or maximum penalties for specified offences. The executive can also "interfere". The President can pardon, commute or remit certain punishments imposed by the courts. Likewise, the judiciary plays an oversight role in making sure that as the legislature and the executive go about executing their functions they do so lawfully or procedurally. A law promulgated unprocedurally or any other administrative function carried out without regard to the law will be knocked down by the judiciary or set aside. That is how the machinery of state functions.

If the applicant argues that something is unreasonable, the obvious question is unreasonable compared to what? If something is disproportionate or punitive, in relation to what? Aren't these mere abstract concepts that defy precision? Without some kind of empirical evidence, how does a court quantify unreasonableness? One appreciates the applicant's example of a toll gate along the Harare–Mazoe Road with figures of $4 per day, $120 per month and $1 200 per year for a light motor vehicle, and $20, $600 and $7 200 respectively for a haulage truck. But the respondents came up with their own set of figures to

illustrate that tolls on Zimbabwe roads are the lowest in the region. As an example they said that a motorist for a light motor vehicle will pay a total toll of only US$8 for a distance of 580 km from Harare to Beitbridge. Yet in South Africa he will pay almost double, R196-50, for a similar distance from Beitbridge to Johannesburg. So again the court is none the wiser.

The South African so-called e-tolling cases dealt with objections to a toll project very similar to the applicant's objection herein. The cases were triggered by the implementation of e-tolling. There was a vigorous, organised and protracted resistance. In a nut-shell e-tolling is the collection of tolls through electronic means. In one particular province it did away with the manual system of having toll-gates mounted along toll-roads as is the current situation in Zimbabwe. The implementation of e-tolling was preceded by massive consultations, advertisements, meetings, presentations and several submissions. Stakeholders such as car hire companies, consumer unions, fleet owners and individual motorists organised themselves into a single body to thwart the move. SANRAL (South African National Roads Agency Limited), the equivalent of ZINARA here, had made budgetary presentations for the minister of transport who had then taken the matter up to Cabinet. SANRAL had obtained a loan for the massive project and the government had stood guarantor for that loan.

Opposition to e-tolling was predicated on a number of grounds. They included the alleged unreasonableness of the massive cost and the impracticality of enforcement of payment. It was also suggested that the government could source funding for the project from elsewhere. The court cases were based on the provisions of the South African Constitution similar to those cited by the applicant herein. They were also based on the South African equivalent of AJA, called the Promotion of Administrative Justice Act ("PAJA").

The opposition failed. The judgment of the Constitutional Court of South Africa, in *National Treasury and Others v Opposition to Urban Tolling and Others, supra*, at para (63) cited with approval the following passage in the case of *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA416 (CC), 2006 (12) BCLR1399;

> "(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of the their preference that would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."

In paragraphs 66 to 68, on page 241, the court held as follows:

"[66] A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict.

[67] The harm and inconvenience to motorists, which the high court relies on result from a national executive decision about the ordering of public resources, over which the executive government disposes and for which it, and it alone, has the public responsibility. Thus, the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain. What is more, absent any proof of unlawfulness or fraud or corruption, the power and the prerogative to formulate and implement policy on how to finance public projects reside in the exclusive domain of the national executive subject to budgetary appropriations by parliament.

[68] Another consideration is that the collection and ordering of public resources inevitably call for policy-laden and polycentric decision-making. Courts are not always well suited to make decisions of that order. It bears repetition that a court considering the grant of an interim interdict against the exercise of power within the camp of government must have the separation – of – powers consideration at the very fore front."

I adopt the same approach in this case. I do find nothing unprocedural in the way the Minister promulgated SI 106/2014. It was within his power to craft it. It was an action within the exclusive domain of the executive to decide how road construction, rehabilitation and maintenance should be funded. Such a decision is manifestly policy-laden and polycentric. In my view s 68 of the Constitution and AJA are in most ways a mere codification of the traditional powers of the courts to review the exercise of the functions of the executive. In my view AJA is merely an elaborate restatement of the rules of natural justice. In the case of *Zindoga & Ors v Minister of Public Service, Labour and Social Welfare & Anor* 2006 (2) ZLR10 (H), PATEL J, as he then was, said at p 13D – E:

"It is axiomatic that any party who has a right or interest that is likely to be affected by an administrative decision or which is susceptible to being prejudiced thereby must be heard before that decision is taken. This is dictated by the time honoured precept of the common law embodied in the *audi alteram partem* rule **and now codified in the Administrative Justice Act [Chapter 10: 28**" (emphasis added).

The courts exercise the powers of review within those bounds as have been developed through case law such as *PF-ZAPU* and the e-tolling cases referred to above. In my view, the applicant has failed to establish a proper cause of action for the court to determine.

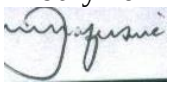
With the view that I have taken I have found it unnecessary to consider in any further detail the requirements for an interdict as set out in *Setlogelo v Setlogelo, supra*, and whether they apply in a matter such as this where the central question was the power of the court to review acts that are the exclusive prerogative of the executive arm of government. Suffice it to say that when I say the applicant has not established a cause of action I mean that it has neither shown a *prima facie* right peculiar to it or its members, nor any well-grounded apprehension of an irreparable harm stemming from the actions of the Minister.

In the result the application is dismissed. Normally the costs of suit follow the event. But not always, especially in a matter of such public importance as this. In one of the e-tolling cases aforesaid[6] the South African Supreme Court referred to the *Biowatch* principle[7]and refrained from ordering the costs of suit against the appellants despite the failure of their appeal. The court said the *Biowatch* principle is that in constitutional litigation an unsuccessful party in proceedings against the state ought not to be ordered to pay costs lest litigants may be discouraged to vindicate their constitutional rights. In this jurisdiction I would refer to what I would term the *Nyambirai* principle after the decision in the case of *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1. The Supreme Court, in a constitutional application brought against the introduction of a compulsory scheme of national social security, refrained from ordering the applicant to bear the costs of suit notwithstanding that he had lost. The court said the issue that the applicant had raised was important and controversial and that the proceedings that he had instituted had led to its resolution.

In the final result the application is dismissed with each party paying their own costs.

Wintertons, applicant's legal practitioners
Civil Division of the Attorney-General's Office, legal practitioners for the respondents
Mutamangira & Associates, legal practitioners for the second respondent

14 July 2014



[6] *Opposition to Urban Tolling Alliance* v *The South African National Roads Agency Limited* 2013 (4) All SALR 639
[7] *Biowatch Trust* v *Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).