NATIONAL CONSTITUTIONAL ASSEMBLY (NCA)
and
PROFESSOR LOVEMORE MADHUKU
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE N.O.
and
THE CHAIRPERSON / ACTING CHAIRPERSON OF THE
ZIMBABWE ELECTION COMMISSION N.O.

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 25 February 2013 & 28 February 2013

Mr *A Muchadehama* with Prof *Madhuku* & Mr *M Chivasa* & Mr *Makunike*, for the applicants
Deputy AG Mr *Machaya*, Mr *N. Mutsonziwa* and Ms *T. Mashiri*, for the 1st respondent
Ms *K.L Murefu*, Ms *C. Saruwaka*, Ms *C.T* Mahuni and Mr *G Mashava*, for the 2nd respondent

CHIWESHE JP: In this urgent chamber application the applicants seek a provisional order in the following terms:

"FINAL ORDER SOUGHT

That the respondents show cause why a final order should be granted in the following terms:

1. It is declared that Proclamation No 1 of 2013 issued by the 1st respondent and gazetted on the 15th of February 2013 as Statutory Instrument 19/2013 be and is hereby declared to be unlawful and ultra-vires section 3 of the Referendum Act (Chapter 2:10).

2. It is ordered that Proclamation No 1 of 2013 issued by the 1st respondent and gazetted on the 15th of February 2013 as Statutory Instrument 19/2013 be and is hereby set aside.

3. 2nd respondent and all those acting through him/her be and are hereby interdicted from acting on SI 19/2013 and/or conducting a referendum on 16 March 2013.

4. Respondents shall pay the costs of this application.

INTERIM ORDER GRANTED

Pending confirmation or discharge of the Provisional Order, the following interim relief is granted.

1. Proclamation No 1 of 2013 issued by the 1st respondent and gazetted on the 15th of February 2013 as Statutory Instrument 19/2013 be and is hereby provisionally set aside.

2. The Registrar of the High Court be and is hereby directed to set the matter down for final determination on an urgent basis, and in any event before the 16th of March 2013."

The background facts to this application are briefly as follows. The first applicant, a common law *universitas*, was formed in 1997. Its stated mission is to push for a new, democratic and people driven constitution in Zimbabwe. The second applicant is the first applicant's National Chairperson. He deposed to the founding affidavit. He did so on behalf of the first applicant and also on his own behalf in his capacity as an ordinary voter.

On 12 April 2009, Parliament set up a committee generally referred to as COPAC. Its mandate was to collect the people's views on a new constitution and, on that basis, come up with a people driven draft constitution. After three and a half years of engagement in this process, a draft was finally agreed on 17 January 2013. The draft constitution was subsequently adopted by Parliament. It now awaits approval by the electorate in a referendum.

The first respondent proceeded to publish in the Government Gazette dated 15 February 2013 a proclamation in terms of which a referendum was to be held on 16 March 2013. In doing so, the first respondent acted in terms of s 3 of the Referendums Act [*Cap 20:10*] which reads:

"Referendum Proclamation.

Whenever the President considers it desirable to ascertain the view of voters on any question or issue, he may by proclamation in the gazette

(a) declare that a referendum is to be held in order to ascertain the view of voters on that question or issue; and

(b) appoint a day or days for the holding of the referendum; and

(c) state the hours at which voting for the purposes of the referendum will commence and will close;

(d) ……"

It is the applicants' view that the time set by the first respondent is "grossly inadequate in light of the importance and complexity of the opinion being sought from voters". In particular, it is averred that at the time of setting of the date no official copy of the draft constitution or translated or simplified versions of the same had been published. It is further averred that by setting the date of 16 March 2013 the first respondent acted arbitrarily, irrationally, grossly unreasonably and *ultra vires* the enabling Act. By acting in this way, it is argued that the first respondent has denied citizens adequate time to study and debate the draft so as to participate in the referendum from an informed position. For these reasons it is further argued that the resultant Proclamation is subject to review by the courts. The present application seeks therefore that this court sets aside the date of 16 March 2013 and order the first respondent to give voters no less than two months to read and analyse the draft constitution. The applicant intends to campaign for a "No" vote. To that end it will need to distribute its objections to all potential voters, organise meetings, debates and other forms of interaction with the electorate and stakeholders. It avers that it cannot mount an effective campaign in the time given.

The first respondent has opposed the application solely on the basis of a preliminary issue, namely that the conduct of the applicant in publishing the Proclamation is not subject to review by the judiciary. It relies in this regard on the provisions of s 31 K (1) of the Constitution "which ousts the jurisdiction of the courts in relation to all executive acts of the President where he has acted on his own deliberative judgment." It is argued that in deciding to call for a referendum on the draft constitution and fixing the day and time for the holding of such a referendum, the first respondent acted "on his own deliberate judgment" in terms of the Referendums Act. His conduct in this regard is the sort of conduct covered by the provisions of s 31 K (1) of the Constitution.

Section 31 K (1) of the Constitution provides:

> "31 K Extent to which exercise of President's functions justiciable
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> (1) Where the President is required or permitted by this Constitution or any other law to act on his own deliberate judgment, a court shall not, in any case, inquire into any of the following questions or matters-
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> > (a) whether any advice or recommendation was tendered to the President or acted on by him; or

(b) whether any consultation took place in connection with the performance of the act; or

(c) the nature of any advice or recommendation tendered to the President; or

(d) the manner in which the President has exercised his discretion."

These provisions are clear and unambiguous. I am convinced that the powers given to the first respondent by s 3 of the Referendums Act, being wide, discretionary and unfettered, fall into the category of those powers envisaged under s 31 K (1), wherein the first respondent is required or permitted to act on his own deliberate judgment. That being the case, I conclude that the conduct of the first respondent, in setting the date of the referendum and the time within which voters may cast their vote, is not subject to review by a court. Indeed this is the position that was taken by the Supreme Court in the case of *Zimbabwe Lawyers for Human Rights and Anor v President of the Republic of Zimbabwe* 2000 (1) ZLR 274 (SC).

In that case GUBBAY CJ (as he then was) had occasion to make reference to the import of s 31 K of the Constitution with regards Presidential immunity. At p 278 D – E he stated thus : "The section specifies a number of situations in which a court is not permitted to inquire into the actions of the President. In all other matters, no fetter is placed upon the court and no immunity is accorded the office of the President." While the first respondent relied on the above case to support its interpretation of s 31 K (1) of the Constitution, the applicants preferred the position taken by DUMBUTSHENA CJ (as he then was) in the case of *Patriotic Front – Zimbabwe African Peoples Union v Ministry of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 SC. In that case the learned Chief Justice dealt with similar challenges, mainly, whether the exercise of executive powers by the first respondent is subject to review by the courts. He concluded that there are some functions performed by the President in terms of the Constitution which are not reviewable. However, should such prerogatives "be exercised under unlawful conditions or performed outside the law, the courts……..have a duty to find out whether the facts upon which the prerogative power was exercised were lawful".

I do not think that much reliance can be placed upon the conclusion in that case. It appears to me that DUMBUTSHENA CJ was addressing situations in which a prerogative or executive power had been exercised unlawfully or outside the law. That is not the position in

the present case because the first respondent is clearly empowered by the Referendums Act to decide the date upon which he may wish to hold a referendum. Unlawfulness is therefore not a factor in the instant case.

Secondly the *PF-ZAPU* case *supra* was decided before the enactment of the present s 31 K of the Constitution. The court could not therefore have had the opportunity to interpret the present constitutional provision. Adv *Machaya* for the respondents submits that s 31 K was brought in precisely because the Legislature wished to ensure that certain executive powers were not justiciable, more so in light of the decision in the *PF – ZAPU* case *supra*. That seems to be the position, moreso in light of the fact that the applicants did not challenge that submission.

Paragraph (d) of subsection 1 of s 31 K is particularly relevant in that what the applicants wish this court to do is to review the manner in which the first respondent has exercised its discretion in fixing the 16th March 2013 as the date of the referendum. The provisions of that paragraph preclude the court from doing so. Mr *Muchadehama*, for the applicants, no doubt realising that the wording of that paragraph cannot be interpreted in any other way, sought to persuade this court that that paragraph should not be interpreted in isolation, but that it should instead be read together or in conjunction with the preceding paragraphs (a), (b) and (c). I agree with Adv *Machaya* that it would be improper to do so. Firstly the use of the word "or" instead of "and" suggests that each of these paragraphs is a stand-alone entity. Secondly the subject matter specifically covered by each of the other paragraphs has nothing in common with the subject matter covered under paragraph "d". But in any event even if the four paragraphs were to be read together the end product would still be the same – namely that the Legislature has expressly and in clear and unambiguous language ousted the jurisdiction of any court with regards the matters spelt out under s 31 K (1) of the Constitution.

The applicants have argued that the executive decision complained of is reviewable where it can be shown that "the private rights, interests and legitimate expectations of citizens" have been affected. In my view the provisions of s 31 K do not, on account of their clear and unequivocal import, permit of such considerations.

For these reasons the preliminary issue must be decided in favour of the first respondent. The second respondent has not opposed this application. It will abide by the decision of the court.

Accordingly, it is ordered as follows:-

1. It is declared that by virtue of the provisions of s 31 K (1) of the Constitution of Zimbabwe the powers conferred upon the first respondent in terms of s 3 of the Referendums Act [*Cap 2:10*] are not justiciable.

2. Consequently it is ordered that the application be and is hereby dismissed in its entirety.

3. The first and second applicants shall jointly and severally, the one paying the other to be absolved, pay the costs of this application.

Mbidzo Muchadehama & Makoni, applicants' legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners