

GUMAI MAKOKA
versus
MINISTER OF HEALTH AND CHILD CARE
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE
and
MINISTER OF LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 13, 19 May 2020 and 19 June 2020

Urgent Chamber Application

T. Biti, for applicant
T. Tembo, for respondent

MUSAKWA J: COVID-19 has spawned a lot of litigation in the wake of its outbreak not so long ago. So much litigation such that in instances like the present case, counsel are tempted to cull whole passages from one founding affidavit and pasting onto another affidavit in a different matter without ado. The other notable feature of COVID-19 litigation is the upsurge in public interest litigation.

In his amended draft order the applicant seeks the following relief-

“Terms of the Interim Relief Granted

- 1 The 2nd, 3rd and 4th Respondents be and are hereby ordered to provide safety nets in the form of cash handouts, food and portable water during the period in which a declaration of COVID-19 as a formidable epidemic disease has effect to eligible citizens as is provided for in regulations referred in paragraph 2 below.
2. The 3rd Respondent be and is hereby ordered to publish regulations in terms of section 13 of the Social Welfare Assistance Act within seven days from the granting of this order that define the eligibility of beneficiaries of the provision of social safety nets

during the period in which a declaration of COVID-19 as a formidable epidemic disease has effect and the methodology to be used in identifying qualifying citizens and any other ancillary matter deemed appropriate to realise the same for such period;

Terms of the Final Order Sought

3. It is ordered and declared that:
 - (a) The Respondents' failure to enact Regulations providing mechanisms that support SI 83 of 2020, Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 for the provision of relief from distress in the form of food 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.
 - (b) The respondents pay costs of suit.”

The applicant resides in Crowhill with his wife, child and a nephew. He is employed in the informal sector as a driver. He does not specify the exact details of his employment. However, the applicant claims that he used to earn RTGS\$600 per month prior to the national lockdown. He used to supplement his income by buying and selling unspecified goods.

The applicant avers that from the onset of lockdown there has been public intimation to avail support to disadvantaged persons like himself. He learnt of that from radio. An unspecified Deputy Minister then visited the community to get names of those in need of aid. The applicant submitted his name and the names of his family. He further claims that no aid has since been availed.

The applicant further avers that there are several people in the same predicament like him in Crowhill. The applicant expresses such hardship of the people in the following manner:

“... face hardships of shortages of water, crowded public wares along Domboshawa road which provides selling points for residents of such communities.”

The applicant contends that the respondents must pass regulations that require and compel the government to provide safety nets that support the implementation of the restriction on movement during the tenure of lockdown to societies that are most affected by the inability to move and trade.

Whilst commending the lockdown regulations, the applicant contends that regulations should be enacted to outline who qualifies for aid, where they can claim, how to claim and the time within which the respondents must respond to any application. This is because no

objective criteria and framework is in place to allow vulnerable people to seek social protection. Therefore this is a constitutional application to compel the respondents to enact regulations that require the State to protect citizens' rights to life, health, food and water.

A large portion of the applicant's founding affidavit relates to a lecture on the essence of coronavirus, how it spreads and how it can be controlled. There is reference to and statistics of the scourge in other countries. A large part of the affidavit is devoted to pleadings on the law. This is despite that a litigant should not plead the law but facts giving rise to the cause of action. Another disquieting feature of the founding affidavit is that some of its paragraphs are culled from the founding affidavit in the matter of *Allan Norman Markham and Another v Minister of Health and Child Care and Others*, HH-263-20.

The respondents raised some preliminary points which I dismissed. I noted that some if not all the preliminary issues were more germane to the merits.

The first respondent opposed the relief sought. An opposing affidavit was sworn to by Doctor Maxwell Mareza Hove, the director of Pathological Services in the Ministry of Health and Child Care. He contends that the first respondent has no mandate to provide social safety nets as that is the responsibility of the third respondent. The same applies to the provision of potable water which is the responsibility of the fourth respondent.

The second respondent personally responded to the application and deposed to a detailed affidavit which I proceed to summarise. Following the declaration of national lockdown on 30 March 2020, he issued a press statement on fiscal mitigatory measures to contain the pandemic. The measures include social protection and the provision of funds to vulnerable members of society. Resources were set aside for the provision of such assistance to one million households. Resources were also allocated to the first respondent. Government also engaged the producers of water treatment chemicals in order to enable local authorities to provide potable water to residents.

The second respondent takes issue with applicant's averments in regard to the earnings of people of Crow Hill without any supporting proof. He also takes issue with the demography of Crow Hill which he avers is not crowded as alleged by the applicant.

The second respondent also contends that there is no obligation on the part of the government to enact regulations on the provision of safety nets. This is because measures have already been put in place for the provision of safety nets. Reference is made to the press statement of 30th March 2020.

Simon Masanga the permanent secretary for the Ministry of Public Service, Labour and Social Welfare deposed to an opposing affidavit on behalf of the third respondent. He contends that there is no need to pass new regulations providing for the provision of support to the vulnerable. The current legal framework is adequate. More people are being assisted than was previously the case before the COVID-19 pandemic was declared a national disaster. Measures have been put in place for the provision food, water and shelter to the vulnerable. The applicant should visit the relevant social welfare office in his locality and apply for social welfare.

Zvinechimwe Churu, the permanent secretary in the Ministry of Local Government and Public Works deposed to a founding affidavit on behalf of the fourth respondent. He avers that in keeping with its supervisory role of local authorities, the Ministry of Local Government and Public Works issued a circular informing local authorities to provide potable water to affected areas during the period of lockdown. A lot of litigation has been instituted in which has been sought orders for the provision of water and in the case of Harare, an order by consent was granted.

Submissions

Mr *Biti* submitted that there is endemic poverty that has been exacerbated by unemployment. People are food vulnerable and urban populations are living in extreme poverty. Under such circumstances the right to life entails maintaining livelihood. Thus safety nets must be provided. Whilst it is contended that interventions have been made, the third respondent is said to have claimed that it has not received any funding for that purpose from the second respondent. Whilst acknowledging that the Social Welfare Assistance Act [*Chapter 17:06*] provides for social welfare assistance, Mr *Biti* submitted that it was not designed for assistance that is required in the wake of the COVID-19 pandemic. Thus what is sought is mass intervention which goes beyond alleviating ordinary hardship. Even if some intervention is taking place the issue is what criteria is being employed.

Mr *Biti* cited a number of authorities dealing with the actualisation of economic, social and cultural rights. These are *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765, *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 and *Louis Khosa and Others v The Minister of Social Development and Others* 2004 (6) SA 505 (CC).

Ms *Tembo* submitted that there is no need for the enactment of regulations. This is because the Social Welfare Assistance Act has provisions that enable the applicant to apply for

assistance. She drew attention to s 6 and further submitted that the scope of assistance provided by the third respondent has been widened. Various media has been used to publicise the assistance that the third respondent is providing. Even the applicant qualifies for such assistance. All that the applicant needs to do is to register for assistance. The issue is not about the deficit in the regulatory framework as is being contended. The state's obligations towards the public is not disputed. However, actualisation of such obligations can only be done progressively.

Analysis

In light of the depositions and the submissions made, the issue before me is a narrow one. This is because the respondents accept that the state is obliged to assist its citizens. In respect of shelter, health and social welfare, the specific provisions of the Constitution of Zimbabwe state that-

“28 Shelter

The State and all institutions and agencies of government at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter.

29 Health services

(1) The State must take all practical measures to ensure the provision of basic, accessible and adequate health services throughout Zimbabwe.

(2) The State must take appropriate, fair and reasonable measures to ensure that no person is refused emergency medical treatment at any health institution.

(3) The State must take all preventive measures within the limits of the resources available to it, including education and public awareness programmes, against the spread of disease.

30 Social welfare

The State must take all practical measures, within the limits of the resources available to it, to provide social security and social care to those who are in need.”

For purposes of the present application, the issues are the provision of social welfare assistance (safety nets) to unidentified people and the passing of enabling legislation for purposes of the provision of social welfare to those affected by the COVID-19 pandemic. The applicant claims to be one of those disadvantaged by the restrictions imposed on the general populace in the State's quest to contain the pandemic.

In motion proceedings the founding and supporting affidavits set out the cause of action. The affidavits constitute the pleadings. Thus they must set out what is necessary to be proved in a trial.¹

Regarding the claim for social welfare, the applicant's averment is that-

"I aver that I gave my name and that of my family as persons in need of aid but to date, no aid has come, and no aid looks like it will come."

According to s 3 of the Social Welfare Assistance Act an application for social welfare is made to the Director in the prescribed form. Section 3 makes reference to a destitute or indigent person making such application. Section 2 defines these terms as:

"destitute or indigent person" means any person who lacks means of subsistence;"

This means that if the applicant or any other person lack means of survival on account of the current lockdown, they fall within the above definition and are eligible to apply for social welfare assistance. The applicant has not tendered any proof of the application he made for social welfare assistance. No date is given when he did so or to whom he made such application despite the clear provision of the Act regarding how such an application is made.

It is also curious that the applicant is seeking the enactment of legislation on the provision of safety nets without seeking an order compelling the Director of Social Welfare to provide him with social welfare assistance. This does not show any seriousness in the institution of the present proceedings. There is a disconnect between the relief being sought and the averments in the founding affidavit. It is lofty for the applicant to purport to litigate on behalf of unidentified people who are in the dire circumstances he describes. There is no doubt that many people are experiencing hardship on account of restrictions that were imposed on their activities. However, it is one thing to know that there are generally such hardships but it is a different issue to know how many people are in dire need of assistance and have been denied such assistance.

A look at the South African case authorities cited by Mr *Biti* shows that the litigants who instituted those proceedings had better causes to mount the constitutional applications. The litigants were either denied social welfare assistance or access to healthcare facilities. Those authorities are clearly distinguishable from the present application in as far as the causes of action are concerned. The present application is some kind of exploratory litigation. The

¹ Herbstein & Van Winsen The Civil Practice Of The Supreme Court Of South Africa

very fact that some parts of the founding affidavit were culled from the case of *Allan Norman Markham and Another v Minister of Health and Child Care and Others supra* exposes the mischief on the part of the applicant or whoever was instrumental in influencing him to litigate. This is because the applicants in *Allan Norman Markham and Another v Minister of Health and Child Care and Others supra* were seeking the same relief that is being sought in the present application but the application was dismissed on account of not having cited the Ministry of Public Service, Labour and Social Welfare.

I am not satisfied that the applicant has made a case warranting the court to order the enactment of subsidiary legislation on safety nets and to provide social welfare assistance to unnamed persons. Accordingly, the application is hereby dismissed. In light of the copying and pasting of averments from another matter that is evident in the drafting of the founding affidavit, the applicant is ordered to pay the respondent's costs.

Tendai Biti Law, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners