HEAL ZIMBABWE
and
TONDERAI CHIWANZA
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 11 April 2025

Constitutional Application

T Biti, for the applicants
L Madhuku, for the respondents

CHITAPI J: The first applicant, Heal Zimbabwe is a universitas with capacity to sue and be sued. It is represented by its Executive Director, Rashid Mahiya duly authorised by a resolution to that effect made by its board of Directors.

The second applicant is Tonderai Chiwanza, an adult male of Chitungwiza. He described himself as a former councillor for Chitungwiza Municipal Council and a human rights activist with "an inherent interest" in protecting the constitution.

The first respondent is the President of Zimbabwe cited in his official capacity as such.

The second respondent is the Attorney General of Zimbabwe cited accordance to the law.

The applicants filed this application as a constitutional application for an order to set aside s 3(6) of the Public Procurement and Disposal of Public Assets [*Chapter 22:23*] (The Act). The basis to seek the setting aside as aforesaid was stated in the founding affidavit to be:

> "the same is a violation of the constitutional right to open public procurement spelt out in s 315 of the Constitution of Zimbabwe and the principles of public accountability set out in Chapter 9 of the Constitutional and therefore the same constitutes a breach of s 56(1) of the Constitution as well as a breach of the principles of public accountability and public transparency, that are recognised as rights in terms of s 47 (sic) of the Constitution of Zimbabwe."

The gravamen of the applicants' complaint is General Government Notice No 635/2023 published on 5 May 2023 in terms of s 3(sic) The Act. In terms thereof, the procurement of listed medical goods and equipment was not to be publicly disclosed. For whatever it is worth, the listed goods were the following as listed in the notice which reads as follows:

> "IT IS hereby notified that the President of the Republic of Zimbabwe has, in terms of s 3(6) of the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*], declared the following to be of national interest and shall not be publicity disclosed-
> (1) Construction equipment and material
> (2) Biomedical and medical equipment
> (3) Medicines and drugs (pharmaceuticals)
> (4) Vehicles and including ambulances
> (5) Laboratory equipment, chemicals and accessories
> (6) Hospital protective equipment; and
> (7) Repairs and maintenance services of hospital equipment and machinery."

The General Notice 635/2025 was not put into effect as it was withdrawn. The applicant averred that it was withdrawn because it was passed unprocedurally. Nothing turns on this because for whatever reason that it was withdrawn, it was not effected.

The applicant followed up on its discontent with an attack on the enabling s 3(6) of the Act. The provisions of that section provide as follows:

> "3. (6) The President, by notice in the Gazette, may declare that it would be contrary to the interest of defence, public security or the national interests of Zimbabwe for the procurement or disposal of any construction works or class of such works to be publicly disclosed, and thereupon this Act shall apply to the proceurement or disposal of such works with whatever modifications may be necessary to ensure that information concerning such works, or their procurement or disposal, is not disclosed to the prejudice of the defence, security or national interests of Zimbabwe."

The applicants contended that the impugned section offended the principles of transparency, honesty, cost effective and competitive procurement as codified in s 315 of the Constitution.

The provisions of s 315 of the Constitution read as follows:

> "315 Procurement and other Government contracts
> 1. An Act of Parliament must prescribe procedures for the procurement of goods and services by the state and all institutions and agencies of government at every level, so that procurement is effected in a manner that is transparent, fair, honest, cost effective and competitive.
> 2. An Act of Parliament must provide for the negotiation and performance of the following state contracts-
> (a) Joint ventures
> (b) Contracts for the construction and operation of infrastructure and facilities; and

(c) Concessions of mineral and other rights; to ensure transparency, honest cost effectiveness and competitiveness."

The applicants contended that the acquisition and procurement of construction works could not constitute a national threat for which non-disclosure could be justified. They gave an example of a disposal or acquisition of an army barracks and argued that what would constitute a threat of national security would be things like the use to which the acquired construction works are put to and not the mere fact of the purchase thereof. They referred to s 4(1) of the Act which repeat the provisions of s 315 of the Constitution.

The applicants averred that the impugned section of the Act promoted corruption as it defeated the requirement for transparency and openness and that in any event construction works disposal and/or procurement did not constitute a national threat which requirement to be protected by non-disclosure. The applicants gave various examples of what they termed national scandals which occurred between 1987 and 1999.

In relation to their *locus standi*, the applicants averred that the Constitution allowed them to *vindicate* and protect it. They claimed that they approached the court in terms of s 85(1)(d) of the Constitution. They averred that corruption was in the public interest as it affects every Zimbabwean.

In para(s) 75-79 of the founding affidavit of the first applicants, the deponent stated as follows-

"75. Section 3(6) of the Act, infringes on our right to equal protection and benefit of the law protected by s 56(1) of the Constitution in that it offences (sic) and breaches s 9 of the Constitution and Chapter 9 of the Constitution of Zimbabwe.
76. It also infringes on publicly accepted norms and laws relating to openness and transparency.
77. These principles are recognised under s 47 of the Constitution of Zimbabwe.
78. Our constitutional rights protected by s 47 and s 56(1) have been infringed.
79. In the circumstances we therefore pray for an order in terms of the draft."

The applicants attached to their founding affidavits as annexures, various documents which included a Veritas Commentary, Public Accounts Committee Report on Agriculture Report on ZINARA audited accounts, Report on compliance Issues for Reserve Bank, Report on compliance Issues for Ministry of Finance, Report on Diamond Exploitation by Political Elites, Report on cases for Corruption in the Health Sector, Education and Local Government. The annexures were intended to highlight cases of corruption and need for transparency.

The respondents opposed the application by affidavit deposed to by the Attorney General Virginia Mabiza. The deponent noted that the General Notice in issue had been withdrawn. She disputed that procurement of construction work cannot be a threat to national interest and further denied that the impugned s 3(6) of the Act offends ss 315 and 194 of the Constitution. She agreed that corruption is a vice which however the State was tackling but denied the applicants averments regarding corruption in Zimbabwe. She described the averments as "incorrect, false and misleading." Significantly, the Attorney General averred that the applicants did not point to any fundamental right that anchored their claim to have a legal standing in terms of s 85(1) of the Constitution. She commented that most averments made by the applicants and attached reports were immaterial and superfluous choosing not to respond to them individually as to her they did not conduce to advancing the applicants cause of action.

Parties filed heads of argument. However, on the date of hearing on 21 March 2024, the respondents' counsel Advocate *Madhuku* submitted that he intended to raise a procedural point of law which was dispositive of the application if it succeeds. I granted leave to both counsels to file supplementary heads of argument starting with respondent's counsel to which the applicants counsel Mr *Biti*, would respond. Both parties filed the supplementary heads of argument as directed. Respondent counsel took the point that the court was obliged to first consider whether or not this constitutional application was properly before it and that the need to do this applied to all applicants to which s 175(1) of the Constitution applies. The respondent relied on the case of *Combined Harare Residents Association and 4 others* v *The Minister of Local Government, Public Works and National Housing* CCZ 3/2024. At para 105of the cyclostyled judgment the court emphasized that it is peremptory to state the provision of the law in terms of which a party approaches the court. GARWE JCC specifically stated as follows:

> "105. The importance of stating the provisions of the law in terms of which a party approaches a court has been emphasized in a long line of cases. In *Minister of Mines and Mining Development and Anor* v *Fidelity Printers and Refineries (Pvt) Ltd and Anor* CCZ 9/22, this court stated as follows as pp 11-12.
> "It must emphasize that litigants must proceed in terms of the relevant rules as that is what informs the respondent and the relief sought. It is the rule that delineates the process to be followed by the parties and the time frames demanded for each process."

The learned judge then referred to and quoted a number of other decided cases which held as such. The respondents counsel submitted that the applicants did not state the provisions of the

law which enabled the making of this application. It was submitted that the applicants only stated in the founding affidavit that their application was a constitutional application and that the Constitution allowed them "to vindicate and protect the Constitution." It was submitted that the applicants ought to but did not state the provisions under which they had filed the application and ought to have cited r 107 of the High Court Rules 2021 which deals with the filing of listed pleadings. The failure to state the rule therefore rendered the application improperly placed before the court.

The applicants also submitted that the application was improperly settled because it was a combined application in that it purported to be based on s 85 of the Constitution, yet it combined a cause of action outside of s 85. The respondents noted that whereas s 85 causes of action are restricted to infractions or enforcement of the Bill of Rights yet the applicants in the same application purport to *vindicate* a constitutional right to "open public procurement spelt out in s 315 of the Constitution and the principle of public accountability set out in s 9 of the Constitution." It was submitted that s 315 fell outside the scope of the Bill of Rights which is contained in ss 48 to 84 of the Constitution. Reliance for the impropriety of the manner of pleading was placed on the case of *Stone & Another* v *CABS and Others* CCZ 5/24 wherein GOWORA JCC stated at para 35 as follows"

"A court that is approached in terms of s 85(1)(d) of the Constitution cannot exercise its jurisdiction on any other matters besides matters that seek redress for direct and actual infringements or likely infringements of rights and freedoms set out in the Bill of Rights."

The applicants argued to the contrary and persisted that their application was in order. They did not cite contrary authority to the decision of GOWORA JCC but argued that strict adherence to formalities hindered access to justice. Counsel submitted as follows in para 7 of his heads of argument:

> "7. It is regrettable that the development of Constitutional jurisprudence in Zimbabwe has been severely affected by a legal regime that heightened constitutional technicalities and a rich adherence to technicalities so as to ban litigants and limit the development of Constitutional law and realization of Constitutional rights in Zimbabwe."

Counsel referred to publications by the Constitutional Law Centre of Zimbabwe and a book, Public Interest litigation and Social Change in Zimbabwe by Fadzai Mahere wherein the authors express their views on how the Constitutional court has dealt with constitutional cases vis

a vis what the authors see as a restrictive approach that impedes access to the court and rights of litigants to redress.

Clearly the arguments are made before the wrong forum. The Constitutional court is the highest and final court of Zimbabwe on constitutional matters. Even in cases where the High Court has made orders of constitutional invalidity of any law or conduct of the President or Parliament, the orders do not have force until the constitutional court has confirmed them. It must follow as a matter of law that this court is the wrong forum to argue on whether or not the Constitutional court approach, pronouncements and guidance on the procedures to be adopted by litigants in constitutional matters promote or impede the right of access to the courts. It is open to the applicants and counsel to argue their case for a review by the Constitutional Court of what the court has laid out as rules and their interpretation of the law on constitutional litigation.

This court is bound to follow what the Constitutional court has set out as the procedure to be followed. A litigant who does not follow the set rules and pronounced procedures is assured that his or her case brought before the court will be thrown out for procedural irregularly. The court will not therefore exercise its constitutional jurisdiction where the correct procedure has not been followed.

The applicants did not even attempt to persuade the court to invoke r 7(a) of the High Court rules which provides as follows:

> "Departure from rules.
> 7. The court or a judge may in relation to any particular case before it or him or her, as the case may be-
> (a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he or she, as the case may be is satisfied that the departure is required in the interests of justice."

The rule does not make a distinction between constitutional and other matters in relation to the powers of this court to regulate the courts' process through directing, authorising or condoning a departure from "any provision of the rules." Rule 107 under which constitutional applications are settled is not excepted from the application of r 7 of the High Court rules. The applicants were not advised to or simply did not apply their minds to seeking a window to save their application using the rules of court. They were ill advised to direct their discontent on the Constitutional court directions and interpretations of how constitutional matters litigation in the Courts is to be approached. The applicants took a long short in seeking that David should kill

Goliath. The Constitutional court laid interpretations of the law on procedure for approaching constitutional litigation is a Goliath which the High Court as little David cannot fight. The law simply does not allow for this and precedent remains so until the court which laid that precedent changes it. Unfortunately, the applicants will continue with their attack on what they perceive as the avoidance by this court to deal with constitutional court cases on the basis of adoption of restrictive rules to which govern how such cases are to be brought to court.

The court cannot operate outside of its rules. Where a litigant has fallen foul of the rules, such litigant has choices to either seek condonation where such is provided for in the rules, such relief or respite not being guaranteed to be granted as a matter of course or withdrawing the application and reinstituting the application afresh. The applicant did not argue that their application was r 107 compliant nor that they be condoned for not settling their application in terms of the rule. The jurisdiction of the court was therefore not properly engaged. To that extent therefore there is no proper application before the court for it to determine the applicants' challenge on the constitutional validity of the law which it seeks to have declared to be unconstitutional and to be struck off the Act.

There being no case for the court to decide in substance, the remaining issue pertains to costs. Costs are in the discretion of the court. The courts generally do not issue costs orders against litigants in constitutional matters and each party bears its own costs. In South Africa the courts follow what is called the *Boiwatch* principle in considering costs orders in litigation against the State. The principle is to the effect that unless an applicant's application against the State is deemed frivolous, vexations or grossly inappropriate, the unsuccessful applicant is not ordered to pay costs. The principle was enunciated by the South Africa Constitutional Court in the case *Biowatch Trust* v *Registrar Genetic Resources and Others* [2009] ZACC 14.

In the case of Combined Harare Residents Association and Ors case, (supra) at para 87 of the cyclostyled judgment MAKARAU JCC espoused the same position as taken by South African courts as follows;

> "87. The position of this court regarding costs is regulated by R55 of the Constitutional Court Rules 2016. The general position is that no costs are awarded in a constitutional matter. There are no reasons on these proceedings to justify a departure from this position."

In *casu*, the application has been disposed of upon a procedural point which did not anchor the respondents' original opposition. It took the ingenuity of the respondents counsel to observe

the irregularity in the application after set down. He made an application to raise the issue at the hearing. This is also a consideration which is relevant to considering the incidence of costs. The applicant's attacks on the Constitutional court pronouncements on procedures for settling and bringing constitutional court matters being raised in this court exercised my mind as deserving censure. It did appear to me however, that it was the exuberance of the applicants' counsel to make those submissions in the manner they were done. Counsel needs to exercise restraint and not use intemperate language when seeking to challenge judicially binding precedent. I however considered in the counsel's favour that the exuberance was motivated by the desire to put strongly the applicants' case. However, as the saying goes "too much noise don't win the day." The sustained attacks on procedure were raised in the wrong court. I remained magnanimous despite the applicants' intransigence. I was not persuaded that the incidence of costs should change on account of that.

This application is therefore disposed of as follows:

IT IS ORDERED THAT

1. The application be and is hereby struck off the roll with no order of costs.

CHITAPI J:……

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