

TENDAI BLESSING MANGWIRO
versus
THE MINISTER OF JUSTICE & LEGAL AFFAIRS (N.O.)
and
THE MINISTER OF HOME AFFAIRS (N.O.)
and
THE ATTORNEY-GENERAL OF ZIMBABWE (N.O.)

HIGH COURT OF HARARE ZIMBABWE
MUSHORE J
HARARE, 30 November 2016 & 15 March 2017

Court Application (Constitution of Zimbabwe- State Liabilities Act- Declaration of invalidity)

T. Zhawarara, for the applicant
H. Magadure, for the respondents

MUSHORE J: After what can only be described as being both an eventful but arduous journey through the courts, applicant is now petitioning this Court for an order declaring that s 5 (2) of the State Liabilities Act [*Chapter 8:14*] is unconstitutional. Section 5 (2) of that Act provides that State Property is immune from attachment and execution, and that in circumstances where the State finds itself to be a judgment debtor, any amount owed by it should be paid out from the Consolidated Revenue Fund. Applicant contends that whilst s 5 (2) remains valid, it is unjustly impeding him from realising an award of damages granted in his favour by this court in matter number HC 4766/13.

The long history of this matter speaks to the effort which the applicant has applied to arrive at this day. The facts are these.

The applicant was wrongly arrested on allegations of theft on 16 February 2008 from a person known as Andre Nsaka Nsaka. He was formally charged and tried for theft and subsequently acquitted of the charge of theft on 18 February 2013. After his arrest, the Police seized two of his vehicles, and cash in the amount of USD 78,000-00 and ZWD 46 135 000 000-00. Unfortunately after his acquittal the Police unprocedurally released the seized property to Andre Nsaka Nsaka. The Police eventually released the motor vehicles to

applicant, but failed to reimburse applicant his cash. That was when the applicant began seeking recourse through the civil courts. He then sued the Co-Minister of Home Affairs; the Commissioner General of the Police; the Officer in Charge of C.I.D suspects (Harare Central Police) and a Detective Inspector Mukambi for the re-imburements of the cash which had yet to be returned to him and his efforts were rewarded when he successfully obtained a default judgment from this Court on 18 February 2015 in case number H.C. 4766/13. The court ordered the defendants to reimburse applicant his money.

After the applicant succeeded in obtaining an order for the payment of US\$ 78,900-00 the defendants jointly applied for that order to be rescinded in matter HC 35001/15. However after filing that application, all of those defendants failed to prosecute it. The applicant was thus forced to ensure that the application for rescission was disposed of which he did by filing an application for dismissal of the rescission application under case number HC 4942/15. On 30 June 2015, Justice TSANGA dismissed the respondents' application for rescission for want of prosecution and awarded costs in applicant's favour on a legal practitioner and client scale.

It would appear that the respondents had also applied for a permanent stay of execution pending finalisation of their application for rescission. Once again the applicant was forced to instruct his lawyers to ensure that that application for a stay of execution was disposed of; and this time the applicant wrote to the respondents' lawyers and requested them to set that matter down for hearing. The respondents responded by withdrawing their application for a permanent stay of execution on 2 October 2015.

Oddly the respondents then made an application challenging the dismissal of their application for rescission in case number HC 7065/15. Once again the applicant took it upon himself to instruct his lawyers to press for a set down date. Upon receiving applicant's request, once again the respondents withdrew this application on 2 October 2015.

In February 2013, the respondents had challenged the default judgment granted in HC 4766/13 on appeal to the Supreme Court. However, the Supreme Court threw out the respondents' appeal.

On 9 October 2015, the applicant's attorneys then addressed a letter of demand to the respondents. They enclosed their trust account details. In response to the letter of demand, on 26 October 2015, the Commissioner General of the Police addressed a letter to the applicant advising him that the Permanent Secretary in their Ministry had granted authority to pay the sum awarded '*subject to treasury concurrence*'. On 16 November 2015 the Director of Legal Affairs in the Police wrote to The Permanent Secretary of Home Affairs confirming the

authorisation of payment of applicant's legal costs in the sum of US\$ 10,500-00 which were reasonable according to them. After telephonic follow ups were done by the applicant's legal practitioners, the Director of Legal Services (Police) wrote to the applicant's attorneys citing s 5 (2) of the State Liabilities Act [*Chapter 8:14*] and informing the applicant that:

"all that the Defendants had to do was to cause to be paid out of the Consolidated Revenue Fund...." And that is exactly what we have done and have always kept you informed so that you may properly advise your client.

We are therefore surprised by the tone of your correspondence and to avoid any misunderstandings between the office of the Commissioner General of Police and his officers and yourselves, we have decided that any future communication be done through our legal practitioners of record, being the Civil Division of the Attorney General's Office." (*my underlining*)

They also attached a copy of their letter to The Director of Finance (Police) dated the 30th October 2015 as proof that they (Director Legal Services Police) had done their part to facilitate the payment to the applicant. Still, no payment was forthcoming to the applicant.

It was then that the applicant tried a different tack and wrote directly to the Minister of Finance in a letter dated 2nd December 2015 stating:

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"The long and short of the above documents is that, the Defendants have been ordered have discharged their part, that is, by causing to be paid out of the Consolidated Revenue Fund which fund is administered by yourselves hence our appeal to you. Our understanding from the attached correspondences is that, the duty to pay is on your shoulders. Put differently, if our client is not paid his money it is because your office would have withheld its authority. In which case your conduct would be contemptuous of the order granted by this Honourable Court.

...Please note that we are under strict instructions to apply for contempt of court against your Ministry as well as to approach the Constitutional Court to have section 5 (2) of the State Liabilities Act to be declared unconstitutional.....In the event that we proceed against you, kindly take this letter as our notice to you in terms of section 6 of the State Liabilities Act [*Chapter 8:16*]" (*my underling*)

Having received no response to this letter, the applicant's attorneys also wrote to the Permanent Secretary of Finance in which letter they effectively repeated the contents of their previous letter and informed the Permanent Secretary that in addition to the cash sums due to applicant, the interest due to the applicant was in the amount of US\$11,835-00 calculated from 25th January 2013 up to 25th January 2016. The following excerpt from the letter explains the bureaucratic stumbling blocks which applicant had encountered:

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“the last communication from the Police reasonably made us believe that they (the Police) had caused the Minister of Finance to release our client’s money; see their letter to us dated 26 November 2015. On the strength of that, we then approached the Minister of Finance since we thought that they were sitting on the request from the police and from your office. See our letter to the Minister of Finance dated 2nd December 2015. Unfortunately the Minister of Finance could not favour us with a response. This prompted us to approach the Accountant General (ex-Chequer) one Mr Zvandasara and the Head of Budget a Mr Churu. These two officials categorically denied ever receiving communication concerning the above matter let alone the request to pay our client. Further to that, they indicated that, they do not have an obligation, in the absence of your instructions, to pay us since we did not sue them. This came as a surprise to ourselves and our client considering that they had sought permission from the Minister of Finance to have that amount released and paid to yourselves for onward transmission to us” (*my underlining*)

In the letter, applicant’s attorneys also informed the Minister of their intention to make the current application in the event that they did not receive a response within seven days of their letter. It appears that this letter had the desired effect of prompting a response from the Secretary of Home Affairs who acknowledged receipt in a letter dated 4th February 2016 and intimated that:

“all payment made by ay Government institution require several processes such as Treasury Concurrence as they are prerequisite to payments processes. At present the Ministry has initiated the required processes and will advise you on the progress made within a reasonable time.” (*my underlining*)

After another demand by the applicant on 19 February 2016, the Secretary for Home Affairs wrote to the applicant’s attorneys stating that ‘all necessary arrangements have been made to request and pay the amount due to your client as granted by the court’.

After a further two warnings from the applicant’s attorneys, the applicant finally approached the High Court for a *mandamus* in which he cited the Minister of Home Affairs only and which he they obtained from this Court on 16 May 2016 in matter number HC 4261/16. The *Mandamus* Order compelled the Minister of Home Affairs to comply with the court order given by Honourable Justice MUSAKWA on 18 February 2015. Costs were ordered against the respondents once again on a punitive scale. The applicant’s attorneys furnished the respondents with the court order attached to their letter dated 7th June 2016 and in which letter they politely urged the respondents to comply with the *mandamus* order to avoid being in contempt of court.

Having received no response, the applicant’s attorneys applied for and were issued with a writ of execution. They furnished the Sheriff to save their writ. The Sheriff of the High Court wrote a letter to the applicant on 15 October 2016 expressing reluctance on the part of the Sheriff’s office to serve the writ on the respondents because of the immunity from

execution which the respondents enjoyed in by virtue of s 5 (2) of the State Liabilities Act [Chapter 8:16] {hereinafter referred to as s 5 (2) for ease of reference}.

This was when the applicant made the current application for s 5 (2) of the State Liabilities Act to be invalidated on the grounds that it is unconstitutional; with the Minister of Justice and the Attorney-General being added as respondents.

Section 5 (2) of the State Liabilities Act reads as follows:

“Section 5 (2)

5 No execution or attachment to be issued, but nominal defendant or respondent authorised to pay the sum awarded.

(1) In subsection (3)-

“judgment debtor” means a person who under any order of any court, is liable to pay money to any other person, and “judgment creditor” shall be construed accordingly.

(2) Subject to this section, no execution or attachment or process in the nature thereof shall be issued the defendant or respondent in any action or proceedings referred to in section two or against any property of the State, but the nominal defendant or respondents’ may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by judgment or order of the court, be awarded to the plaintiff, the applicant or the petitioner, as the case may be”.

In the present matter, the applicant believes that the respondents are indifferent to the rights which he ought to enjoy and which are guaranteed to him by the Constitution of Zimbabwe. He believes that whilst s 5 (2) remains valid, his constitutionally guaranteed rights are being infringed. The following is a point form summary of applicant’s submissions in support of his contention that the respondents are unconstitutionally encroaching on his fundamentally protected rights and freedoms.

1. The Constitution provides for the enforcement of fundamental human rights and freedoms *per* section 85 of the Constitution:

“85. Enforcement of fundamental human rights and freedoms

(1) Any of the following persons, namely-

- (a) any person acting in their own interests;
- (b)
- (c)
- (d)
- (e)

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation” (My emphasis)

2. Applicant submits that section 5 (2) is unconstitutional in that despite the Constitution providing for equality before the law, the section under scrutiny places the respondents in inequitable superiority to other persons, and all other bodies and institutions.

He submits that the Constitution does not recognise that there should be such a distinction or that the rights of a certain class of persons be preferred over another class of persons and that that is certainly not the intention behind the guaranteed right in s 56 of the Constitution:

“56 Equality and non-discrimination.

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.”

3. In addition he cites other provisions of the Constitution which he believes deem s 5 (2) to be unconstitutional. Those are as follows:

Section 44 imposes a duty to respect the Declaration of Rights *pari pasu* on both the State and person without limitation.

“44 Duty to respect fundamental human rights and freedoms.

The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.”

Section 45 provides a ‘for the avoidance of doubt’ emphasis of this duty.

“45 Application of Chapter 4

(1) This Chapter binds the State and all executive, legislative and judicial institutions of government at every level”

4. Section 164 (3) provides for compliance with court orders without limitation.

“164 Independence of the Judiciary

(1)

(2)

(3) An order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them”

5. Applicant has also stressed that the respondents, like any other litigants are constitutionally bound to obey court orders per s 164 (3) of the Constitution and that the court is mandated to ensure compliance thereto without favour or prejudice:

“164 Independence of the Judiciary

(1) the courts are independent and are subject only to this Constitution and the law, which they must apply impartially, expeditiously and without fear, favour or prejudice”. (*my underlining*)

6. The Constitution specifically requires the respondents who are State representatives to protect the democratic functions and processes of the courts and ensure compliance with the provisions in the Constitution.

“164 cont’d

(2) The independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore-

- (a) neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;
- (b) the State, through legislative and other measures must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165”.

8. Furthermore, he complains that the respondents have denied him access to information and that none of the respondents have been forthcoming with proof that they were indeed processing his claim despite their constant assurances. To that end he submits that the respondents have breached his constitutionally guarded right to information provided for in section 62 of the Constitution which reads:

“62. Access to information

- (1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at any level, in so far as the information is required in the interests of public accountability.
- (2) Every person, including the Zimbabwean media.....
- (3) Every person has the right to the correction of information, or the deletion of untrue, erroneous or misleading information, which is held by the State or any institution or agency of the government at any level, and which relates to that person”

The respondents are opposing the application arguing that s 5 (2) is not unconstitutional and is in fact necessary and justifiable and is in the public interest. The respondents believe that s 86 (3) of the Constitution supports s 5 (2) as being a law of General application, which permits a limiting of applicant's fundamental rights and freedoms and that to that extent they have not fallen foul of the law.

“86 Limitation of rights and freedoms

(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair reasonable and necessary in a democratic society based on openness, justice, human dignity, equality and freedom and taking into account all relevant factors, including-

- (a) the nature of the right or freedom concerned;
- (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
- (c) the nature and the extent of the limitation;
- (d) the need to ensure that the enjoyment of right and freedoms by any person does not prejudice the rights and freedoms of others;
- (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the rights and freedom concerned than are necessary to achieve its purpose;
- (f) whether there are less restrictive means of achieving the purpose or the limitation”

The respondents contend that:

1. Section 5 (2) is in fact necessary in the interests of the public because if State assets could be executed then chaos would ensue and disruption to essential services, such as ambulances will occur; {s 86 (2) (b) (*supra*)}
2. That applicant ought to resort to other legal remedies to enforce payment such as obtaining a contempt of court order or obtaining a garnishee order against income accruing to the State; {s 86 (2) (f) (*supra*)}
3. They are not reluctant to pay, but that there are procedures which need to be followed first in terms of the Public Finance Management Act [Cap 22:19] and Treasury instructions because they are the relevant procedures for payment of court ordered debts.
4. If government assets become executable the country may experience difficulties due to the current dire economic environment.

IS THE LIMITATION JUSTIFIABLE?

Section 86 (2) of the Constitution *{supra}* provides guidelines to aid the courts in determining whether or not the limitation is justifiable to the extent of allowing the law of general application to override the constitutionally guaranteed rights and freedoms which it encroaches.

Section 5 (2) is worded almost exactly the same as section 3 of the South African State Liabilities Act 20 of 1957 which was declared invalid in the case of *Nyathi v MEC for Department of Health, Gauteng* 2008 (5) SA (CC). The facts and issues in the *Nyathi* case when compared to the facts and issues *in casu* bear a striking similarity. At page 101 in the judgment in *Nyathi*, MADALA J explained the roots of such an immunity from execution clause from an historical perspective. He stressed that the limitation was out-dated.

“[17] This legislation is in line and compatible with the doctrine of parliamentary supremacy.....

[18] The Act is a relic of a legal regime which was pre-constitutional and placed the State above the law; a State that operated from the premise that ‘the King can do no wrong’. That state of affairs ensured that the State, and by a parity of reasoning its officials, could not be held accountable for their actions”

The law has since developed. There are parameters for addressing this issue in s 86 (2) of the Constitution in addition to common law tests.

Proportionality.

The test of proportionality is an expanded juristic translation of the factors which are found in s 86 (2). It is apposite in providing guidelines for determining the validity of a limitation even in the face of an existing or potential collision with guaranteed constitutional rights. It balances out the list of considerations itemised in our s 86 in a way that makes for a common sense determination of whether the limitations can be said to be justifiable in a democratic society.

Proportionality is applied in circumstances such as this on the basic premise that the State can sometimes successfully establish legal cause to encroach an individual’s rights which are protected and held dear by the Constitution. At the outset, it occurs to me that broadly speaking s 5 (2) is disproportionately biased in favour of the State as it deems the State to be a judgment debtor with privileges. Nevertheless the doctrine exists in our law and is one which I am obliged to defer to.

In *S v Makwanyane* 1995 (3) SA 391, (CC) CHASKALSON P, (rendering the principle judgment of the court), gave an explanation on the doctrine thus:

“The limitation of constitutional rights for the purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality..... The fact that different rights have different implications for democracy as in the case of our Constitution, for an open and democratic society based upon ‘freedom and equality’ means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and the importance of that purpose to such a society; the extent of the limitation and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question”

See also: *S v Williams* 1995 (3) SA 632 (CC), (at para 104)

The formulation in *S v Bhulwana* 1996 (1) SA 388 (CC), in my view, provides a far more practical way of approaching proportionality. At para 18 the South African Constitutional Court put it this way:

“.....the court places the purposes, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds for justification must be”.

Whether the limitation imposed by section 5 (2) can weather the proportionality test?

Before I begin the process of weighing up infringement of applicant’s rights versus the justification made by the respondents, I need to mention the special obligation which exists and which is placed upon the respondents and specifically prescribed for in the Constitution. I take judicial notice of the constitutional provisions which emphasise the need for judicial impartiality and the independence of the Judiciary in a democratic state. Section 164 (2) of the Constitution as aforementioned emphasises the necessity of state organs to assist in ensuring that the courts are not being undermined and that the dignity, and independence of the judiciary is preserved. To that end it seems to me that that special obligation ought to be considered in a determination because obviously the independence of the judiciary should never be compromised to any extent because of the State deliberately failing to carry out their obligations to assist persons to enforce their rights. In *De Lange v Smuts NO & Ors* 1998 (3) SA 785e ACKERMAN J stated that:

“In a constitutional democratic State, which ours certainly is, and under the rule of law citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors”.

In *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446, JAFTA J derided the eroding of the right of access to the courts brought upon by deliberate non-compliance of court orders by the State as presenting “an illusion” to the constitutional right of access to the courts.

The respondents contend that their constitutional duty to ensure ‘public order and safety, override the applicant’s desire to attach and execute State property. They believe that “chaos and confusion” will ensue if applicant was to be allowed to proceed with execution of State assets. Counsel for the respondent submitted that if ambulances were to be attached in order that the applicant’s claim is met, then State health services would be disrupted. No explanation was proffered by the respondents as to how or why an ambulance would be put forth for seizure, or why a specific sector of government should be exposed to the consequences of any attachments of State assets. There was no attempt by the respondents to establish a *nexus* in that regard. I got the sense that perhaps the rather fantastical and dramatic statements from the respondents were an attempt to set up the likelihood of theatrically ominous consequences in the event that s 5 (2) was declared invalid.

However, the submission was disconcertingly vague in its content and example. Equally it made no sense against the backdrop that respondents had repeatedly reassured applicant that his claim had been approved for payment from the Consolidated Revenue Fund. According to the respondents, all that remained was for them to obtain treasury approval for the payment itself.

Further, from the record and the submissions made, respondents did not advert to any attempts they might possibly have made to pursue and push through the required processes which should have resulted in a release of the money to applicant. The point thus made by the respondents was founded on respondents’ mere say-so. Nevertheless their point did little to persuade me that their interests in the present matter have a bearing on public order and public safety.

Secondly, respondents submitted that s 5 (2) ought to remain valid because applicant had other remedies available at his disposal. The respondents fleetingly suggested that the applicant ought to go the route of obtaining a garnishee order; or a contempt of court order. It

is clear that the second respondent is in and continues to be in contempt of court. The suggestion being made is obviously intended to delay matters perhaps because respondents wish to avoid reimbursing applicant altogether. The respondents' proposal for a garnishee order flies in the face of the respondents' special obligation which I have referred to already. The respondents continued obstructiveness is in defiance of that special duty. A *mandamus* order was granted against them on 16 May 2016. They have chosen to ignore it thereby ignoring the strict and unambiguous language of s 164 (2). By their conduct, they have denounced the applicant's fundamental right to equal protection before the law (s 56) and acted contrary to the applicant's fundamental rights and freedoms.

It is without sense for the first and second respondents to make a choice to ignore the peremptory provisions of the Constitution and then decide what the applicant ought to do to enforce his rights. The Police erroneously gave away property and cash belonging to the applicant. It is outrageous that the respondents can make casual suggestions to the applicant about how he ought to force them to reimburse him his own cash, particularly in circumstances that the payment has been approved and only awaits authorisation. At present the respondents have been and are continuing to be in contempt of court.

It is to that end that it is my considered view that the respondents consider themselves to be immune to legal consequence by virtue of the validity of s 5 (2). It would be dangerous for this court to endorse their wrongful actions and justifications by accepting that their justifications have merit, which they do not.

Further, they are defiant in suggesting that the applicant has the option of obtaining a garnishee order against income accruing to the State. This is in obvious contradiction of their submission that it is their duty to preserve State assets. There is no substantial difference between property owned by the State and moneys owed to the State. They are both assets with the latter being intangible and the former tangible. The respondents are positively refusing to obey court orders and in the process wilfully and deliberately obstructing the processes of the court. Clearly, they regard themselves as being above the law.

Thirdly, the respondents make some befuddled references to the Public Finance Management Act [*Chapter 22:19*]. According to them there are some procedures laid out in that legislation which prevent them from immediate compliance with the court order. This contention is not reasonable and is not a satisfactory excuse. It is not for the court or the applicant to become immersed in the procedures which the respondents have to follow to obtain a release of applicant's funds. All that concerns the court are the reasons why the

respondents have not followed up a release of the funds from the Consolidated Revenue Fund and none so far have been of persuasive value.

Court intervention has now become necessary without which the respondents will no doubt comfortably remain in contempt of court.

In *Mjeni v Minister of Health and Welfare, Eastern Cape* {supra} JAFTA J said:

“A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to a breach of [a] constitutional duty [imposed by s 165 of our Constitution]. Such conduct impacts negatively upon the dignity and the effectiveness of the courts.

.....

The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and the resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order. To a great extent section 3 of Act 20 of 1957 {immunity from execution clause} encroached upon that enforcement of rights against the State by judgment creditors”.

It is a matter of fact that applicant’s constitutional rights continue to be encroached and that such infringement has not been justified by the respondents’ reasons. The immunity from execution which has been extended to the respondents by virtue of s 5 (2) carries with it a corresponding responsibility on the respondents to assist and not impede justice delivery. If s 5 (2) is being used to frustrate justice as is clearly the case in the present matter; then s 5 (2) is not justifiable in a democratic society based upon openness, justice, fairness, human dignity, equality and freedom. Thus proportionally the respondents’ justifications are neither reasonable nor necessary and in fact are destructive of applicant’s rights; which rights I have elaborated upon above.

RIGHTS WHICH CANNOT BE LIMITED WHATSOEVER.

Further the applicant has, in my view, an unassailable case to obtain the *declaratur* he seeks by the fact that his rights to dignity and access to the courts are not subject to the test of proportionality. As a matter of both fact and law, any encroachment of those rights is a constitutional infringement without the need for an enquiry into the degree to which applicant’s right may have been affected. The applicant contends that contrary to the provisions of s 86 (3) the respondents’ actions and their reliance on the immunity from execution afforded to them by virtue of s 5 (2) have caused him to be denied justice and that his access to the courts has been overstepped. Section 86 (3) provides as follows:

Section 86 (3):

“No law may limit the following rights enshrined in this Chapter, and no person may violate them-

- (a) the right to life, except to the extent specified in section 48;
- (b) the right to human dignity;
- (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
- (d) the right not to be placed in slavery or servitude;
- (e) the right to a fair trial;
- (f) the right to obtain an order of habeas corpus as provided in section 50 (7) (a).” (*my emphasis*)

There can be no application of the exceptions to the right to dignity and the right to a fair trial. These are iron clad. Any competing legislation or contradictory legislation is rendered unconstitutional so far as these rights have been encroached upon as has been complained of in the current case. Thus on that basis alone and speaking of the present matter, the respondents actions are unconstitutional.

THE COURT’S CONSTITUTIONALLY ORDERED POWER.

It is my considered view that a court should never shirk its responsibility in doing all that is necessary in making judicial law. In *Poindexter v Greenhow* 114 US 270 (885), (cited in the *Nyathi* case) the following observation was made with respect to State immunity and a democratic government at p 291;

“of what point are written constitutions whose bill of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created to appoint and guard, defend and enforce them; and that too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and rights be maintained, if, when violated, the judicial tribunals are forbidden to force penalties upon individual offenders, who are the instruments of wrong, wherever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. It is the doctrine of absolutism, pure, simple and naked.”

I have identified that s 5 (2) is destructive of important rights which the Declaration of Rights speaks to and represents. If those rights are impeded, the Declaration of Rights implementation is severely impeded. In a constitutional democracy, the authority and effectiveness of a constitution is determined by the authority and effectiveness of the courts.

UNIVERSAL EFFECT.

Proportionality is objective, with each matter being adjudicated on its own merits. Even though the courts (as stated by CHASKALSON P in the *Makanyane* case) deal with each matter on a case by case basis, the relief sought in this matter will, if granted, have wide reaching and national consequences. To that end it is important for me to stress that my determination in the current matter is not limited to the poor justification given by the respondents. I am alive to the fact that if indeed I were to grant applicant the declaratory relief he is after; that that decision will have far-reaching consequences which will be brought to bear in the national scheme of things.

The effect of any pronouncement which I may make thus will have a universal effect, and it is because of that that I have made my researches for guidance in the situation I find myself in. In *Registrar General, Zimbabwe v Chirwa* 1993 (4) SA 272 (ZSC) the full bench held:

“A judgement determining a person’s nationality by a court of competent jurisdiction (*in casu* a judgment of the High Court of Zimbabwe declaring the respondent to be a citizen of Zimbabwe) relates to a matter of status and is accordingly a judgment *in rem*, conclusive and binding against the whole world.....

There is a leg of thought which has gained considerable momentum which formed the view that where a statute which is invalid by virtue of its inconsistency with the Constitution, even before a dispute is presented to the courts for a ruling on invalidity, prior to such a declaration, the legislation is *ex facie* valid, but objectively invalid. If and when it is declared invalid by the court, that does not alter that piece of legislations objective invalidity prior to such a declaration. The declaration of invalidity by the court is an order as to the status of the thing. So when a court makes that pronouncement the court merely declares an invalid, then it is a judgment *in rem* (against the thing) which judgment becomes *res judicata* and therefore binding against the whole world.”

What has been referred to as one of these most powerful statements of constitutional supremacy was given by ACKERMANN J in *Ferreira v Levin NO; Vryenhoek v Powell* 1996 (1) SA 984 (CC);1996 (1) BCLR 1 is as follows:

“The court’s order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws, are inconsistent with the provisions of the Constitution. It is one of this court’s functions to determine and pronounce on the invalidity of laws, including Act of Parliament. This does not detract from the reality that pre-existing laws either remain valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is valid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person’s rights are threatened or infringed by the offending law or not”. (*my underlining*)

Thus even in circumstances where in a particular case the rights which cannot be limited *per s 86 (3)* have not been cited by a party and are therefore not under determination in that particular case, they are still unconstitutional because the exemption from limitation is law.

It is my view that if I make a pronouncement on the invalidity of s 5 (2) in the present matter; in effect all that I would be doing is rendering s 5 (2) with a status I deem has to be pronounced. *In casu* and with those rights having been placed under my scrutiny, I am persuaded that there is a need for a declaration of unconstitutionality by the simple fact that applicant's rights of access to the courts and rights to dignity which applicant ought to enjoy unhindered by any limitation whatsoever, were encroached upon by the respondents who felt cause to hide behind the immunity of execution status. Thus in accordance with the Constitution, the respondents are disentitled from pleading immunity regarding those rights which the legislature deems to be sacrosanct.

On an application of the proportionality test with respect to the other rights such as equality before the law, I do not find there to be any legitimate reason which justifies the legislation complained about being spared the *declaratur* sought given the spurious reasons given by the respondents. I have made the observation that the respondents deliberately obstructed the court processes and positively ignored court orders under cover of the immunity. In fact in these very proceedings they continued misleading applicant as to their desire to pay him without being forthcoming once again about when they would honour their court mandated obligations. For what protection can the courts afford any person if even contempt of court orders are ignored as though they are meaningless pieces of paper because there is a law in existence which has the ability to shield one party from another?

CONCLUSION.

The *Nyathi* case *{supra}* is on all fours with the present matter. In the *Nyathi* case the Constitutional Court of South Africa, (by a majority judgment of six) confirmed a High Court order declaring the immunity from execution limitation clause in the South African State Liabilities Act invalid. I wholly associate myself with the judgment and its ruling. The ruling in the *Nyathi* case was given in default; and awarded without a *mandamus* order hanging over the State's head as is the case in the present matter. The High Court in the *Nyathi* case found

no difficulty in intervening and the South African Constitutional Court confirmed that the *declaratur* was correctly granted.

In casu, the applicant is already armed with a *mandamus* order which was granted in 2015 and has not been of any use to the applicant which is an unacceptable reality. Other than simply not pushing for the authorisation, no compelling interest has been proved which would persuade me to see things in the way that the respondents see things. Although they referred to s 86 (2) (b) {acting in the public interests} they offered no proof of such interest.

Furthermore, because it is a factual reality that s 5 (2) will never withstand a contest between its justifiability and the strictly guarded rights which are wholly not negotiable (per s 86 (3) of the Constitution; then s 5 (2) is unconstitutional. It is my conclusion that s 5 (2) is not justifiable in a democratic society based upon openness, justice, human dignity, equality and freedom. The respondents have failed to justify their position even though they made an unremarkable reference attempt to cite s 86 (2) as their reason for fairness

In the result, I order as follows:

“IT IS DECLARED THAT

1. Section 5 (2) of the State Liabilities Act [*Chapter 8:14*] be and is hereby declared to be inconsistent with the Constitution of the Republic of Zimbabwe; and is therefore invalid.
2. The matter is referred to the Constitutional Court in terms of section 175 (1) of the Constitution of Zimbabwe, for confirmation or otherwise.
3. 1st and 2nd Respondents are ordered to pay the applicant’s costs”

Mahuni and Mutatu Attorneys, applicant’s legal practitioners
Civil Division of the Attorney General’s Office, respondents’ legal practitioners