REPORTABLE (40)

Judgment No. SC 48/07
Const. Application No. 124/07

MOVEMENT FOR DEMOCRATIC CHANGE v

(1) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
(2) THE CHAIRMAN OF THE ZIMBABWE ELECTORAL COMMISSION
(3) ATTORNEY-GENERAL OF ZIMBABWE (Intervener)

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA, MALABA JA, GWAUNZA JA & GARWE JA
HARARE, SEPTEMBER 26, 2007

H Zhou, for the applicant

N Mutsonziwa, for the first respondent and the Intervener

G Chikumbirike, for the second respondent

CHIDYAUSIKU CJ: This is an application made in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution").

The first and second respondents raise two points *in limine*. At the commencement of the hearing of this matter, the Court advised counsel that it intended to determine the points *in limine* before determining the merits of the application. Thereafter both counsel made submissions on the points *in limine*. At the conclusion of

submissions, the Court upheld the first point *in limine* and dismissed the application. It was indicated then that the reasons for judgment would follow. The following are the reasons for judgment.

The first respondent sets out the first point *in limine* in para 4.6 of his opposing affidavit, which reads as follows:

> "4.6 I do not believe that the applicant has a grievance which falls to be redressed in terms of section 24(1) of the Constitution of Zimbabwe. To the extent that I can understand the complaints of the applicant I do not think that such fall within the ambit of section 24(1) of the Constitution. This is a classic case of the applicant abusing this procedure. The section 24(1) procedure is open only in instances where there is a contravention of any of the provisions of the Declaration of Rights (Chapter 3 of the Constitution). Nowhere in the Founding Affidavit is there any allegation of a violation of the Declaration of Rights by any of the respondents. The purported allegation of a contravention of section 20 of the Constitution has no basis and is put forward in bad faith."

The second respondent also raised the same point, namely that the application does not fall within the ambit of s 24(1) of the Constitution, and the further point that the citing of the second respondent was a misjoinder.

Thus, the two points *in limine* that emerge on the papers were – (1) whether this application falls within the ambit of s 24(1) of the Constitution; and (2) whether or not the second respondent was properly cited.

It is now settled law that in a Court application the founding affidavit in support of the application sets out the applicant's cause of action. The applicant's case

stands or falls on the founding affidavit. Consequently it can never be over-emphasised that care must be taken by legal practitioners representing applicants when drafting the founding affidavit. The founding affidavit must succinctly set out the cause of action. The cause of action should be clearly stated so that the respondent is left in no doubt as to what case he has to meet and the relief sought. The relief is usually contained in the draft order which forms part of the application. It is equally important that the opposing affidavit be sufficiently clear so that it informs the applicant and the Court of the defence the respondent is raising. In those circumstances where the cause of action is based on a statutory provision, be it the Constitution or an Act of Parliament, it is a must that the legal practitioner reads carefully and understands the requirements of the particular statutory provision.

This application perhaps represents what has become very common among legal practitioners, namely taking a statement from the client and rehashing that statement, as in the founding affidavit, without giving careful thought to what it is in that statement that constitutes the cause of action or what procedure is required to be complied with by the relevant statutory provision.

A perusal of the application reveals that the applicant was ill-advised on which forum or Court to bring its application. Alternatively the cause of action was poorly drafted and no attempt was made to bring it within the ambit of s 24 of the Constitution, in terms of which the application is purported to have been made.

The applicant, in para 6 of the founding affidavit, avers that the application was made in terms of s 24(1) of the Constitution. Section 24(1) of the Constitution provides as follows:

> "**24 Enforcement of protective provisions**
>
> (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress." (the emphasis is mine)

The applicant then proceeds to set out the cause of action in paras 7-10 of the founding affidavit. Paragraphs 7-10 of the founding affidavit read as follows:

> "7. The applicant has participated in Presidential, Parliamentary and local authorities elections in this country since it was formed about eight (8) years ago. During the Presidential election in 2002 I represented the applicant as its candidate. The applicant therefore has a vested interest in this application as it is going to field me as its Presidential candidate in the event that the applicant decides to participate in the Presidential elections to be held in 2008. The applicant will also participate in the Parliamentary and Senatorial elections in the event that these are held in 2008 as has been reported in the Government-controlled media. It is therefore important that all legal instruments which regulate the elections comply with the provisions and spirit of the Constitution of Zimbabwe for there to be free and fair elections.
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> 8. In 2004 the Legislature enacted the Zimbabwe Electoral Commission Act [*Chapter 2:12*] (Act Number 22 of 2004). That Act came into operation on the 7th January 2005. Among other things, the Act establishes the Zimbabwe Electoral Commission and defines the functions of that Commission.
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> 9. It is my contention that certain sections of the Zimbabwe Electoral Commission Act (hereinafter referred to as the Act) are inconsistent with the provisions of the Constitution of Zimbabwe, and are therefore null and void. The following are the sections in issue:

9.1 Section 3(1)(a) of the Act contravenes section 61(1)(a) of the Constitution, in that the Act limits the appointment of the Chairman of the Commission to 'a person qualified to be appointed as a Judge of the High Court or the Supreme Court'. The Constitution in the section cited above provides that the Chairman of the Commission 'shall be a Judge of the High Court or the Supreme Court or a person qualified to be appointed as a Judge of the High Court or (the) Supreme Court'. Given that the Chairman is appointed by the President who, under the current set up, is the President and Secretary of the ruling ZANU (PF) party, the section as (it) appears in the Act leaves room for the President to appoint a party activist from his political party merely because that person might be qualified to be appointed as a Judge having regard to his educational qualifications and experience after being admitted as a legal practitioner.

9.2 Section 3(1)(b) of the Act contravenes section 61(1)(b) of the Constitution in that the Constitution provides that in addition to the Chairman, there shall be **six** other members of the Commission, at least **three** of whom shall be women, appointed from a list of **nine** nominees submitted by the Committee on Standing Rules and Orders. The Act gives a total of **four** other members of the Commission (in addition to the Chairman), at least **two** of whom shall be women. The Act also reduces the number of nominees to be submitted by the Committee on Standing Rules and Orders to **seven**.

9.3 Section 61(8) of the Constitution stipulates exhaustively what shall or may be provided for in an Act of Parliament. Among the functions of the Zimbabwe Electoral Commission provided in section 61(4) of the Constitution is 'to conduct voter education'. That is provided for in section 61(4)(f) of the Constitution. The same function is repeated in section 4(f) of the Act. However, the Act in section 15 deals with voter education by persons other than the Commission or political parties. Section 15 of the Act, in my submission, is invalid as its provisions are not included in section 61(8) of the Constitution, and do not fall within any of the matters which shall or may be provided for in the Act. Accordingly, section 15 must be declared to be null and void for contravening the provisions of section 61(8) of the Constitution of Zimbabwe.

9.4 Alternatively, section(s) 15(1)(d) and 15(2) of the Act are null and void for contravening section 20 of the Constitution, which protects freedom of expression. One of the Commission's

functions is to conduct voter education. Any organisation involved in voter education is in essence performing the same function as the Commission. The requirement that the other persons or organisation involved in voter education must furnish the Commission with a programme for approval by the same Commission offends against both principles of natural justice and hinders enjoyment of freedom of expression. The Commission must have its own programmes. The Constitution does not allow it to approve voter education programmes of other persons or organisations.

9.5 Section 15(3) of the Act contravenes section 61(8) of the Constitution, as the Constitution does not provide for criminal or penal provisions to be included in the Act. Accordingly, section 15(3) of the Act is null and void.

9.6 Section 16 of the Act makes the Commission the sole and exclusive recipient of all foreign contributions or donations for the purpose of voter education. That provision is not provided for in section 61(8) of the Constitution and is accordingly null and void."

Thereafter the application sets out the relief sought in the draft order, which reads as follows:

"**IT IS ORDERED THAT**

1. A rule *nisi* will issue calling upon the respondents to show cause before this Court at 09.30 hours on the …… day of …… 2007, why:

   (a) Section 3(1)(a) of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be inconsistent with section 61(1)(a) of the Constitution of Zimbabwe.

   (b) Section 3(1)(b) of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be inconsistent with section 61(1)(b) of the Constitution of Zimbabwe.

   (c) Section 15 of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be *ultra vires* section 61(8) of the Constitution of Zimbabwe.

(d) Section(s) 15(1)(d) and 15(2) of the Zimbabwe Electoral Commission Act [*Chapter 2:12*] should not be declared to be inconsistent with section 20 of the Constitution of Zimbabwe.

(e) Section 16 of the Zimbabwe Electoral (Commission?) Act [*Chapter 2:12*] should not be declared to be *ultra vires* section 61(8) of the Constitution of Zimbabwe.

2. The costs of the application are to stand over for determination on the return day."

The first respondent contends in both the opposing affidavit and in his Heads of Argument that the Declaration of Rights provisions of the Constitution are found in *Chapter III*, namely ss 11-23, and that s 24 provides a remedy for the breach of these rights. He argued that s 61 of the Constitution, a violation of which forms the basis of the application, does not fall within the Declaration of Rights and consequently the applicant could not allege that its fundamental rights, as guaranteed by the Declaration of Rights, have been violated. He argued further that, as the application was for a breach of s 61 of the Constitution which is not part of the Declaration of Rights, it could not form the basis of an application in terms of s 24(1) of the Constitution. On this basis the respondents contend the application was improperly before this Court.

In my view, the respondents' submissions are simply unanswerable. The clear intention of the Legislature in enacting s 24(1) of the Constitution was to provide a speedy procedure for the violation of the Declaration of Rights. Section 24(1) was never intended to apply to a violation of the Constitution other than the Declaration of Rights. Lest I be misunderstood, I am not suggesting that other violations of the Constitution have no redress. They do have. They can be redressed via the High Court and by this

Court through the process of appeal. It is a question of procedure. It is not every violation of the Constitution that can found an application in terms of s 24(1).

This Court is essentially an appeal court without original jurisdiction. Section 24(1) of the Constitution confers original jurisdiction on this Court in respect of specific cases that fall within the four corners of s 24(1) of the Constitution. In my view, if the applicant had stated its cause of action as a violation of s 18 of the Constitution in that its right to protection of the law guaranteed by s 18 had been, or is likely to be, violated by the application to it of a law that was invalid by reason of its being *ultra vires* the Constitution, then that might have brought this application within the four corners of s 24 of the Constitution. Section 18 of the Constitution is part of the Declaration of Rights and its violation entitles an applicant to resort to a s 24(1) application. An applicant who simply avers, as this applicant has done, that sections of the electoral law are *ultra vires* the Constitution and prays for a *declaratur* to that effect, should launch such an application in the High Court which enjoys original jurisdiction.

This point is not new. This Court has time and again determined that for a litigant to establish *locus standi* in terms of s 24(1) of the Constitution, it is necessary for the litigant to aver that a violation of the Declaration of Rights has occurred or is likely to occur in respect of himself/herself/itself. The only exception provided for in s 24 is in respect of a person in custody on whose behalf an application can be made by another person.

This proposition finds support in the following cases –

In *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Ors* 1993 (1) ZLR 242 (S) GUBBAY CJ, dealing specifically with the issue of *locus standi* at p 250F-251A makes the following observation:

> "THE RELEVANT CONSTITUTIONAL PROVISIONS
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> Section 24(1) of the Constitution, which is the provision pursuant to which the application was brought, vests in the Supreme Court the power to deal with constitutional issues as a court of first instance. It enjoins the Supreme Court to examine challenged legislation, or a particular practice or action authorised by a State organ, in order to determine whether or not it infringes one of the entrenched fundamental rights and freedoms of the individual. The Supreme Court is empowered to measure the effect of the enactment or action against the particular guarantee it is claimed it offends. Clearly it has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the Declaration of Rights and, particularly, where there is no other judicial procedure available by which the breach can be prevented. Compare, *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S)." (the underlining is mine)

It is quite clear from the remarks of the learned CHIEF JUSTICE that an application can be made in terms of s 24(1) of the Constitution only where it is alleged that there has been or is likely to be a breach of the Declaration of Rights and **not** any other provision of the Constitution.

This case was followed in *In re Wood and Anor* 1994 (2) ZLR 155 (S) at pp 159F-160A where GUBBAY CJ stated the following:

> "In the present matter, as Mr *Colegrave* so fairly and graphically put it, Mrs Wood is seeking to assert a right to reside in Zimbabwe by hanging onto Martin's coat-tails. Her claim, which she acknowledges she does not otherwise

possess, is to some form of collateral right to the protection afforded a citizen or permanent resident under s 22(1). Such a stance, in my view, is quite untenable.

Under subs (1) of s 24 of the Constitution, and by inevitable implication under subs (2) as well, the applicant or party to the proceedings, save only in relation to a detained person, must be able to allege that a provision of the Declaration of Rights has been, is being, or is likely to be, contravened in respect of him. He must, therefore, sue only for the acts or threats to himself. Yet Mrs Wood does not assert, nor could she, that a constitutional right afforded her is being contravened by the decision to refuse the grant of a residence permit. Plainly it is not **her** freedom of movement that is being unlawfully interfered with by the action of the Immigration authorities."

Again, the point is made clear that a litigant who brings an application in terms of s 24(1) of the Constitution must allege that a violation of the Declaration of Rights, as set out in ss 11-23 of the Constitution, has occurred or is likely to occur. No such averment has been made in this application.

Again, in *Retrofit v PTC and Anor* 1995 (2) ZLR 199 (S) at pp 207G-208A the Court reemphasised the same point where GUBBAY CJ, who delivered the judgment of the Court, had this to say:

"The contention advanced on behalf of the Corporation was that s 24(1) affords the applicant no *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights other than in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. Put otherwise, a constitutional right that invalidates a law may be invoked by a person affected by the law only if that person is also entitled to the benefit of the constitutional right. If not so entitled, then that person will be precluded from impugning the law. See *Hans Muller v Superintendent Presidency Jail, Calcutta* 1955 AIR 367 (Supreme Court of India). The exception is where the person is the accused in a prosecution for breach of the law. See Hogg *Constitutional Law of Canada* 3 ed at p 1274. I have no difficulty in accepting this proposition."

In the case of *United Parties v The Minister of Justice, Legal and Parliamentary Affairs and Ors* 1997 (2) ZLR 254 (S), this Court held that a political party had no *locus standi in judicio* to challenge the provisions of the Electoral Act which it alleged contravened the right to freedom of expression of voters, such right being protected by s 20 of the Constitution. In dismissing the application GUBBAY CJ said at p 258 B-E:

> "Thus, s 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of *itself* being affected by the law impugned before it can invoke a constitutional right to invalidate that law. See *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation and Anor* 1995 (2) ZLR 199 (S) at 207H-208A; 1995 (9) BCLR 1262 (ZS) at 1269 E-G; 1996 (1) SA 847 (ZS) at 854 D-F.
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> So it was in *In re Wood and Anor* 1994 (2) ZLR 155 (S) at 159F-160B; 1995 (1) BCLR 43 (ZS) at 46H-47B; 1995 (2) SA 191 (ZS) at 195 G-I, that this Court held that the right to reside in any part of Zimbabwe, as guaranteed by s 22(1) of the Declaration of Rights, vested in the minor child of Mrs Wood and not in her. No constitutional right in relation to her was violated by the refusal of the immigration authorities to grant her a residence permit. See also *Ruwodo NO v Minister of Home Affairs and Ors* 1995 (1) ZLR 227 (S); 1995 (7) BCLR 903 (ZS)."

The *United Parties* case re-emphasised the point that it is critical for an application in term of s 24(1) of the Constitution to allege that the Declaration of Rights has been violated in respect of the applicant. There is no such averment in the present application.

Following this line of cases, I made the following observation in the case of *Capital Radio (Pvt) Ltd v The Broadcasting Authority of Zimbabwe and Two Ors* SC 128/02 at pp 4-5 of the cyclostyled judgment:

> "This Court is essentially an appeal court. It enjoys no original jurisdiction except in constitutional matters in terms of s 24 of the Constitution. Thus the jurisdiction and the *locus standi* of litigants seeking to approach this Court in terms of s 24 have to be found within the four corners of s 24 of the Constitution. This restriction does not affect a litigant that wishes to institute a constitutional application in the High Court. The provisions of s 24 do not, in any way, circumscribe the *locus standi* of an applicant in the High Court. In the High Court the common law test, namely having an interest in the matter under adjudication, is sufficient to establish *locus standi* (*Van Winsen, Cilliers and Loots* stated in Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 364; *Zimbabwe Teachers' Association and Ors v Minister of Education* 1990 (2) ZLR 48 at 51B *et seq*). In a constitutional application in the High Court all that a litigant is required to show to establish *locus standi* is a substantial interest in a matter.
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> A direct approach to the Supreme Court requires a litigant to allege that his not another person's fundamental right has been violated. Obviously it is not sufficient to merely allege that one's fundamental right has been, is (being), or is likely to be, violated. The factual basis for such an allegation has to be set out. It follows, therefore, that when a litigant is denied a hearing by this Court because he has no *locus standi* that does not necessarily mean that the door to litigation has been closed. It may merely mean that the litigant has commenced his application in the wrong forum, taking into account the basis of his *locus standi*.
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> A constitutional application commenced in the High Court can always find its way to the Supreme Court on appeal. In short, the basis of a litigant's *locus standi* in the High Court is much wider than it is in this Court sitting as a constitutional court. In my view, it would be doing violence to the language of s 24 of the Constitution to ascribe to it the meaning that it is sufficient to allege an interest in the matter in order to establish *locus standi*."

Again the same point is made that for an application to fall within the ambit of s 24(1) of the Constitution there has to be an allegation of a violation of the Declaration of Rights in relation to the applicant.

In the matter of *Law Society of Zimbabwe v Minister of Justice, Legal and Parliamentary Affairs and Anor* SC 16/06 I made the same point in the following remarks to be found at pp 16-17 of the cyclostyled judgment:

> "I have no difficulty in accepting the general submission made by Mr *Moyo* that the Law Society has a substantial interest in a statute that is *ultra vires* the Constitution. I do not, however, accept that this substantial interest is sufficient to vest the applicant with *locus standi in judicio* to make an application in terms of s 24 of the Constitution.
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> *Locus standi* to bring a constitutional application to the Supreme Court in the first instance must be found within the four corners of s 24 of the Constitution. It is not sufficient to simply establish that the applicant has an interest in the matter. The applicant has to go further and establish that the Declaration of Rights has been or is likely to be contravened in respect to itself.
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> The applicant in this case has failed to establish that a constitutional right, enshrined in the Declaration of Rights, has been or is likely to be violated in respect of itself by the impugned Act.
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> While the applicant may be entitled to bring its application before the High Court on the basis argued before us, it certainly has not established the basis for approaching the Supreme Court directly in terms of s 24 of the Constitution."

Thus, the submission of the respondents that an application in terms of s 24(1) of the Constitution is limited to violations of the Declaration of Rights, protected in terms of ss 11-23 of the Constitution, is supported by a long line of cases of this Court.

In the present case the allegation is that there has been a violation of s 61 of the Constitution, which does not form part of the Declaration of Rights. Redress for the violation of s 61 of the Constitution cannot be obtained using the s 24(1) of the Constitution procedure.

There is a suggestion in para 9.4 of the founding affidavit that ss 15(1)(d) and 15(2) of the Electoral Act violate s 20 of the Constitution. However, there is no

averment that the applicant's right to freedom of expression has been violated. That paragraph simply avers that other people's rights protected under s 20 have been violated. This averment is insufficient to found an application in terms of s 24(1). See the *United Parties* case *supra*. There is no averment in the founding affidavit that the applicant's right to receive information has been violated. In the Heads of Argument the suggestion is made that the right to receive information is interfered with. There is no factual basis in the founding affidavit to found such a submission.

Finally, it is quite clear from the line of cases cited above that the applicant is in the wrong forum. It should have brought its application in the High Court if it wished to have the provisions of the Electoral Act set aside on the basis that they are *ultra vires* s 61 of the Constitution. Alternatively, the drafting of its cause of action should have been done in the manner suggested above in order to bring it within the ambit of s 24 of the Constitution.

Having found in favour of the respondents in respect of the first point *in limine*, there was no need to determine the second point *in limine* and it accordingly fell away.

In the result, we dismissed the application with no order as to costs for the reasons set out above.

CHEDA JA: I agree

MALABA JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

Gutu & Chikowero, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first respondent's and Intervener's legal practitioners

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