WILLIAS MADZIMURE
and
ALLAN NORMAN MARKHAM
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 27 September 2021 & 29 July 2022

Opposed Application

T Biti, for the applicants
LT Muradzikwa, for the respondents

MUZOFA J. The applicants seek a constitutional declaration as follows:

1. The Presidential Powers (Temporary Measures) Act [Chapter 10:20] is hereby declared inconsistent with the Constitution of Zimbabwe and therefore invalid.
2. Alternatively, s2 (2) of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] is hereby declared null and void.
3. It is declared that consistent with section 134 (f) of the Constitution of Zimbabwe a Statutory Instrument shall not come into effect until Parliament in particular the Parliamentary Legal Committee has given and provided a certificate of Constitutional compliance.
4. The 1st respondent shall pay the costs of suit.

The first applicant is a Member of Parliament for the Kuwadzana Constituency and a human rights activist.

The second applicant is a Member of Parliament for the Harare North Constituency. He is also a human rights activist.

The first respondent is the President of the Republic of Zimbabwe whose functions are defined in Chapter 5 of the Constitution.

The second respondent is the Attorney General of Zimbabwe. He is cited in his capacity as the Principal Legal Advisor of Government as defined in s114 of the Constitution.

Background

The applicants' *locus standi* is not disputed. They bring the application in the public interest as human rights activists and members of Parliament.

The legislative authority has conferred power on the legislature (which consists of Parliament and the President) to make laws for the peace, order and good governance of the country, amend the Constitution in terms of s328 and to delegate subordinate legislative power to any authority in terms of s134 of the Constitution[1].

Section 134 of the Constitution deals with the parameters within which Parliament may delegate its subordinate legislative powers. It specifically provides:

> **"134 Subsidiary legislation**
>
> 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."

In terms of that section, Parliament can delegate power to make statutory instruments but it cannot delegate its primary law making power.

For the sake of completeness, I set out the section that the applicants impugn in full. It provides:

> **"2 Making of urgent regulations**
> (1) When it appears to the President that—
> (*a*) a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and
> (*b*) the situation cannot adequately be dealt with in terms of any other law; and
> (*c*) because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation; then, subject to the Constitution and this Act, the President may make such regulations as he considers will deal with the situation.
> (2) Regulations made in terms of subsection (1) may provide for any matter or thing for which Parliament can make provision in an Act:
> Provided that such regulations shall not provide for any of the following matters or things—

[1] S117 of the Constitution

(a) authorizing the withdrawal or issue of moneys from the Consolidated Revenue Fund or prescribing the manner in which withdrawals may be made therefrom; or
(*b*) condoning unauthorized expenditure from the Consolidated Revenue Fund; or
(*c*) providing for any other matter or thing which the Constitution requires to be provided for by, rather than in terms of, an Act; or
(*d*) amending, adding to or repealing any of the provisions of the Constitution."

The challenge to the constitutionality of the Act is that, Parliament has exceeded its powers and delegated its primary law making function to the President.

In the course of making submissions, the court queried the rationale to impugn the whole Act yet the founding affidavits do not specifically address the whole Act. In response although *Mr Biti* was of the firm view that the Act is unconstitutional, he indicated that the court may address the constitutionality of s2 (2) only.

This application will therefore address the constitutionality of the said section and consider the rest of the prayer as set out in the draft order.

The applicants specifically impugn s2(2) of the Act in that, although the President has delegated power to make statutory instruments, if such regulations '*may provide for any matter or thing for which Parliament can make provision in an Act'* Parliament has exceeded its powers and delegated its primary law making function.

Applicants' submissions

The voluminous heads of argument filed in support of the application outlines the background to the constitutional making process and why the country embarked on such processes.

Further to that, they emphasise the point that the 2013 Constitution is a transformative document which makes a break with the past. It was said this has been acknowledged in a number of judgments[2].

The court was urged to consider this application based on three fundamental principles, the supremacy of the Constitution, the doctrine of separation of powers and legality.

On the supremacy of the Constitution, it was submitted that the Constitution is the supreme law of the country. Any law that is inconsistent with the Constitution is invalid to the

[2] Mawarire v Mugabe NO & Ors 2013 (1) ZLR 469 (CC)

extent of the inconsistency[3]. Its values must be interpreted and protected within the limits of the Constitution itself.

The first respondent is duty bound to protect the Constitution[4]. However, contrary to that duty the first respondent has failed to uphold the Constitution by constantly using the regulations to make Statutory Instruments.

Obviously the submission is misplaced. The abuse or otherwise of the provision does not affect its constitutionality. That would be a separate and distinct cause if the applicants are so inclined to pursue the alleged abuse.

In respect of separation of powers, it was submitted that the Constitution provides for separation of powers of the three arms of government the legislature which makes the laws, the judiciary which interprets the law and the executive which implements the law.

In a constitutional democracy where there is a clear separation of power the executive cannot make legislation which is a preserve of the legislature.

Although separation of power is provided for, the Constitution provides two instances where there are cross functions, the legislative power to delegate the legislative functions and the role of the President[5]. It was argued that the proper interpretation is that the President does not possess an open ended power to make laws. The power to make laws is regulated in Chapter 6 of the Constitution.

Further to that, it was argued that the President's legislative power is confined to signing of Acts of Parliament into law in terms of s131 (10) of the Constitution as read with the Fifth Schedule of the same.

Section 134 of the Constitution gives Parliament power to delegate power to make subsidiary legislation and not its primary law making power. In this case by virtue of s2 (2) of the Act, Parliament has delegated its primary law making powers.

The amendment of s44 of the Reserve Bank Act by the first respondent was cited as an example. It was submitted that the amendment resulted in far reaching consequences on policy

[3] S2 of the Constitution of Zimbabwe
[4] S90 of the Constitution
[5] S134 &s116 of the Constitution

in respect of currency issues. This is a preserve of Parliament. In this case, it was submitted that the first respondent overrode Parliament which is unconstitutional.

Despite the persuasive submissions on separation of power, it is not applicable in this case. It is true and correct that the spirit of constitutionalism is in the separation of powers in the three arms of Government the judiciary, executive and the legislature. In its pure form, separation of powers envisages separate and independent functioning of the three arms. In its application it was never intended to be absolute. It is a check and balance system among those that hold power through limited interference with each other. A Constitution can ably provide for overlapping in the three arms.

In this case *Mr Biti* conceded that there is some cross function in the roles of the legislature and the President. What is crucial is that the Constitution provides that the legislature can delegate its law making function, to the extent of making subsidiary laws. The President is one such authority that can be endowed with such powers. On that basis the doctrine of separation of power cannot be applicable in the resolution of this case. Section 134 is a demonstration that inroads can be made in the doctrine.

Although the heads of argument referred to the Constitution of Zimbabwe 2013, surprisingly the same heads of argument forcefully put forward that the constitutionality of the Act must be determined by reference to the Constitution of Zimbabwe 1980, which was applicable at the time of enactment of the Act.

It was argued that reference to the Constitution of Zimbabwe, 1980 would assist the Court to appreciate the historical background of the Act which was promulgated to cater for the structure of Parliament at that time. That structure has since changed.

I was not persuaded to take the proposed approach. The approach is legally unsound. It is trite that courts resolve cases based on the applicable law at the time the cause of action arises. In this case, the applicant's cause of action arose from the delegation and subsequent use of the Act by the first respondent at a time when the 2013 Constitution was applicable. There is no basis to use the 1980 Constitution.

Mr *Biti* acknowledged the decision in *S v Gatsi, S v Rufaro Hotel (Pvt) (Ltd) t/a as Rufaro Buses*[6] wherein the Act was challenged .The court came to the decision that Parliament had not delegated its fundamental law making power.

In my view the facts in the *Gatsi* case (supra) are slightly different from the case before this court. In that case the court was called upon to make a declaration on the validity of regulations made in terms of the Act for non-compliance with the tabling procedure.

After considering the submissions by both parties on the constitutionality of the Act, the court opined that although the Act is extensive and wide ranging, the power to make law is contingent upon the existence of defined circumstances and, the regulations made are made subject to the control of Parliament itself by the tabling procedure. Therefore, Parliament had not abdicated its fundamental legislative authority.

The constitutionality of the Act in the *Gatsi* case (supra) was determined in light of s32 of the repelled Constitution of Zimbabwe Amendment[7] (No. 12) Act 1993. The Constitution then provided for delegation of Parliament's legislative function. It was couched in general terms as follows:

> "32 **Legislative authority**
>
> (I) The legislative authority of Zimbabwe shall vest in the Legislature which shall consist of the President and Parliament.
> (2) The provisions of subsection (1) shall not be construed as preventing the Legislature from conferring legislative functions on any person or authority".

The section is materially and substantively different from s134 of the current Constitution. The framers of the current Constitution deliberately limited the extent to which Parliament can delegate its law making function which was not the case in the repelled Constitution.

Despite the differences in the wording of the 1980 Constitution and the current Constitution, *Mr Biti* did not distinguish the case from the one before the court. He simply highlighted that it was governed by the old Constitution. In my view the *ratio decidendi* in that case is very persuasive.

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[6] 1994 (1) ZLR 7 (HC)
[7] Schedule to the Zimbabwe Constitution Order 1979 (S.1. 197911600 of the United Kingdom).

The submissions then referred to a number of case law where the issue of delegation of legislative power was discussed. The cited cases from the Indian, South African and American jurisdictions all have one common trend. In those jurisdictions the courts have held that the legislature can delegate its powers within the tenets of the country's Constitution.

The respondents' submissions

The application was opposed. According to the respondents, the Act was not promulgated in terms of s134 of the Constitution. It was enacted in terms of s110 of the Constitution.

Section 110 of the Constitution deals with the executive functions of the President. It provides that the President 'has the powers conferred by this Constitution and by any Act of Parliament or other law, including those necessary to exercise the functions of Head of State'.

Reference to 'other law' in that section, so the submissions continued, by necessary implication refers to the application of common law and the President's prerogative power to make law is implied. This power is subject to review by Parliament in terms of s4 of the Act which means the President does not have unbridled power to make law.

The first respondent's prerogative power is a residual legislative power that exists independently of Parliament and it is not derived from s134 (a) of the Constitution.

Further, it was submitted that, the Act and the Constitution bestows power on the President to deal with matters set out in s86 (2) of the Constitution which deals with the limitation of fundamental rights and freedoms. It is only the first respondent that has the authority to address the issues in s86 (2) (b) of the Constitution. The respondents relied extensively on the case of *Mfundo Mlilo* v *The President of the Republic of Zimbabwe*[8] where the court discussed the President's power to limit fundamental rights and freedoms of the people of Zimbabwe.

The court was urged to follow the reasoning in the *Mlilo* case.

In my view the *Mlilo* case is distinguishable from the case before the court.

In the *Mlilo* case the applicants challenged the Presidential Powers (Temporary Measures) Amendment of the Electoral Act Regulations, Statutory Instrument 117/2017. In the

[8] HH 236/18

process of determining the legality of the Statutory Instrument the court was asked to make a declaration on the constitutionality of the Act and in particular s2(2) of the Act.

The *ratio decidendi*, in that case was predominantly influenced by the promulgation of the Statutory Instrument in question. Thus the Court made a finding that, the Constitution endowed the President with power to limit the rights and freedoms of the citizens whenever necessary in terms of s86 (2) (b) of the Constitution. The Statutory Instrument was one such instance where the President limited such rights.

In this case, the application is not challenging any specific Statutory Instrument. It is simply challenging the delegation of power by Parliament to the President. Put differently the declaration does not concern a specific conduct by the President. The challenge before the court is for the court to consider legislative conduct to delegate its power to the President.

It appears the respondent missed the point and the real cause of action in this case.

This is not a general application challenging the President's law making function. Thus whether the President still retains the prerogative powers or not under s110 of the Constitution is not the issue.

Similarly, that the President has power to limit fundamental rights in terms of s86 (2) (b) of the Constitution is not an issue before the Court. This is because, the cause of action is not about the law that the first respondent has made. It is about Parliament's conduct to delegate its legislative function to the President. The first respondent did not enact the Act that is being challenged. It is Parliament.

Thus to submit that the Act was not promulgated in terms of s134 of the Constitution is misguided. The Act is an Act of Parliament sanctioned by the Constitution. It is only s134 of the Constitution that gives power to the legislature to delegate its law making power, *viz*, to make subsidiary legislation. Neither s110 nor s86 (2) (b) of the Constitution clothes the legislature with power to delegate its law making function.

If the President has the power to make laws under s110 or s86 (2), which is not the issue before this court, that is not delegated legislation. The power is derived from the Constitution and would not be subject to the Act. To submit that the law made by the President pursuant to the said sections is subject to s4 of the Act would therefore be incorrect. There is

no basis to apply s4 of the Act to any subsidiary legislation except that made pursuant to s134 of the Constitution.

Issues for determination

As already stated the real issue for determination is the constitutionality of s2 (2) of the Act.

The second part of the draft order is procedural, it seeks a declaration that Parliament must comply with the tabling procedure.

The law

The superior courts have set out the applicable approach in the determination of a constitutional challenge. The first premise is to recognize that it is an exercise to interpret the specific provision of the Constitution and the impugned law. The approach set out in *Kawenda v Minister of Justice Legal and Parliamentary Affairs & Ors*[9] and the cases cited therein are instructive.

The steps can be summarized as follows:

I. Interpretation of the relevant provision of the Constitution to set the yardstick against which to measure the impugned law. The preferred interpretation is one that serves the interests of the Constitution.
II. Constitutional validity is always presumed – where a piece of legislation is capable of two interpretations, the court must uphold that which is favour of constitutionality.
III. The court must examine the effect of the impugned law on the right or freedom in question.
IV. If the court finds that the law is inconsistent with the Constitution, it must determine if the inconsistency is permissible in terms of s86 (2) of the Constitution.

Although the court in the *Kawenda* case (*supra*) was addressing an infringement of a fundamental human right, the step by step approach is applicable to this case.

[9] CCZ 3/22

Since this is interpretation of statutes, the golden rule of interpretation is the starting point. The golden rule of interpretation is that words must be given their literal meaning. Other cannons of interpretation apply where the literal meaning results in an absurdity that the legislature must not have intended.

In *Chihava and Others* v *The Provincial Magistrate Francis Mapfumo N.O and Another*[10] the Constitutional Court said:

> "The starting point in relation to the interpretation of statutes generally would be what is termed 'the golden rule' of statutory interpretation. This rule is authoritatively stated thus in the case of *Coopers and Lybrand & Others* v *Bryant* 1995 (3) SA 761 (A) at 767:
>
> 'According to the "golden rule" of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or *inconsistency with the rest of the instrument*.'" (the underlining is for emphasis)"

After considering a number of cases and learned authors' views on interpretation, the Court summarized the approach to interpretation of statutes as follows:

> "The principles set out in the *dicta* cited above can aptly and instructively be summarized as follows:
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> i) the Legislature is presumed not to intend an absurdity, ambiguity or repugnancy to arise out of the grammatical and ordinary meaning of the words that it uses in an enactment.
>
> ii) therefore, in order to ascertain the true purpose and intent of the Legislature, regard is to be had, not only to the literal meaning of the words, but also to their practical effect.
>
> iii) In this respect,
>
> a) the words in question must be capable of an interpretation that is 'consistent' with the rest of the instrument in which the words appear;
>
> b) the state of the law in place before the enactment in question, is a useful aid in ascertaining the legislative purpose and intention, and
>
> c) where an earlier and later enactment (or provision) deals with the same subject matter, then, in the case of uncertainty, the two should be interpreted in such a way that there is mutual consistency".

The approach requires that a provision be contextualized so that it is in tandem with the spirit of the Act.

In this case no other canon of interpretation was suggested neither does the court find any absurdity that will result in the application of the golden rule.

Where the court is interpreting a constitutional provision it must be guided by the wording of the Constitution. This point was succinctly expressed in the case of *The Executive Council of the Western Council of the Western Cape Legislature & ors* v *The President of the*

[10] 2015 (2) ZLR 31 (CC) at pp 35H-36A

Republic of South Africa & Ors[11] where the court dealt with a similar matter on delegation of legislative power to the executive. The court briefly analysed Parliament's power to delegate its legislative function and concluded that:

> "... where Parliament is established under a written constitution, the nature and extent of its power to delegate legislative powers to the executive depends ultimately on the language of the Constitution, construed in the light of the country's own history."

In the final, since this is interpretation of statutes, the application is resolvable by applying the principles of interpretation bearing in mind the supremacy of the Constitution.

Application of the law to the facts.

The legislature's mandate is set out in s328 of the Constitution .It is to make laws for the peace, order and good governance of the country and to confer subordinate legislative powers on another body or authority in terms of s134 of the Constitution[12].

Consequent to the legislative mandate, s134 of the Constitution empowers Parliament to delegate power to make statutory instruments subject to the *proviso* provided therein. The proviso forming the subject of this application is that Parliament cannot delegate its primary law making power.

The language used in the Constitution is clear and unambiguous. Parliament can delegate its power to make subsidiary legislation and not its primary law making power. What stands for consideration is what constitutes the legislative primary law making power. This is not defined but what constitutes primary law and how it is enacted can be a useful step in coming up with what the legislature's primary law making power is.

Primary law is an Act of Parliament. In terms of s117 of the Constitution the *'legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature'*. The phrase '*in accordance with the Constitution'* implies that the Act must be a product of the process set out in the Constitution. Primary law making power must therefore be understood from both content and process.

An Act of Parliament is a product of a plenary process, which is initiated as set out in the fifth schedule to the Constitution. The process involves the customary method of legislation

[11] 1995 (4) SA 877
[12] S117 of the Constitution ,2013

by debate and vote as provided in the Constitution[13]. Parliament is obliged to debate and scrutinize bills to add value to the bill. The bill becomes law after going through both houses of Parliament and assented and signed by the President. This plenary law making function is a preserve of the legislature.

It would appear then, that the legislature's primary law making power is the plenary law making process. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body. The latter is a preserve of Parliament and it cannot be delegated.

I now examine the specific provision that is impugned.

Section 2(2) of the Act really refers to the content of the subsidiary legislation that the President can make. The Act is clear on how such subsidiary legislation is made. Parliament retains its supervisory role in terms of s4 of the Act.

The wording in the Act is clear, Parliament has not delegated its plenary law making power, in the sense of s131 to 133 of the Constitution as read with the fifth schedule. The President does not have to go through the debate and voting process of law making. The process of making such subsidiary legislation is set out in the Act. It is different from the plenary process. The finding in the *Gatsi* case (supra) on this issue that Parliament has not abdicated is primary function is persuasive and I associate with it.

As already stated the impugned section speaks to the content of the subsidiary legislation. It exercised the court's mind that, if the President can provide for any matter that may be provided in an Act of Parliament, the literal meaning of the statement is that, by way of subsidiary legislation the President can make law that can be made by Parliament.

If the subsidiary legislation has the force and effect of a provision in an Act of Parliament, it ceases to be subsidiary or subordinate to an Act of Parliament. This is not what is contemplated by the Constitution. The subsidiary legislation must remain at that level where it only gives effect and efficacy to the Act. It is not an Act in itself.

[13] S131-133 of the Constitution as read with the fifth schedule to the Constitution.

However, if recourse is made to the context of the provision the issue is settled. The purpose of the Act is:

> "to empower the President to make regulations dealing with situations that have arisen or
>
> are likely to arise and that require to be dealt with as a matter of urgency; and to provide for matters connected therewith or incidental thereto."

Its purpose is predominantly to give the President power to make subsidiary legislation where an urgent situation arises. Section 2(1) (a) then identifies the areas that can be addressed. From this context it then is reasonable that in terms of content the President can make Statutory Instruments on any subject matter provided it complies with the set out provisions.

Despite s2 (2) of the Act giving the President a very wide latitude on content, the tabling procedure brings the subsidiary legislation under the scrutiny of the legislature in terms of s4. Parliament still retains its supervisory role. The subsidiary legislation is therefore considered and debated before Parliament.

Even in terms of content the President has not been given carte blanche power to make subsidiary legislation. It remains delegated power subject to Parliament's supervisory role.

From the forgoing, I find no merit in the prayer as amended.

The applicants also pray for a declaration that all Statutory Instruments must laid before Parliament in particular the Parliamentary Legal Committee and a certificate of Constitutional compliance issued before its coming into effect.

It was submitted that although this is a Constitutional requirement, in practice this is not happening. The respondents did not address the issue.

This issue does not have to detain the court. A litigant cannot seek a declaration of what is plainly provided in the law. There is no need for any interpretation or application of the law. What the Court is being asked to do is to regurgitate what the Constitution already provides for.

The law having provided for the process, it is up to any offended party to litigate in the event any Statutory Instrument is not tabled before Parliament in terms of s134 (f) of the Constitution.

From the foregoing the applicants cannot succeed.

In respect of costs, l was not given any reason to deviate from the established principle that costs follow the cause.

Accordingly, the following order is made,

The application is dismissed with costs.

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