ROGER DEAN STRINGER
versus
MINISTER OF HEALTH AND CHILD CARE
and
SAKUNDA HOLDINGS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 29 March & 31 March 2020

Urgent Chamber Application

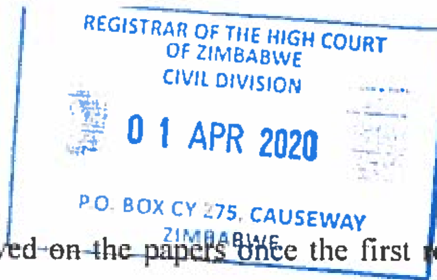
J. Bamu, with him *O. Shava*, for the applicant
Mrs *O. Zvedi* for the first respondent
N. Chimuka, with him *N. Sithole*, for the second respondent

ZHOU J: What started as a pneumonic respiratory disease in the Wuan District of the People's Republic of China has turned into a cataclysm of unprecedented levels in the history of the world. This disease is called the **COVID-19**, and is caused by a virus known as the **Coronavirus.** It is an infectious, airborne disease that is highly contagious. It has spread to virtually every corner of the globe with devastating consequences. At the time of hearing this matter not less than thirty thousand people across the globe had been confirmed dead and more than half a million confirmed cases of infection had been recorded. Thousands of lives continue to be lost everyday throughout the globe. Zimbabwe has not been spared by this catastrophe as seven cases of infection and one fatality have been recorded to date. The World Health Organisation has declared the decease to be a public health emergency of international concern. The Government of Zimbabwe, as it is enjoined to do, has responded by putting in place a series of measures to deal with this global pandemic. Some of these measures are drastic. The Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020 (Statutory Instrument 76 of 2020) declared the Coronavirus an infectious disease and a state of disaster. The Public Health (COVID 19 Prevention, Containment and treatment) Regulations, 2020 published as Statutory Instrument 77 of 2020 declared the disease a formidable

epidemic disease. In order to further contain the spread of the disease the second respondent through the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 contained in Statutory Instrument 83 of 2020, *inter alia*, declared a period of twenty-one days of lockdown of all sectors except for the essential services and the few cases exempted.[1] Likewise, private actors, such as the second respondent and many others, have joined in the fight against the COVID-19 or the Coronavirus. Some of the extraordinary measures instituted to fight the Coronavirus have impacted and will impact on the fundamental rights of the citizen. This urgent chamber application alleges a violation of the applicant's constitutional rights as a consequence of the decision taken to refurbish and customize Rock Foundation Medical Centre, also known as Arundel Mediclinic and Arundel Hospital through the efforts of the first and second respondents, so that it can accommodate COVID-19 patients who have to be isolated and quarantined from patients suffering from other illnesses.

The matter was initially set down for argument at 1000 hours on 29 March 2020. The first respondent was not represented then. The hearing was postponed to 1700 hours on the same day for the application to be served on the Civil Division of the Attorney-General's Office, the legal practitioners for the first respondent and, also, because the second respondent asked for time to prepare and file its opposing papers. There is need for me to remind the legal profession and all litigants that the Attorney-General is the Government's legal advisor. For this reason, all process or other documents in terms of which proceedings are being instituted against an arm of Government, the President, Vice-Presidents, a Government Minister, Ministry or Department or any Government employee or official cited in an official capacity, must, in addition to service upon the affected entity or person, be served upon the Civil Division of the Attorney-General unless there is a law to the contrary. At 1700 all the parties were legally represented. Mrs *Zvedi* for the first respondent advised that she had not been able to take instructions from her clients on the matter and would require time to do so and probably file opposing papers. She submitted, however, that she was in a position to advance argument in support of the objection *in limine* that the matter is not urgent which the second respondent has also taken. In view of the national lockdown which was effective from 30 March 2020 I directed, with the consent of all counsel, I

[1] See, for example, the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No. 1) which is contained in Statutory Instrument 84 of 2020.



directed that the matter could be resolved on the papers once the first respondent had filed his opposing papers by end of day on 30 March 2020. The applicant had filed heads of argument in support of the application while the second respondent had filed a notice of opposition and opposing affidavit. I indicated to all counsel that the filing of heads of argument was not compulsory for purposes of determination of this matter but that if they wished to file them they were free to do so.

By letter dated 30 March 2020 Mrs *Zvedi* communicated her failure to receive instructions from the first respondent because he and his Deputy and the Permanent Secretary are engaged in in the provinces trying to assess the capacity of the country to deal with the COVID-19 pandemic. She sought extension of the time within which to file the papers to 1st April 2020. I am unable to accede to the request for two reasons. Firstly, the matter was filed as an urgent chamber application. Its urgency would be lost if further postponements continue to be granted. Secondly, I am of the view that I can comprehensively deal with the matter on the papers filed of record. For the record, the second respondent has also filed heads of argument which, together with those filed on behalf of the applicant, will assist me in dealing with the matter.

The application is opposed by both respondents. Apart from contesting the application on the merits both respondents have raised objections *in limine* based on the following two grounds: (1) that the application is not urgent; and (2) that there was material non-joinder of an interested party, the City of Harare, under whose jurisdiction the medical facility which is the subject of the application falls.

Urgency

A matter is urgent if it cannot wait to be dealt with as an ordinary court application, see *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991 (1) ZLR 71(H) at 93E; *Dilwin Investments (Pvt) Ltd t/a Formscaff* v *Jopa Engineering Company (Pvt) Ltd* HH 116-98 at p. 1. An applicant seeking relief on an urgent basis is asking for preferential treatment from the court by being allowed to jump the queue of other pending matters, hence the requirement that that they must show that they acted expeditiously having regard to the date when the need to act arose and that if the relief is not granted they will suffer irreparable prejudice. The applicant's founding affidavit which consists largely of legal arguments rather than factual averments and evidence to support

them, does not clearly state when he became aware of the developments taking place at Rock Foundation. However, it is clear that the developments only started around 26 March 2020. A letter dated 25 March 2020 written to the first respondent on behalf of the second respondent and another one dated 27 March 2020 written by the Secretary for Health and Child Care to the City of Harare's Director of Health show that the application was filed within a few hours of these letters being written. The application was filed on 28 March 2020. The nature of the allegations, alleged violations of the fundamental rights, including an alleged threat to the applicant's health, justify dealing with the matter on an urgent basis.

For the above reasons, I accept that the matter is urgent and must be dealt with urgently.

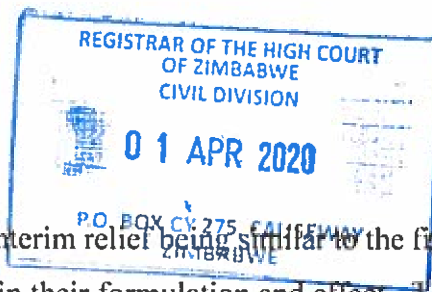
Non-joinder of the City of Harare

The second ground of objection is the non-joinder of the City of Harare, the local authority responsible for the area. In fact, it is not the only interested party which was not cited in these proceedings. The letter dated 27 March 2020 written to the City of Harare by the Secretary for Health and Child Care which has been referred to above shows that the second respondent is collaborating with the Seventh Day Adventist Church in the initiative under challenge. This Church also ought to have been cited. In respect of the City of Harare the applicant was aware of its interest as it served the application on it. It is difficult to understand how he hoped that the City of Harare would respond, if it wanted to, when it is not cited as a party. The non-citation is clearly deliberate. It cannot be excused by the fact that no relief is being sought against the local authority yet the involvement of the authority in the project is documented.

Be that as it may, the non-citation of the city of Harare is not fatal. Rule 87 of the High Court Rules, 1971 states that no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party. The rule gives the court the discretion to determine the issues or questions in dispute to the extent that they affect the rights and interests of the persons who are parties to the cause. *In casu* I am able to determine the issues in dispute notwithstanding the omission by the applicant to cite the City of Harare.

Accordingly, the objection based on the non-joinder of the City of Harare must fail.

Interim relief and final relief are similar



The objection pertaining to the interim relief being similar to the final relief is not properly founded. The two are clearly different in their formulation and effect. The interim relief is for a temporary interdict to stop the work at the hospital while the final relief sought is for the setting aside of the partnership between the respondents in terms of which the development is taking place. This objection is also dismissed.

The factual basis upon which the application is founded

It is common cause that the second respondent offered to collaborate with the first respondent in fighting COVID-19 by refurbishing and customizing the Rock Foundation Hospital facilities to make them suitable for the isolation and quarantining of patients. The allegation by the applicant that this is a business partnership has been refuted as the second respondent has stated that this is a not-for-profit venture. It is part of the Corporate Social Responsibility venture meant to assist the Government and the people of Zimbabwe to manage and combat the devastating effects of the disease. In its letter to the first respondent asking for assistance to facilitate licencing by the different statutory bodies the second respondent states that its involvement in the project is meant to complement Government efforts to provide health facilities, equipment, training and vaccines as a way of fighting the Coronavirus. The letter of support written by the second respondent to the city of Harare states the same. Applicant states that his residence where he stays with his elderly wife and elderly domestic worker is at Number 90 Norfolk Road, Mount Pleasant, Harare which is adjacent to the Hospital premises which are at Number 92 and 94 Norfolk Road. The hospital was authorized to operate an emergency medical facility by the City of Harare in April 2010.

Applicant's case

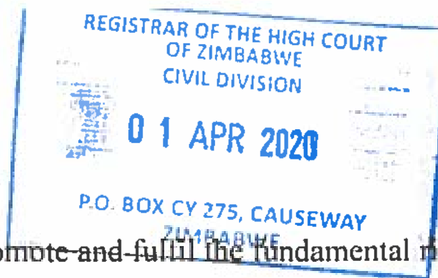
The interim relief which the applicant seeks is for the respondents or any person acting through them or on their behalf to be interdicted from continuing with the refurbishment or equipping of the Rock Foundation Medical Centre or using it as an isolation or quarantine centre for COVID-19 patients. The final relief sought is for the partnership between the respondents for the establishment and setting up of the medical centre as an isolation or quarantine centre for

COVID-19 patients. Applicant contests the setting up of an isolation centre at the premises of Arundel Mediclinic and Arundel Hospital on the following grounds. It is the applicant's contention that his right to protection of the law has been or would be violated if the isolation centre is established without him being given an opportunity to object to the licencing. Applicant alleges violation of his right to an environment that is not harmful to his health or well-being if the Hospital is to operate as an isolation centre for patients infected with the Coronavirus. In this respect the applicant's case is that he stands exposed to the Coronavirus by reason of the proximity of his residence to the hospital. Applicant argues that the setting up of an isolation centre and the treatment of infectious diseases is the exclusive preserve of the local authority and no exceptional circumstances have been shown to exist to justify the involvement of private entities such as the second respondent in the establishment of an isolation centre or treatment of an infectious disease. In the heads of argument filed on his behalf, the applicant in addition to alleging violation of the right to equal protection and benefit of the law adds one other ground, namely, violation of the right to administrative action that is lawful, reasonable and fair in terms of the Administrative Justice Act [*Chapter 10:28*].

The respondents' case

The respondents dispute the alleged violations of the applicant's rights. They contend that the second respondent is merely assisting the Government to fight COVID-19 in the best interests of the people. The second respondent has put in place infrastructure, including facilities to handle COVID-19 and has put in place facilities and experts to prevent the spread of the Coronavirus within the vicinity of the Medical Centre. The second respondent states that the public stands to benefit from the centre. Extensive renovations, civil works and electrical works have been completed and the facility is almost ready for use. The second respondent states that it has also procured equipment, medication and other facilities for the two other infectious diseases hospitals, Wilkins and Beatrice Infectious Disease Hospital. Given the fact that COVID-19 is a global pandemic the second respondent has as part of its social Responsibility engaged the Government to assist in the manner detailed in the papers filed of record.

The constitutional issues and applicable law



The obligation to respect, protect, promote and fulfil the fundamental rights and freedoms enshrined in the Constitution of Zimbabwe is imposed upon the State and every person by the Constitution itself.[2] The applicant, like all other persons, is equal before the law and has the rights to equal protection and benefit of the law.[3] This section means that the applicant is entitled to be treated equally when it comes to protection and enjoying any benefits conferred by the law. This entitlement would extend to the administrative rights protected by the Administrative Justice Act.

In this instance, however, there was no administrative decision which was being taken in relation to the applicant. The Administrative Justice Act does not apply to a person unless the decision taken is relative to that person. The mere fact that a decision of an administrative nature is taken does not mean that every person can invoke the administrative rights in relation to such a decision unless the person shows that the decision concerns him or her. The duty to act lawfully, reasonably and in a fair manner does not arise from the air but is one that is relative, otherwise any person remotely interested in a decision would approach the court to allege violation of administrative rights even where only their ego is what is affected by such a decision. In the present case the collaboration of the respondents to refurbish and furnish the hospital so that it can accommodate COVID-19 patients is not directed at the applicant as he has no legal right in the property concerned. The action involved was not directed at the applicant to justify alleging the invocation of the rights to administrative justice.

Further, the procedures outlined by the applicant based on the provisions of the Public Health Act [*Chapter 15:17*] have not been shown to be conferring any right upon the applicant. It is not enough for the applicant to merely recite the provisions, as was done in his heads of argument. The applicant's case is completely misplaced as he seems to be complaining on behalf of the City of Harare yet he deliberately omitted to cite the local authority. An alleged non-compliance with the law must be shown to be relative to the party complaining. The applicant is not an agent of the City of Harare and cannot arrogate to himself the right to represent it. Paragraphs 20 – 25 of the heads of argument raise issues which the applicant would have no *locus standi* to bring before a court of law. Allegations of fraud, corruption, favour, and unreasonableness are founded upon the false premise that there is a partnership entered into for the

[2] Section 44 of the Constitution of Zimbabwe.
[3] Section 56(1) of the constitution of Zimbabwe.

benefit of the second respondent. The applicant makes the startling submission that "no information and no statistics have been made public by 1st respondent for an anticipated exponential rise in the number of confirmed cases warranting the establishment by Government, in partnership with a private player, for a private facility". The applicant would rather have a situation where the respondents become overwhelmed by the deaths before any action is taken. The developments on the entire globe regarding the impact of the Coronavirus are there for everyone to see and the court takes judicial notice of them.

Environmental rights are protected by s 73 of the Constitution. Subsection (1)(a) of that section provides that every person has the right "to an environment that is not harmful to their health or well-being". The justiciability of these rights and the other protected socio-economic rights is not in question given their protection under the Constitution of Zimbabwe. Apart from the unsubstantiated allegations, there is no evidence adduced of exposure of the applicant to a harmful environment. Second respondent's averment that measures have been and are being instituted to prevent the spreading of the virus to areas within the proximity of the hospital have not been challenged. In any event, what is sought is the refurbishment of a healthcare facility which would benefit the public in general, including the applicant.

Even if there was a threat to the environmental rights of the applicant as an individual, this is a case for the application of the principle ***Salus Populi Suprema Lex*** which is the foundation of every modern constitution, including the Constitution of Zimbabwe which is the supreme law.[4] The principle originated around 100BC-1AD, and is found in Cicero's *De Legibus* (book III, part III, sub. VIII).[5] John Locke uses it as the epigraph in his *Second Treatise on Government* and refers to it as the fundamental rule of government. It was also endorsed by Hobbes in his *Leviatham*. The maxim '*Salus Populi Suprema Lex*' translates to: "The health (or welfare, good, salvation, felicity) of the people is the supreme law"; or "Let the welfare of the people be the

[4] Section 2 of the Constitution of Zimbabwe 2013.
[5] Marcus Tullius Cicero, *On the Laws: "De Legibus"*, Translated by David Fott Ithaca, New York, Council University Press, 2014. The principle was embraced by other eminent philosophers and jurists such as John Locke, Francis Bacon, Thomas Hobbes and Spinoza.

supreme (or highest) law" – *Salus populi est suprema lex*.[6] The principle has been applied in many other jurisdictions, including the United States of America.[7]

In India the principle was invoked in many cases. In the case of *Gargula Chandra Sekhar & Others v State Through Police Station*,[8] it was said:

> "The Supreme Court as the custodian and protector of the fundamental and the basic human rights of the citizens cannot wish away the problem. The right to interrogate the detenus, culprits or arrestees in the interest of the nation, must take precedence over an individual's right to personal liberty. The Latin maxim ***salus populi suprema lex*** (the safety of the people is the supreme law) and ***salus republicae suprema lex*** (the safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community."

In *D. Viswanatha Reddy and Company & Others* v *Government of Andhra Pradesh & Others*[9] para 19, the Court stated the following:

> "It must be remembered that . . . the public interest should prevail over the private interest, be it at ownership or be it at a possessory ownership by reason of a lease. There is nothing wrong to apply the legal maxim ***Salus Populi Suprema Lex*** with regard to the public welfare and the Court is bound to follow the same when almost a million residents . . . are suffering the shortage of drinking water and the after effects."

Equally, in the case of *Shiv Adhar Yada v The State of Maharashtra*,[10] para 7, it was held:

> "The Government and the Court have to examine the rights of an individual vis-à-vis the larger public interest and once the public interest demands the equity of law, both will tilt in favour of notification rather than against it. The maxim '***Salus populi suprema lex***' has been applied by the Courts in determining such controversy and has been repeatedly held in favour of larger public interest as held in the case of *Hira Tikkoo v Union Territory of Chandigarh & Others* (2004) 6 SCC 765 and *Barague Ramchandrappa v State of Karnataka* (2007) 5 SCC 11."

In my view the principle is part of our law and should apply in cases of extreme emergency when the welfare of the people has to be protected and a trade-off has to take place between the safety of the people and the rights of an individual. The principle ***Salus Populi Suprema Lex*** places the welfare of the people above the rights of an individual where the welfare of the people

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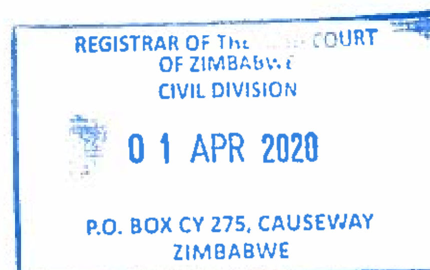
[6] Marcus Tullius Cicero, *On the Laws: "De Legibus", Op. Cit.*; see also W. H. Helfand *et al, "Salus Populi Suprema Les:* The health of the people is the supreme law," *American Journal of Public Health* 2001 May, Vol. 91, No. 5, 689, American Public Health Association.

[7] *United States v Pacific Railroad Co* 120 US 227; *Beer Company v Massachusetts* 97 US 25; *Bartemeyer v Iowa* (18 WALL. 129).

[8] Judgment delivered on 26 June 2006, para. 7.

[9] 29 April 2002.

[10] 16 April 2009.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is threatened. In other words, the will or interests of an individual, such as the applicant *in casu*, must be subservient to and yield to the needs of the populace, such that where the health of the people is in danger or threatened by danger the State must suspend the rights of the individual in order to give priority to the safety of society. The Constitution of Zimbabwe envisages that in an appropriate case fundamental human rights and freedoms may be limited where public safety, public health and the general public interest so demand. The other factors outlined in the Constitution will, of course, also be taken into account.[11] What is fundamental is that the action take to save the public health, welfare, good or interest must be right, just and fair. The actions taken must not be more that is reasonably necessary to protect the welfare of the public from the danger that is threatening it.

Conclusion

In this instance, the Government and the whole world face the devastating effects of the Coronavirus as highlighted above. The speed with which the virus has taken lives in other countries is such that the legitimacy of the Government would be in question if it was to wait for more people to be infected or die before it can enlist or embrace the support of private entities such as the second respondent to fight the virus. The applicant's environmental rights must be understood and protected in a manner that does not expose the safety of the greater public. His exposure to the Coronavirus which has not been proved by evidence, must be subordinate to the public interest which can be saved by refurbishing the Medical Centre in question in order to establish an isolation centre which would facilitate the treatment of affected patients without endangering the public at large. The welfare of the people must therefore prevail over the individual interests of the applicant.

I therefore find no merit in this application given that the action taken by the respondents is not only right, but is also just and fair.

The second respondent asked for dismissal of the application with costs on the attorney-client scale. The punitive order of costs is warranted where there are special circumstances, such as the vexatiousness of the application or some other reprehensible conduct on the part of a litigant.

[11] See section 86 (1) and (2) of the Constitution of Zimbabwe 2013.

There are worrying features of this application which would have justified such a special order of costs if this was an ordinary application in a normal situation. The heads of argument raise many issues which are not raised in the founding affidavit and make vexatious allegations of corruption which are not based on evidence. However, these deficiencies which I have no doubt are attributable to the legal representatives who prepared the papers rather than to the applicant alone, may be excused because of the general state of emergency in which the papers were prepared. Further, this case is of importance as it raises important matters that will probably guide the response of individuals to some extra-ordinary measures which may be implemented by the responsible authorities and concerned citizens during this time of what is clearly a global calamity. For these reasons, I would excuse the applicant from paying attorney-client costs.

In the result, IT IS ORDERED THAT:

1. The application is dismissed.

2. Applicant shall pay the costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
Civil Division of the Attorney-General's Office, first respondent's legal practitioners
Chimuka Mafunga, second respondent's legal practitioners