

ALLAN NORMAN MARKHAM
and
MFUNDO MLILO
versus
MINISTER OF HEALTH AND CHILD CARE
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
MINISTER OF LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSAKWA AND TAGU JJ
HARARE, 14 & 15 April 2020

Urgent Chamber Application

MUSAKWA J: In the wake of the prevailing scourge wrought by the Covid-19 virus, the applicants seek the following relief:

“Terms of the Interim Relief Granted

1. The second, third and fourth respondents shall pass regulations and enforce such regulations that provide for emergency relief in the form of door to door food hand-outs, cash hand-outs, water deliveries and related provisions that sustain the livelihoods of affected communities during the lockdown period, within forty eight hours of this order.

Terms of the Final Order Sought

2. It is ordered and declared that:

(a)The respondents’ failure to enact regulations providing mechanisms that support Statutory Instrument 83/2020, Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 for the provision of relief from distress in the form of and water deliveries is a breach of the right to life, the right to health and the right to a clean environment as protected by the Constitution of Zimbabwe.

2. The respondents pay costs of suit.”

The first applicant is a Member of Parliament and represents Harare North constituency. He is also a medical doctor. The second applicant is also said to be a legislator whose

constituency is not stated. He has qualifications in Regional and Urban Planning, Public Policy, Public Finance and Economics.

Whilst the applicants support the publication of the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, Statutory Instrument 83/2020, they contend that the measures are inadequate as there is no provision for safety nets for the vulnerable. Hence the quest to compel the passing of regulations for the provision of emergency relief. The first applicant elaborates that the respondents have a constitutional obligation to protect the right to life and health by providing water and food subsidies during the period of lockdown. It may be noted that in many respects some of the measures being urged by the applicants are already being implemented. For example restrictions on movement and the provision of personal protective equipment

In opposing the relief sought the first and second respondents contend that they are not responsible for the enactment of the envisaged regulations the first respondent contends that this is the responsibility of the Ministry of Public Service, Labour and Social Welfare which has not been cited in the proceedings.

A more detailed response was filed by the second respondent who from the onset disputes that he is obliged to pass regulations on safety nets. The second respondent points out that the government is in the process of rolling out electronic cash payments to vulnerable households. Assistance is also being extended to the “new vulnerable” during the lockdown period. Homeless people have been sent to various places of safety of which money for their welfare has been availed. Government has availed the bulk of resources for fighting the pandemic to the Ministry of Health and Child Care. The second respondent attached a press statement that he issued on 30th March 2020. The press statement covers interventions being made by the government which on the face of it address the concerns being raised by the applicants.

It would have been remiss on the part of Mr *Biti* not to display some erudition reflective of his understanding of public interest litigation. This he did by referring to such authorities as *Loveness Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ 12/15, *Francis Corale Mullin v The Administrator Union* 1981 AIR 746, *Olga Tellis and Others v Bombay Municipal Council* [1985] 2 Supp SCR 51, *SP Gupta v The Union of India And Others* (1982) 2 SCR 365 and *State of Uttaranchal v Chaufal and Others* AIR

(2010) SC 2550. It will be noted that these authorities are referred to in the judgement of *Loveness Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs and Others supra*. It is not in doubt that the present matter is of public interest and no argument was raised by the respondents to dispute that. Therefore I will not delve into s 85 of the Constitution, upon which the application is premised.

Mr *Biti* further submitted that the government is trying to avoid responsibility by apportionment of responsibility to a party who is not before the court. He emphasised that the application has nothing to do about social welfare. Rather it has more to do with creating a legal environment to give effect to the government's interventions.

Counsels for the respondent submitted that the Ministry of Public Service, Labour and Social Welfare should have been cited. They further submitted that notwithstanding its non-joinder, the Ministry of Public Service, Labour and Social Welfare is already implementing what is being sought. The issue of water provision is being addressed through the various local authorities. In the case of Mutare a judgment enforcing the provision of water has already been handed down. It was also contended that it is not the second respondent's mandate to make regulations on social protection.

The enactment of subsidiary legislation, notwithstanding the dire situation the country finds itself in, is not a routine affair. S 134 of the Constitution provides that-

"Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but—

- (a) Parliament's primary law-making power must not be delegated;
- (b) statutory instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights;
- (c) statutory instruments must be consistent with the Act of Parliament under which they are made;
- (d) the Act must specify the limits of the power, the nature and scope of the statutory instrument that may be made, and the principles and standards applicable to the statutory instrument;
- (e) statutory instruments do not have the force of law unless they have been published in the *Gazette*; and
- (f) statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny."

With the above provision in mind, it will be necessary to consider the various Acts that have a bearing on the present matter. The minister with responsibility for the administration of the Civil Aviation Act [*Chapter 10: 06*] is the third respondent. S 44 of the Act provides that-

“(1) The Minister may, by regulation, provide for all matters which by this Act are required or permitted to be prescribed or which, in his opinion, are necessary or convenient to be provided for in order to give effect to this Act.

(2) Regulations made in terms of subsection (1) may prescribe penalties for contraventions thereof, but no such penalty shall exceed a fine of level five or imprisonment for a period of six months or both such fine and such imprisonment.”

S 68 of the Public Health Act [*Chapter 15:17*] provides that-

“(1) Subject to the provisions of this Act, in the case of the occurrence or threatened outbreak of any formidable epidemic disease, condition or event of public health concern, the Minister may make regulations as to all or any of the following matters, namely—

(a) the imposition and enforcement of quarantine and the regulation and restriction of public traffic and of the movements of persons;

(b) the closing of schools or the regulation and restriction of school attendance;

(c) the closing of churches and Sunday schools and restriction of gatherings or meetings for the purpose of public worship;

(d) the regulation or restriction or, where deemed necessary, the closing of any place or places of public entertainment recreation or amusement, or where intoxicating liquor is sold by retail, and the regulation or restriction, or, where deemed necessary, the prohibition, of the convening, holding or attending of entertainments, assemblies, meetings or other public gatherings,;

(e) the prevention and remedying of overcrowding or the keeping of an dwelling or other building or the contents thereof in a state of sanitation posing or likely to pose a public health risk;

(f) the medical examination of persons who are suspected of being infected with, or who may have recently been exposed to the infection of, such disease, and of persons about to depart from any infected area, and the disinfection of their baggage and personal effects, and the detention of such persons until they have after such examination been certified to be free from any infectious disease and until their baggage and personal effects have been disinfected;

(g) the keeping under medical observation or surveillance, or the removal, detention and isolation of persons who may have recently been exposed to the infection of, and who may be in the incubation stage of; such disease the detention and isolation of such persons until released by due authority, the use of guards and force for that purpose, and, in case of absolute necessity, the use of firearms or other weapons, and the arrest with or without warrant of any person who has escaped from such detention or isolation;

(h) the establishment of isolation hospitals and the removal and isolation of persons who are or are suspected to be suffering from any such disease, the accommodation, classification, care and control of such persons and their detention until discharged by due authority as recovered and free from infection, and the establishment, management and control of convalescent homes or similar institutions for the accommodation of persons who have recovered from any such dis-ease;

(i) inquiries into the cause of death of any person, apart from any inquiry by a magistrate under any other enactment; the ordering, when deemed necessary, of post-mortem examinations or of exhumations; the prohibition in special circumstances of the burial of any dead body except on a certificate by a medical officer appointed to

grant such certificates or after compliance with any other specified conditions, the regulation of the mode of disposal, the times and places of burial of dead bodies and the manner of conducting removals and burials thereof;

(j) the regulation and restriction and, if deemed necessary, the prohibition of the removal of merchandise or any article or thing into, out of or within any specified or defined area;

(k) the provision of disinfecting plant and equipment, and the disinfection or where disinfection is impossible, the destruction of any article or thing, or the disinfection of any premises which are or are believed to be contaminated with the infection of such disease;

(l) the inspection of premises and articles and the discovery and remedying of sanitary or other defects likely to favour the spread or render difficult the eradication of such disease;

(m) the evacuation, closing, alteration or, if deemed necessary, the demolition or destruction of any premises the occupation or use of which is considered likely to favour the spread or render more difficult the eradication of such disease, and the definition of the circumstances under which compensation may be paid in respect of any premises so demolished or destroyed and the manner of fixing such compensation;

(n) in the case of plague, the destruction of fleas and rodents and the removal or improvement of conditions likely to favour the harbourage or multiplication of rodents, and the disposal of the carcasses of rodents or other animals believed or suspected to have died of plague;

and such other matters as the Minister may deem necessary for preventing the occurrence of such disease or limiting or preventing the spread thereof or for its eradication and generally for the better carrying out and attaining the objects and purposes of this Part.

(2) Any person who contravenes any provision of regulations made in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

(3) Regulations made under subsection (1) shall not apply to persons about to depart from Zimbabwe.”

On the other hand s 13 of the Social Welfare Assistance Act [*Chapter 17:06*] provides that-

“(1) The Minister may make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Regulations made in terms of subsection (1) may provide for—

- (a) the form and manner of application to be made in terms of this Act;
- (b) the information and other evidence required to be furnished by an applicant or beneficiary for social welfare assistance in terms of this Act;
- (c) the duration for which social welfare assistance may be granted in respect of different categories of beneficiaries;
- (d) the rates and amounts of financial assistance that may be granted in respect of different categories of beneficiaries;

Provided that before making any regulations in terms of this paragraph the Minister shall obtain the approval of the Minister responsible for finance.”

It is trite that a matter stands or falls on its founding papers. Mr *Biti* argued that regulations must be made in terms of the Civil Protection Act and the Public Health Act. The purpose of such regulations is to give effect to the provision of relief that is being availed by the second respondent. Whilst Mr *Biti* strenuously argued that the redress they seek is not about welfare, paragraph 184 of the first applicant's founding affidavit avers that-

“The order sought herein is the promulgation of regulations that support the provision for relief for those in distress during this period, which relief is in the form of food hand-outs, cash hand-outs, provision for water deliveries for affected areas and provision and other consequential relief for the needs of particular areas.”

It is inevitable that the current lockdown will inconvenience and distress a lot of people. It is also inevitable that vulnerable sections of the population will have difficulties in accessing basic necessities. Essentially what the applicants seek is the provision of welfare to the marginalised. And this is already being done by the provision of funds for that purpose by the second respondent. The second respondent has no power to pass regulations in terms of the legislation applicable in this matter. The same applies to the first respondent. Whilst a pandemic such as COVID-19 falls within the definition of national disaster as defined in the Civil Protection Act, the provisions of the Act fall short of what the Social Welfare Assistance Act provides as regards the scope of social welfare.

It is not in dispute that the Ministry of Public Service, Labour and Social Welfare is already seized with the exercise of providing relief to those worst affected by the lockdown. It is the Ministry of Public Service, Labour and Social Welfare that is responsible for the administration of the Social Welfare Assistance Act. What the applicants seek is *fait accompli*, but for there being no regulations governing what is already being implemented. Consequently Ministry of Public Service, Labour and Social Welfare should have been cited in the present proceedings.

In the result, the application is dismissed with no order as to costs.

TAGU J agrees

Tendai Biti Law, applicants' legal practitioners

Civil Division of the Attorney-General, Respondents' legal practitioners