ABINEL MUKARO
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
THE ATTORNEY-GENERAL OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE, 23 January & 7 June 2023

Opposed application

A Dracos, for the applicants
T S Musanganwa, for the respondent

MUTEVEDZI J: In Catholic doctrine**,** the purgatory is a sanctuary for the souls of sinners. I am sure the Catholics imagine it to be a place midway between heaven and hell from where those with redeemable sins expiate their wrong doing before being allowed through the Pearly gates but the hopeless reprobates are transferred to hell. There is unfortunately no purgatory in law. In Zimbabwe the law only recognizes two categories of litigants in civil cases in relation to means. You are either an indigent or you have means. There is no middle category to accommodate those who are too proud to sue *informa pauperis* but with no means at the same time.

The applicant, *Abinel Mukaro*, is a cleric. He approached this court in terms of s 85(1) (a) of the Constitution of Zimbabwe, 2013 (the Constitution). He seeks a declaration of constitutional invalidity of item 2 of the High court (Fees) (Civil Cases) Regulations, 1992 published in the High Court (Fees) (Civil Cases) (Amendment) Rules 2020 through statutory instrument 221 /2020 (hereinafter the fees regulations). He prayed that the particular provision of the fees regulations be impugned because it impedes on his right to equal protection and equal benefit of the law and his right to access the courts. He derived his *locus standi* from the fact that he intends to sue summons out of the High Court of Zimbabwe. He therefore has a direct interest in the order sought.

The first respondent is the Minister of Justice, Legal and Parliamentary Affairs. He was cited in his official capacity as the Minister who is responsible for the administration the High

court Act [*Chapter 7:06*] (hereinafter the Act) under which the fees regulations are promulgated. The second respondent is the Attorney- General of Zimbabwe. He was also cited in his official capacity as the chief legal advisor to the Government of Zimbabwe.

The background of the matter is as follows:

The applicant's wife died on 12 September 2021 allegedly at the hands of members of the Zimbabwe Republic Police (The ZRP) stationed at Chivhu who assaulted her severely. On 1 October 2021, the applicant through his legal practitioners being the Zimbabwe Lawyers for Human Rights wrote to the Commissioner-General of the ZRP, the Minister of Home Affairs and Culture and a detective Dondo giving them notice of the applicant's intention to sue on his own behalf and on behalf of his minor children for loss of support consequent to the unlawful killing of his wife by members of the police force. After all the three ignored his notice, he proceeded to issue summons. In total his claim amounted to USD $73 500. It was then that he was advised that he was required to pay to the registrar of this court an amount equivalent to one *per centum* of the total claim. He said that amount worked out to be ZWL $ 8 483.54. Additionally he was required to pay the Sheriff an amount of ZWL $10 266.00 for the service of the summons on the defendants. He argues that he cannot afford the charges because he is indigent. The legal practitioners appearing for him in this case are assisting him on a *pro bono* basis. He is desirous that his action be heard by the court. His view is that he does not qualify to proceed *informa pauperis* and wishes to be represented by a legal practitioner of his choice.

The applicant further argued that the decision to empower the registrar of the High court (the registrar) to charge an additional one *per centum* to the amount of ZWL $1000.00 chargeable under item 1 of the regulations is irrational because the duties of the registrar remain the same under both items 1 and 2. Put differently his contention is that the registrar's duties do not mutate to become more onerous solely because an action sounds in money. S 56(1) of the Constitution, so the argument continued, provides that all persons are equal before the law and have the right to equal protection and benefit of the law. The applicant therefore believes that it is wrong for the law to require him to pay the extra one *per centum* charge. It deprives him of his right to equal benefit of the law. In addition the extra charge militates against his right to access the courts in terms of s 69(3) of the Constitution. He added that he is a full time pastor who earns an average income of about USD $200 per month. In his view item 2 of the regulations allows the registrar to charge a commission on his claim. The net effect is that it shuts him as a poor litigant, out of court and makes justice appear like a commodity accessible

only by those that are financially well off. The provision is therefore not reasonable or acceptable in a democratic society. It offends ss 56(1) and 69(3) of the Constitution.

The respondents opposed the application. The first respondent deposed to an affidavit in which he claimed that he also had authority from the second respondent to oppose the application on his behalf. In summary, his argument was that where on one hand, an applicant affords to pay court fees he/she/it proceeds to do so. On the other hand, the law caters for indigent litigants by allowing them to proceed *informa pauperis.* Litigants, so he said, fall into these two broad categories. In this case, it appears the applicant desires to create a special class of his own where he hires out a legal practitioner of his choice to whom he pays legal fees but cannot afford to pay court fees as prescribed by the law. Court fees are payable in order to augment the costs incurred in administering the offices of the registrar and the sheriff. He further contended that while it is true that justice must be accessible, it is equally true that it comes with ancillary costs chargeable on every litigant to ensure that the courts continue to function. He accepted that the Constitution recognizes that all people are equal before the law. It was on that basis that the legal system caters for people who are unable to afford court fees by allowing them to approach the courts *informa pauperis*.

At the hearing the parties largely stuck to their arguments as on the papers and sought to only emphasize those. That approach was inevitable given that the issue is a legal argument.

The issue for determination

From the unremarkable facts of this matter, the only issue which arises for determination is whether item 2 of the High court (Fees) (Civil Cases) Regulations, 1992 published in the High Court (Fees) (Civil Cases) (Amendment) Rules 2021(No. 12) infringes the applicant's fundamental right to equal protection and benefit of the law as enshrined in s 56(1) and his right to access the courts in terms of s 69(3) of the Constitution.

The law

In relation to courts' powers to invalidate legislation, the Supreme Court in the case of *S* v *Delta Consolidated limited and Ors* 1991(2) ZLR 234(S) at 238 A-C expressed the view that:

> "Naturally, the courts are reluctant to exercise this jurisdiction. It borders closely, on a transgression of the divide between the judicial and the legislative functions of government, so fundamental to our constitutional law. It will be noted that the jurisdiction to strike down legislation is normally confined to subordinate legislation. It will not normally be exercisable in relation to acts of the legislature. Laws can be tested in this way only by reference to a given

> context; and that context is the intention of the Legislature, expressed in terms of the Act in terms of which the subordinate legislation has been formulated. The courts in claiming jurisdiction to strike down legislation, do not in other words, lay claim to any power to say by what laws people ought to be governed. This is the exclusive preserve of the legislature. The jurisdiction claimed serves to entitle courts to rule that a particular by-law is procedurally unsound (therefore unenforceable) in terms of its own parent Act."

The applicant in this case impugns the High Court fees regulations which are subordinate legislation. He however does not allege that item 2 of those regulations is *ultra vires* the parent Act. The test of reasonableness which is used to examine whether subsidiary legislation is intra vires the parent Act is therefore not the primary consideration here. Instead, the applicant alleges that item 2 of the fees regulations directly contravenes ss 56(1) and 69(3) of the constitution.

Section 56(1) of the Constitution is couched as follows:

> **"56 Equality and non-discrimination**
>
> (1) All persons are equal before the law and have the right to equal protection and benefit of the law."

Explaining the import of s 56(1), the Constitutional Court in the case of *Nkomo* v *Minister of Local Government, Rural & Urban Development & Ors* 2016 (1) ZLR 113*(*CC) at p. 118 held that:

> " The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law <u>to persons in a similar position</u>. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a <u>similar position</u> are not subjected". (Underlining is for my emphasis)

My understanding of the above principle is that laws should not discriminate. Put differently laws should apply equally to all citizens. There appear to be two closely related and overlapping but distinct rights which flow from s 56(1). The concept of equality before the law is different from the principle of equal protection and benefit of the law. I understand equality before the law to be a declaration that everyone is equal and that there mustn't be any special entitlement accruing to one individual ahead of others who are similarly placed. Similar treatment is not akin to identical treatment. Even from a common sense perspective identical treatment would be impossible. It follows in my view, that the principle of equality before the law is not averse to reasonable classification. It is permissible for the law to categorise on the

basis of logical and objective criteria relevant to the particular issue which the law seeks to address. The categorization, where such is sought, is required to fulfill certain prerequisites. First, it must be grounded on understandable criteria which separate people or things which are grouped apart from others who/which are excluded from the group. Second, the distinguishing attributes must be rationally linked to the objective which the law seeks to achieve. In other words there must be a connection between the basis of distinction and the target of legislation. Once the distinction is grounded on reasonably justifiable criteria and every individual in the same class is handled alike the question of violating the right to equality before the law does not and cannot arise. [1]

Equal protection and benefit of the law simply means the right to be treated equally in similar circumstances both in the negative and positive senses. Positive in terms of rights accorded and negative in relation to the responsibilities or obligations imposed. Persons who are unequally detailed cannot be treated similarly. Amongst indistinguishables the law should be equal and should be applied commensurately. What the law proscribes is the uneven treatment of subjects who are in considerably similar situations.[2]

With the above considerations in mind, ZIYAMBI JCC in *Nkomo* v *Minister of Local Government* (*supra*) emphasised once more the requirements which an applicant who seeks to get relief on the basis of an alleged violation of s 56(1) must meet when she said:

> "In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons." (My underlining for emphasis).

In the case of *Thabani Mpofu* v *Zimbabwe Energy Regulatory Authority and 2 Ors* CCZ 13/20 the court remarked that:

> "In order for one to found a claim in terms of s 56 (1), it must be demonstrated that the party concerned has received unfair treatment."

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[1] See Tobias P van Reenen *Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa*, Sabinet Journal, 2014

[2] See Anne Smith, *Equality constitutional adjudication in South Africa*, African Human Rights Law Journal;(2014) 14 AHRLJ 609-632

In the same authority, HLATSHWAYO JCC proceeded to cite with approval the dictum in the case of *Sarrahwitz* v *Martiz N.O. & Anor* 2015 (4) SA 491 at p 510E where the South African Constitutional Court interpreted the equal protection right in s 9 (1) of the South African Constitution, a provision similarly worded to s 56(1) of the Constitution in the following manner:

> "This subsection guarantees everyone the right to equal protection and benefit of the law. The concept of 'equal protection and benefit of the law' suggests that purchasers who are equally vulnerable must enjoy the same legal endowments irrespective of their method of payment."

In *Willmore Makumire v Minister of Public Service, Labour and Social Welfare and Attorney-General of Zimbabwe* CCZ 1/20 at p.7 of the cyclostyled judgment the court cited with approval the case of *Ashwander* v *Tennessee Valley Authority* 297 U.S. 288 (1936) at 346-347, in which the Supreme Court of the United States of America laid five principles which must guide a court before it proceeds to impugn legislation on the basis of constitutional invalidity. For the purposes of determining this application the most important two of the principles are that:

a. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding and
b. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

The same principle in b. above was central to the court's determination of the case of *Majome* v *Zimbabwe Broadcasting Corporation and 2 Others* CCZ 14/16 where the court held that:

> "The Constitution confers power on a court under s 85(1) to grant appropriate relief to an injured person who has approached it for relief. It is not the business of a court to grant relief to an applicant whose fundamental rights or freedoms have not been violated. He or she would be an uninjured applicant. A court does not grant relief to an uninjured applicant."

Authors Iain Currie and Jonathan De Waal in their work *The Bill of Rights Handbook*, 6th edition, Juta, 2015 argue that the correct approach for a court to take is to first determine whether indeed the applicant's specified right has been violated. If it has, the respondent is required to show that the infringement is an excusable limitation of the right. To establish that the respondent has to base its/his/her argument on s 86 (2) of the Constitution which is a general limitation clause. It must be illustrated that the criteria prescribed under s 86 have been met. The right can only be curtailed by a law of common application for purposes which are

reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality. This two stage approach applies where an applicant alleges discrimination based on one or more of the prohibited grounds of discrimination listed under s 56(3) because those grounds are regarded as presumptively discriminatory. Where, such as in this case, an applicant seeks to rely on some other ground analogous to those in s 56(3) it is him/her who bears the onus to show that he/she has been discriminated against.

S 69 (3) of the Constitution is fairly straightforward. It is worded as follows:

> "(3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute."

What the provision entails is that a party who has a justiciable grievance has the right to approach a court of law to have that complaint adjudicated upon and resolved. See the case of *Glens Removal and Storage Zimbabwe (Private) Limited Patricia Mandala* CCZ 6/12.

Put in another way, the State is obliged to ensure that every person has access to impartial and independent courts and tribunals for the settlement of disputes and that the jurisdiction of the courts is not excluded by law. In the context of this case it includes the duty on the State to ensure that payment of court fees is not a barrier to access to the courts by litigants. The right must not only be recognized but must also be effective because it is central to the enforcement of every other right conferred by the Constitution.

Application of the law to the facts

The applicant in this case argues that he has been discriminated against. He is required, so he says, to pay one *per centum* of the amount he claimed in his summons as court fees. Other litigants who file summonses commencing action in matters not sounding in money do not pay a percentage of what they claim. Instead, they pay a fixed fee. The applicant believes his and their positions are comparable. It is important to indicate from the onset that the applicant appeared to mix up the regulations which he is challenging. In his founding affidavit he alleges that he is challenging item 2 of the High court (Fees) (Civil Cases) (Amendment) Rules, 2020 (No. 11). In his supplementary heads of argument he sought to correct that and alleged that what he in fact was challenging was item 2 of High court (Fees) (Civil Cases) (Amendment) Rules, 2021 (No. 12). The latter rules provide for the payment of 0.001 unit of the amount claimed and not one *per centum* of the amount claimed as alleged by the applicant. Despite that error I still believe I can properly relate to the argument which the applicant raises. The mistake is inconsequential. It did not cause any prejudice to the respondents as it does not in any way change the foundation of their argument.

The applicant needs to appreciate that there is a difference between discrimination and differentiation. I have already highlighted that the law does not proscribe government from creating categories where it treats some citizens differently from others. Laws can legitimately classify people and impose on them different obligations. Admittedly in this case, through a legal instrument, litigants who seek to vindicate their interests through the action procedure have been classified in terms of whether their actions sound in money or not. That law can only be impugned and be held to be in violation of s 56(1) if it is shown that the law is not a law of general application; that the categorization does not serve a justifiable purpose and that the criteria used to separate the groups of litigants in incomprehensible; or that there is no nexus between the categorization and the objective of the law. [3]

The purpose of High Court fees can be drawn from s 57 of the High Court Act [*Chapter 7:06*]. It provides that:

> **57 Regulatory power to fix fees**
> The Minister may make regulations providing for the fees which shall be payable in respect of instruments, services or other matters received, issued, provided or otherwise dealt with by the registrar or Sheriff or any other officer to the High Court in the course of his duties or in the office of such officer.

In conformity with s 57 the first respondent fixed the fees being challenged in this case. In his opposing affidavit the first respondent did not state the purpose of the fees but did so in his heads of argument. Generally in application procedure, the rule is that an application stands or falls on the founding affidavit. See *ZIMSEC* v *Mukomeka and Anor* SC 10/2020 for that proposition. It therefore must follow that a respondent's defence also stands or falls on the opposing affidavit. In constitutional applications however, the court is still not precluded from considering whether an argument that the limitation is justifiable could be made in favour of the challenged law on the basis of the absence of such averment in the respondent's opposition. I find support in my view from the decision of the South African Constitutional Court in the case of *Philips* v *Director of Public Prosecutions Witwatersrand Local Division* 2003(3) SA 345 (CC) where it said the absence of evidence and argument from the state in favour of justification does not exempt the court from the obligation to conduct a justification analysis. There wouldn't therefore be any basis for me to exclude the justification that was given by the first respondent in his heads of argument. His reasoning is simply that court fees are a form of

[3] Seethe case of *Prsinsloo v Van der Linde* 1997(3) SA 1012 (CC) [22]

public tax intended to ensure that the justice delivery system remains effective and efficient. The efficiency is achieved through the proper remuneration of court officials such as registrars, clerks and recorders; the maintenance of law libraries and the production of law reports among others. The first respondent also made the argument that court fees are chargeable to discourage the filing of frivolous litigation necessitated by extra-legal motivations in instances where such could be resolved through alternative dispute resolution mechanisms. For the proposition that court fees qualify as a tax the court was referred to the case of *Nyambirai* v *NSSA and Anor* 1995(2) ZLR 1 (S) where at p. 8 the court held that a charge is a tax if:

> "From these authorities, the following features which designate a tax may be said to emerge:
> i. "It is a compulsory and not optional contribution
> ii. Imposed by the legislature or other competent public authority
> iii. Upon the public as a whole or a substantial sector thereof
> iv. The revenue from which is to be utilised for the public benefit and to provide a service in the public interest"

In casu, the fees in issue are a compulsory obligation. They were fixed by the 1st respondent who is empowered by s 57 of the High Court Act to do so. They are therefore subsidiary legislation and are deemed to be an act of the legislature itself. The fees affect every litigant who falls into the stipulated category and therefore affect a substantial portion of the public. The revenue collected is deployed for the public benefit as argued by the 1st respondent. It is for the public benefit because the services they are intended to contribute to are funded from public money anyway. In all material respects therefore I hold that court fees fall into the category of taxes.

In my view, the equality provisions in s 56 do not outlaw discrimination *per se*. What they prohibit is discrimination on illegitimate grounds. In other words discrimination must not amount to unfair discrimination. I have already indicated that where the allegation of discrimination is not based on a prohibited ground of discrimination specified in s 56 (3) the obligation to prove its unreasonableness and unjustifiability is on the applicant and not the respondent. The brevity of his submissions in both the founding affidavit and heads of argument smacks of an applicant who was possibly unaware of his obligations. The only attempt which the applicant made to discharge that onus is the bare allegation that litigants whose claims do not sound in money are not charged using the same tariff. What he appears oblivious of is that he and those litigants do not fall into the same category. As stated in *Nkomo* v *Minister of Local Government* (*supra*), discrimination can only be pleaded in instances where the applicant is treated differently from others in the same or similar positions. The High Court

fees regulations are not the only enactment which prescribes tax on an ad valorem basis. Several others do. For instance, the Income Tax Act [*Chapter 23:06*] and the Customs and Excise and Excise Act [*Chapter 23:02*] both provide for payment of tax according to value. The tariff used in the High court fees regulations is intended to impact on claims according to value. Cheaper claims attract less fees and vice versa. The rationale is that private individuals must augment public resources because they use public courts for the redress of their private wrongs. Put differently, the ad valorem fees represent a proper charge for the resort to public courts by individuals pursuing private considerations. In essence the regulations are a fiscal enactment whose purpose is to protect revenue. It is not to shut out litigants or coerce them in any manner. In addition the fees are calculated transparently. See the Indian case of *Chandranani Koer* v *Basudev Narain Singh, 49 IC 442.*

In any case if a litigant is indeed confident with the success of his/her claim the cost incurred in issuing out summons is temporary. Serve in exceptional circumstances he/she is likely to recover that through an award of costs on the general rule that costs follow the cause. It is from that perspective that the 1st respondent mounted the argument that the levying of ad valorem costs on claims sounding in money protects the courts against frivolous applications stems from. Whether this view is accurate or not may be something else. It would need scientific surveys to validate it but it certainly is a justifiable and rational criterion if it were to be used to separate one group of litigants from the other. It is not uncommon to have crank claims and flippant lawsuits in the courts. It is true that the courts are public institutions which must offer public services and open their doors to whosoever wishes to file their claim. They are funded from public moneys. In other words the general taxes that members of the public pay contribute to the purse used for the administration of the courts. There is no irrationality in imposing a negligible extra burden on those who approach the courts for services. That the charge may be insignificant may be lost to the applicant because as shown earlier, he uses a wrong tariff. One *per centum* of an amount is mathematically higher than 0.001 unit of the same amount. That the first respondent is alive to the reality that courts are public institutions is illustrated by a revision of the court fees from **0.01** unit of the amount claimed under the Amendment Rules, 2020 (No. 11) to the current **0.001** unit of the amount claimed levied under the current Amendment Rules, 2023 (No. 14).

In conclusion, on this aspect the applicant hasn't shown the court the yardstick against which he wishes to be compared. If he compares himself, like he mentions in para 7 of his founding affidavit, to litigants in divorce proceedings or as in para 9 to litigants in motion

proceedings then his argument is flawed. Such categories of litigants have their own set tariffs. Clearly the applicant seeks to compare himself to litigants with whom he is not in the same or similar category. The grounds which informed the decision to charge court fees as a fixed portion of the amount claimed are rational and directly linked to the objective of legislation governing the charging of court fees. The fees are borne out of public finance legislation enacted to protect revenue. The differentiation of litigants whose claims sound in money from those whose claims don't is in my view justifiable in an open and democratic society based on human dignity, freedom and equality.

The first respondent makes the additional point which the court finds favour with, that the High Court Fees regulations meet the rationality test on the further basis that the law allows indigent litigants to proceed *informa pauperis.* The fees are intended to be paid by those who can afford to pay. A litigant cannot claim on one hand that he/she is non- suited to sue *informa pauperis* and then allege on the other that he/she can't afford the cost of the litigation. The law created those two categories of litigants. The applicant desires to create his own class which is not provided for in terms of the law. He cannot be accommodated therein. It is against that background that I find that the applicant was not injured by item 2 of the provision that he prays that the court invalidates. His injury is self-created and imaginary. He cannot possibly obtain the relief he seeks.

The above reasoning would apply with equal force to the argument relating **to access to justice.** I did not hear the applicant to make serious argument that his right to access the courts had been violated by the challenged law. He only alleged in para(s) 14 and 15 of his founding affidavit that he is poor and the fees have the effect of shutting him and other poor persons out of court. In his heads of argument, he did not refer the court to any authorities which support his view. The applicant overlooks that he is not specifically challenging the levying of court fees. The charging of fees is not a creation of the High Court fees regulations. Instead, it is provided for by s 57 of the High Court Act. What the regulations simply do is to permit the first respondent to fix the level of fees. The applicant's failure to challenge the constitutionality of s 57 amounts to an acquiescence that courts must charge fees for purposes of enhancing their proper administration among others. The reasonableness of the level of fees payable by litigants in applicant's position has been discussed above. I found it to be reasonable. The remarks of PATEl JA (now JCC) in the case of *City of Harare* v *Farai Mushoriwa* SC 54/18 puts paid to any pejorative description that the applicant sought to ascribe

to the regulations. Citing with approval the case of *Mixnam's Properties Ltd* v *Chertsey UDC* [1964] 1 QB 214 he held at p12 of the cyclostyled judgment that:

> "The concept of unreasonableness in relation to by-laws is similar to the equivalent *Wednesbury* principle, as applied in judicial review of administrative action. It was further elucidated by DIPLOCK LJ in *Mixnam's Properties Ltd* v *Chertsey UDC* [1964] 1 QB 214, at 237, as follows:
>
> "…. the kind of unreasonableness which invalidates a by-law is not the antonym of 'reasonableness' in the sense in which the expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say: 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*' …. ."

I embrace the above views wholly. As a result I am persuaded to conclude that the applicant has not provided any evidence that the fees regulations violate his right to access the courts. The fees are not manifestly arbitrary. If anything the regulations provide a scientific method of calculating what is payable. They are impartial in that they treat all litigants falling into that category equally.

Disposition

I have shown above that court fees are intrinsic to the processes and systems put in place for the proper functioning of the justice system. In a large measure, they facilitate more than they obstruct or limit litigants' rights to equality before the law, litigants' rights to access the courts and the smooth administration of the courts. In the context of s 56(1) it is not mere differentiation which would persuade the court to strike down legislation as unconstitutional. The applicant in this case failed to show the existence of unfair discrimination between himself and people in similar or same circumstances as his. The applicant equally failed to show how the impugned provision curtails his right of access to the courts in terms of s 69(3).

Costs

In the case of *Thabani Mpofu* v *Zimbabwe Energy Regulatory Authority and 2 Ors* (*supra*) the Constitutional Court held that it is only in rare circumstances that an order of costs can be made against a losing party in constitutional matters, unless the party concerned would have conducted itself in a particularly odious manner. There is nothing particularly repulsive about the applicant's attempt to vindicate his rights in this case. The application although without merit remains one of public interest. I therefore have no reason to depart from the norm and order costs against the applicant.

Against the above background, item 2 of the High court (Fees) (Civil Cases) Regulations, 1992 published in the High Court (Fees) (Civil Cases) (Amendment) Rules 2021(No. 12) is not unconstitutional. It therefore is ordered that:

The application be and is hereby dismissed with each party bearing its own costs.

Honey & Blanckenberg, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners