MFUNDO MLILO
versus
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 12 February & 18 September 2019

Opposed Application

T. Biti, for the applicant
F. Chingwere, for the respondent

ZHOU J: The applicant seeks the following relief which is set out in the draft order:

"1. The decision made by the respondent on the 1st of October 2018 reviewing the Intermediate Money Transfer Tax from 5 cents per transaction to 2 cents per dollar transacted effective 1st October 2018 be and is hereby set aside.

2. The Finance (Rate and Incidence of Intermediated Money Transfer Tax) Regulations published as SI 205/2018 be and are hereby set aside and declared a nullity.

3. Alternatively, section 3 of the Finance Act Chapter 23:04 be and is hereby set aside or alternatively amended to read as follows:
'Provided, he is not amending or repealing any provision in an Act of Parliament, the Minister responsible for Finance may make such regulations as he or she may consider necessary or expedient for the administration of this Act and the better carrying out of these purposes.'

4. The respondent pays costs of suit on a scale as between attorney and client."

The alternative relief sought in para 3 of the draft order is clearly incompetent as it is an invitation to this court to amend an Act of Parliament in the manner suggested. Amending an Act of Parliament is the domain of the Legislature.

The application is opposed by the respondent.

The background to this application is as follows. On 1 October 2018 the first respondent presented the 2018 Mid-Term Monetary Policy under the title "Fiscal Measures for Revising Fiscal Dis-equilibrium". Among the series of measures contained in this presentation was a review of the Intermediated Money Transfer Tax from 5 cents per transaction to 2 cents per

dollar transacted. Clause 35 of the policy statement reads as follows: "I hereby review the Intermediated Money Transfer Tax from 5 cents per transaction to 2 cents per dollar transacted." On 5 October 2018 the respondent published a press statement in which he gave supplementary information on the 2 cents per dollar transacted tax. The supplementary statement explained that the tax applied on transactions of $10 and above only. Put in other words, transactions below $10 were exempt from the tax. It further explained that there is a cap of $10 000 on the amount of tax payable which means that transactions above $500 000 would incur a flat tax of $10 000. The other transactions exempted from the application of the tax are intra-company transfer Funds including transfer from intermediary accounts, transfer of funds on purchase and sale of equities, transfer of funds on purchase and redemption of money market instruments, transfer of funds for payment of salaries, transfer of funds for payment of taxes, transfer of funds to intermediary accounts such as conveyancers, transfer of funds in respect of foreign currency related payments, and transfer of funds by Government.

In order to give legislative effect to the above policy pronouncements the first respondent made the Finance (Rate and Incidence of Intermediated Monetary Transfer Tax) Regulations, 2018, which are contained in Statutory Instrument 205 of 2018 (hereinafter referred to as "the Regulations"). These regulations became effective on 13 October 2018. Section 2 of the Regulations provides as follows:

> "With effect from the day after the promulgation of these regulations, section 22G of the Finance Act [*Chapter 23:04*] is repealed and the following is substituted:
>
> '22G Intermediated Financial Transactions Tax
>
> With effect from the day after the promulgation of these regulations, the Intermediated Money Transfer Tax chargeable in terms of section 36G of the Income Tax Act shall be calculated at the rate of zero comma zero two United States dollars on every dollar transacted for each transaction on which the tax is payable:
>
> Provided that if a single transaction on which the tax is payable is equivalent to or exceeds five hundred thousand United States dollars, a flat intermediated money transfer tax of ten thousand United States dollars shall be chargeable on such transaction.'"

These regulations repeal s 22G of the Finance Act [*Chapter 23:04*] which provides as follows:

> "The intermediated money transfer tax chargeable in terms of section 36G of the Income Taxes Act shall be calculated at the rate of zero comma two United States

> dollars on every dollar or part thereof transacted for each transaction on which the tax is payable:
>
> Provided that if a single transaction on which the tax is payable is equivalent to or exceeds five hundred thousand United States dollars, a flat intermediated money transfer tax of ten thousand United States dollars shall be chargeable on such transaction."

The applicant's complaint is that the respondent's policy statement and the enactment of the Regulations violate the separation of powers principle provided for in s 3 (2) (e) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 as read with s 134 of the Constitution which gives legislative authority to the Legislature. On account of the alleged violations of the Constitution it is argued that the policy statement and the Regulations be declared null and void.

The respondent's case is that he acted properly in terms of s 3 of the Finance Act [*Chapter 23:04*]. That section provides as follows:

> "(1) The Minister responsible for finance may make such regulations as he or she may consider necessary or expedient for the administration of this Act and the better carrying out of its purposes.
>
> (2) Regulations made in terms of subsection (1) may amend or replace any rate of tax, duty, levy or other charge that is charged or levied in terms of any Chapter of this Act, and the rate so amended or replaced shall, subject to subsection (3), accordingly be charged, levied and collected with effect from the date specified in such regulations, which date shall not be earlier than the date the regulations are published in the *Gazette*."

The respondent further states that proceedings are underway for An Act of Parliament to confirm the provisions of the Regulations as required by s 3 of the Finance Act.

In order to resolve this dispute consideration must be given to the constitutional provisions against which the conduct of the respondent must be measured. This is because the Constitution is the supreme law of the land. Constitutional supremacy means that the Constitution takes priority over any other rule or principle of law or practice, custom or conduct within our legal system. Eminent jurists have explained the meaning and implications of the supremacy of the Constitution. According to Moyo:

> "What does this (supremacy of the Constitution) mean for Zimbabwean courts and other interpreters of the Constitution? In simple terms, this means that whenever a legal norm or rule of decision which is established by the Constitution comes into practical conflict with a legal norm or rule of decision stipulated by every form of non-constitutional law, the norm that is contained in the Constitution is to be given precedence by anyone whose duty is to enforce the

> provisions of the Constitution. Accordingly, legal norms or rules of decision which are embodied in parliamentary legislation, subordinate legislation, judicial decisions, the common law and customary law are subordinate to the Constitution as the supreme law of the land. In the context of statutory interpretation, domestic courts should – in the event of a clash between constitutional and non-constitutional norms – ensure that the Constitution's norm or rule of decision supersedes non-constitutional norms or rules."[1]

There are fundamental differences between the current Constitution of Zimbabwe and its predecessor in terms of how the supremacy of the Constitution is entrenched which shows that this principle is now at a higher level than it was in the past, and demands a new way of doing things on the part of all persons and other authorities who exercise power. All public power derives its authority and legitimacy from the Constitution, see *The National Gambling Board* v *The Premier of Kwazulu-Natal*[2]; hence the need to subject its exercise to the imperatives of the Constitution.

Under the Constitution of Zimbabwe 2013 supremacy of the Constitution appears as a rule in s 2 and as one of the values and principles upon which the nation of Zimbabwe is founded, in s 3(1)(a).

Section 2 of the Constitution of Zimbabwe provides as follows:

> "(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.
>
> (2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

Subsection (1) shows that unlike in the old Constitution, it is not just a law whose constitutional validity can be inquired into by a court. Practice, custom or conduct can now be reviewed for constitutional validity. Put in other words, s 2(1) means that constitutional supremacy is no longer confined to measuring the validity of legislation or other rules of law against the Constitution; it also entails measuring customs, practices and acts or conduct of public and other authorities and persons in order to ensure compliance with the Constitution,

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[1] A. Moyo, "Basic Tenets of Zimbabwe's New Constitutional Order," in A. Moyo (Editor) (2019), *Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights*, p. 10; see also I. Currie & J. de Waal, *The Bill of Rights Handbook 5th Ed.*, pp. 8-9.

[2] 2002 (2) SA 715(CC), para 23.

such that if they are found to be in conflict with the Constitution they are invalidated. Thus, even the policy statement by which the respondent announced the new tax rate can be subjected to constitutional scrutiny. Subsection (2) explicitly enjoins every person and every authority named therein to fulfil the obligations imposed by the Constitution as they bind them. This means that all state authorities and non-state authorities must act within the confines of and adhere to the constitutional rules as contained in the Constitution.[3] This, again, is a new feature in the Constitution and is no doubt intended to emphasize the binding nature of the duty to act constitutionally upon every person or authority.

Section 3(1) provides that:

> "Zimbabwe is founded on respect for the following values and principles –
> (a) Supremacy of the Constitution;
> (b) The rule of law;
> (c) . . .
> (d) . . .
> (e) . . .
> (f) . . .
> (g) . . .
> (h) Good governance."

These overarching concepts together with the others contained in the same section are the normative values and principles which underpin the constitutional order in this jurisdiction and are inspired by constitutionalism. They are "a new feature" of our constitutional law because they were not explicitly stated in the previous Constitution. This means that the new Constitutional dispensation aspires for a new normative order, a new value system based on the ideals expressed as "Founding Values and Principles" in s 3 of the Constitution. Previous approaches to constitutional review of the conduct of public and other authorities, though helpful, may not therefore entirely capture the aspirations of the new Constitution. New approaches which give effect to these values and principles are called for if the supremacy of the constitution, the rule of law, good governance, transparency, justice, accountability, separation of powers and the many other values and principles are to be given meaning in the interpretation of

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[3] J. Kokott & M. Kasper (2012), "Ensuring Constitutional Efficacy", in M. Rosenfeld & A. Sajo (Editors) (2012), *Comparative Constitutional Law*, p. 796.

the Constitution. It is the primary responsibility of the courts to give meaning to these values and principles in the exercise of their powers of interpreting the Constitution.

The obligation imposed upon the Court by what is essentially a transitional constitutional dispensation which is embedded in a new thinking, new values, norms and principles is far-reaching in its implications. It means that for the courts previous decisions while relevant may not be entirely adequate to give effect to the new aspirations. What must be embraced is a broad and purposive interpretation; one that, according to LORD WILBERFORCE, "eschews the austerity of tabulated legalism".[4] Currie & de Waal posit that a purposive interpretation is aimed at teasing out the core values that underpin the new constitutional order, one that is open and democratic.[5] This approach to interpretation necessarily requires a value judgment to be made. But this should not be a value judgment predicated upon the judge's personal values. MAHOMED CJ expressed this in the following terms:

> "It is . . . a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the . . . people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in a civilized international community which . . .(is shared by us). This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable . . . some decades ago, may appear to be manifestly . . . (unacceptable) today. Yesterday's orthodoxy might appear to be today's heresy."[6]

The purposive interpretation enjoins the Court to identify the purpose of a constitutional provision bearing in mind that in constitutional interpretation there is no "intention of the legislature" in the ordinary narrow sense applicable to the interpretation of Acts of Parliament and legislation subsidiary to them. This is so because unlike an Act of Parliament, the Constitution of Zimbabwe was the product of a protracted process of consultation with the citizens, and had to be validated by a referendum. Through these processes the citizens set for themselves certain values and principles such as constitutional supremacy, separation of powers, good governance, e.t.c.

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[4] Per LORD Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher (1980) AC 319 (PC); [1979] 3 ALLER 21.*
[5] I. Currie & J. de Waal, *The Bill of Rights Handbook 5th Ed.* p. 148.
[6] *Ex parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State* 1991 (3) SA 76(NmSC) p. 91D-F.

In terms of s 116 of the Constitution of Zimbabwe legislative authority vests in the Legislature which consists of Parliament and the President. Section 118 of the Constitution states that Parliament consists of the Senate and the National Assembly. The Constitution also provides in s 131(1) that Parliament's legislative authority is exercised through the enactment of Acts of Parliament. The authority of Parliament in relation to statutory instruments is dealt with in s 134 of the Constitution. In terms of that section Parliament may delegate its power to make statutory instruments. The section prescribes that such delegation is to be done (a) in an Act of Parliament and (b) within the scope of and for the purposes laid out in that Act.

Section 134(a) explicitly states that Parliament's primary law-making power must not be delegated. This primary law-making power is the enactment of Acts of Parliament. This is the power which is excluded from delegation. This provision is consistent with the separation of powers principle.

The separation of powers principle is enjoined by s 3(2)(e) as one of the "principles of good governance, which bind the State and all institutions and agencies of government at every level". That section demands "observance of the principle of separation of powers". Good governance, of which separation of powers is a principle, is one of the values upon which the nation of Zimbabwe is founded, see s 3(1)(h) of the Constitution. The essence of separation of powers is to ensure institutional, procedural and structural sharing of power between the three organs of the state – namely – the Legislature, the Executive and the Judiciary. There is no universal model of separation of powers, hence each jurisdiction adopts a system that adequately serves its interests.[7] Zimbabwe has its own unique model of separation of powers. While there is a requirement that, save as provided for in s 104 (3) of the Constitution, Minister and Deputy Ministers must be Members of Parliament, the Constitution makes a demarcation of the functions of these authorities. The underlying idea, as shown above, is that separation of powers is intended to counter arbitrariness which results from the concentration of power in the hands of one person or group of persons by creating "checks and balances" in order to ensure that each of

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[7] S. Seedorf & S. Sibanda, "Separation of Powers", in Stu Woolman and M. Bishop (Editors) (2013), *Constitutional Law of South Africa 2nd Ed. Volume 1* pp. 12-10 to 12-16; see also *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment)* 1996 (4) SA 744(CC) para 111, where the Constitutional Court of South Africa held that the doctrine of separation of powers is not "a fixed or rigid constitutional doctrine" and that "it is given expression in many different forms and made subject to checks and balances of many kinds".

the three arms of government does not exercise absolute power to the exclusion of the other organs.[8]

As concluded above, the effect of the impugned Regulations was to amend an Act of Parliament by repealing the existing rate of the Intermediated Money Transfer Tax of 5 cents per transaction and replacing it with 2 cents per dollar transacted. Repealing an Act is the prerogative of Parliament which according to s 134(a) may not be delegated. That only the power to make subsidiary legislation can be delegated by Parliament is equally clear from s 117 of the Constitution. Section 117 provides as follows:

> "**117 Nature and extent of legislative authority**
> (1) The legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature.
> (2) The legislative authority confers on the Legislature the power –
> (a) to amend this Constitution in accordance with section 328;
> (b) to make laws for the peace, order and good governance of Zimbabwe; and
> (c) **to confer subordinate legislative powers upon another body or authority in accordance with section 134."** (Emphasis added).

It is therefore only subordinate legislation in respect of which the Legislature can delegate the authority to make to another body. To the extent that Clause 35 of the "Fiscal Measures for Reversing Disequilibrium" policy document and s 2 of the Finance (Rate and Incidence of Intermediated Money Transfer Tax) Regulations, 2018, amend s 22G of the Finance Act [*Chapter 23:04*] they contravene the provisions of s 134(a) as read with s 117(1) of the Constitution of Zimbabwe. Although the Regulations do not purport to be an Act of Parliament they do amend an Act of Parliament.

It was submitted on behalf of the respondent that in making the Regulations the respondent was exercising the powers given to him by s 3 of the Finance Act whose provisions have been cited above. That section cannot be read as granting to the Minister power to make Regulations which amend an Act thereby exercising Parliament's primary law-making power. To do so would undermine the separation of powers principle which is the very basis upon which our nation is founded and the government is structured. A Minister, who is a member of the

[8] A. S. Miller (1977), *Presidential Power in a Nutshell*, West Publishing Company, p. 16; .

Executive, or any other arm or agency of Government does not have the power to amend, repeal or enact and Act of Parliament. Only the Legislature has that power. The Legislature is precluded by the constitution from delegating that power to any other authority. The respondent cannot therefore claim to have been authorized to exercise that power by s 3 of the Finance Act. For these reasons both the policy decision contained in Clause 35 of the Fiscal Measures for Reversing Fiscal Disequilibrium and the Finance (Rate and Incidence of Intermediated Monetary Transfer Tax) Regulations, 2018 are invalid for being inconsistent with the provisions of s 134(a) as read together with s 3(2)(e) of the Constitution of Zimbabwe.

In other jurisdictions where the principle of separation of powers is firmly established the primary law-making authority of Parliament is jealously guarded. In the case of *Loving* v *United States*[9], KENNEDY J said:

> "Another strand of our separation of powers jurisprudence, the delegation doctrine, has been developed to prevent Congress from forsaking its duties . . . The fundamental precept of the delegation doctrine is that the law-making function belongs to Congress . . . and may not be conveyed to another branch or entity."[10]

Many years before that the court in America had consistently upheld that approach to the question of delegation of the primary law making function of Parliament. In *Field* v *Clark*[11], HALARN J held that: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of Government ordained by the Constitution." HUGHES CJ in *Panama Refining Co* v *Ryan*, said:
"The Congress manifestly is not permitted to abdicate or transfer to others, the essential legislative functions with which it is thus vested."[12]

In South Africa where the Constitution has no express provision which refers to the principle of separation of powers the Constitutional Court held that the principle is implied in the structure of the Constitution. In the case of *Executive Council of the Western Cape Legislature* v *President of the Republic of South Africa*[13], the Constitutional Court held that the "manner and form" of provisions of the Constitution prevent Parliament from delegating to the Executive the

[9] 517 US 748(1996).
[10] 135 L Ed (2d) 36 at p. 49.
[11] 143 US 649 (1892), p. 692; 36 L Ed 294 at p. 310.
[12] 293 US 388 (1935) at p. 421; 79 L Ed 446.
[13] 1995 (4) SA 877(CC).

power to amend the provisions of the enabling Act of Parliament.[14] The effect of this decision is that whenever the Executive arm of Government is empowered to make, amend or repeal Acts of Parliament the doctrine of separation of functions between the Legislature and the Executive will be undermined.[15] Where, as in this jurisdiction, there is an explicit entrenchment of the principle of separation of powers there would, *a fortiori*, be an infraction of the principle if a Minister amends or repeals provisions of an Act of Parliament.

On the relief sought, the decision referred to in para 1 of the draft order was contained in a specific paragraph of the policy document prepared by the first respondent. The order must therefore be addressed to that specific paragraph of the policy document.

The applicant has asked for attorney-client costs. These are a special order of costs and are awarded in special circumstances such as where the Court wishes to express its displeasure at the reprehensible conduct of a party. An example of such a situation would be where the defence is vexatious and amounts to an unacceptable abuse of the procedures of the court. That cannot be said of the instant case. This matter raises important constitutional issues. It is not the practice of the court to award costs in such a case unless there are good reasons for awarding costs against the unsuccessful party. For these reasons, I do not believe that the applicant should recover attorney-client costs.

In the result, IT IS ORDERED THAT:

1. The decision made by the respondent which is contained in Clause 35 of the ***Fiscal Measures for Reversing Fiscal Disequilibrium*** which was presented on 1 October 2018 be and is hereby set aside.
2. The Finance (Rate and Incidence of Intermediated Monetary Transfer Tax) Regulations, 2018 which are contained in Statutory Instrument 205 of 2018 are invalid and are hereby set aside.
3. Respondent shall pay the costs.

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[14] See also *Justice Alliance of South Africa v President of the Republic of South Africa & Others, Freedom Under Law v President of the Republic of South Africa & Others, Centre for Applied Legal Studies & Another v President of the Republic of South Africa & Others* 2011 (5) SA 388(CC).

[15] I. Currie & J. de Waal, *The Bill of Rights Handbook 5th Ed.* p. 20.

Mafume Law Chambers, applicant's legal practitioners
Civil Division of the Attorney-General's Office, respondent's legal practitioners