MFUNDO MLILO
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 8 March 2018 & 4 May 2018

Opposed Application

T Biti, for the applicant
Ms *V Munyoro,* for the respondent

MANGOTA J: This is an ordinary opposed application which the applicant turned into an urgent one. He did so through a letter which he addressed to the registrar of this court. The letter is dated 20 February 2018. It reads, in part, as follows:

> "2. As you will be aware, the application among other things seeks to challenge the constitutionality of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] amended to Electoral Act Regulations 2016 published in Statutory Instrument 117/2017.
>
> 3. As you are aware of, the regulations we (sic) enacted on 15 September 2017 and therefore they will naturally expire by 15 March 2017.
>
> 4. In order to avoid a situation where arguments will be academic on aspects of the regulations, and given the fact that both parties have filed heads of argument in this matter., we seek that the matter be determined urgently." [emphasis added]

It is evident, from the foregoing, that the applicant was rushing against time. However, the application was, in my view, not urgent. It was more of self-created urgency than it was urgent in the sense which the rules of court contemplate.

The regulations were published on 15 September 2017. The applicant did not apply as he should have done shortly after the publication of the regulations. He only filed his application some thirty-five (35) days after the event. He filed it on 20 October 2017. He did not explain the cause of the delay.

The form which he employed showed that the application should not have been enrolled on applications which fall under r 244 of the High Court Rules, 1971. It did not have a certificate from a legal practitioner. It did not give reasons for its urgency. It was filed under Form 29 instead of under Form 29 B of the rules of this court.

Urgency was, therefore, created by the applicant himself. He suddenly became aware of the date of the expiration of the regulations. He, accordingly, requested the registrar to draw the court's attention to his predicament and, in the process, he moved the court to hear the application before the period of the expiration of the regulations.

The applicant used the regulations as his point of entry into the substance of the application. The application has less business with the regulations. It, in fact, has more business with the constitutionality or otherwise of the Presidential Powers (Temporary Measures) Act [*Chapter 10.20*].

Paragraph 2 of the applicant's letter of 20 February 2018 is relevant in the mentioned regard. He states, in the same, that the application seeks to challenge the constitutionality of the Presidential Powers (Temporary Measures) Act, [*Chapter 10:20*]. This, in my view, is the thrust of the application.

The applicant describes himself as a Zimbabwean scholar, businessman and human rights activist. He says he has a direct interest in issues which relate to the rule of law, constitutionalism, democracy and Zimbabwe's electoral process.

I mention in passing that human rights activism and constitutionalism took root in Zimbabwe in the late 1980s and early 1990s. Many non-governmental organisations sprouted through the length and breadth of the country. Activists who fell into, and continue to remain in, this very important field of work brought the government of the day to account for its conduct in

such areas as the due observance of the rule of law, people's fundamental rights, democracy and elections.

Persons of the mind of the applicant remain a thorn in the eyes of government. They made, and continue to make, it to remain on course. They criticized, and continue to criticize, the conduct of Ministers of Government and their Ministries. They, in short, remain a constant cause of concern to the three pillars of the state: namely the executive, the judiciary and the legislature. They worried, and continue to worry, the politicians especially those whose functions fall under the executive organ of the state.

Human rights activists are, therefore, a *sine qua non* aspect any democratic order. They make every effort to point out, as well as speak against, such deviant behaviour as corruption, inertia, unconstitutionalism and/or the absence of democratic principles. Their continued existence in a society is a most welcome development which governments the world over are encouraged to embrace and not ignore.

When such activists as the applicant request members of the executive to jump, the ideal situation is that the latter should not question why they are being asked to jump. The only question which they can, and should, ask is how high they should jump. It is, therefore, in the context of the above stated matters that this application would be considered as well as determined.

The applicant, it has already been stated, falls into the category of the above described group of persons. He lays stiff criticism on the continued existence of the Presidential Powers (Temporary Measures) Act. He insists that the Act serves no meaningful purpose in an independent and democratic Zimbabwe. He advocates the strengthening as well as the observance of constitutional provisions which, he says, protect and advance the people's fundamental rights and freedoms. He lays emphasis on matters which relate to the rule of law, democracy, constitutionalism and/or the doctrine of separation of powers amongst the three pillars of the state.

The thrust of the applicant's argument is that the Presidential Powers (Temporary Measures) Act is *ultra vires* the Constitution of Zimbabwe. He submits that the President has abused the Act as and when he pleased. The Act, he argues, allows the President to make law by decree as opposed to having the same made by Parliament which, in terms of the constitution, is

the law – making authority in Zimbabwe. He insists that the Act must be struck off the country's statute books because its provisions are not consistent with those of the Constitution of Zimbabwe.

The application which is before me is unique. It is unique in the sense that it is the first of its kind to test the constitutionality or otherwise of the Presidential Powers (Temporary Measures) Act after the coming into existence of the Constitution of Zimbabwe Amendment [No. 20] Act of 2013.

The Presidential Powers (Temporary Measures) Act was promulgated in 1986. It survived all applications, and they were many, of the present nature. It did so largely because of some provision of the 1979 constitution which provision ensured its continued existence in the country's statute books. That provision, it was argued, does not exist in the new constitution which replaced the old one.

It follows, from the foregoing, that case authorities which dealt with the continued existence or otherwise of the Act will not be of much assistance towards the determination of this application. The decisions were, no doubt, anchored upon the provision which ensured the retention of the Act.

The current application will, in the result, be decided on what, in my view, is the correct interpretation of the new constitutional provisions. It will be decided on the basis of provisions which define the role and functions of such state actors as the President, Parliament and the Judiciary of an independent and democratic society such as the one in which we live.

I have already stated, in some part of this judgment, that the applicant used the Presidential Powers (Temporary Measures) Amendment of Electoral Act Regulations, Statutory Instrument 117/2017, as his point of entry into the application. He criticizes the regulations which the President published on 15 September 2017. He says these are null, void and of no force or effect. He submits that only Parliament can make law in Zimbabwe. He insists that the President cannot do so. He criticizes s 2 (2) of the Act which he says purports to give to the President power to change, or over-ride, an Act of Parliament. He states that the President's conduct of publicizing the regulations is *ultra vires* the Act. He, therefore, moved the court to declare:

a) the Presidential Powers (Temporary Measures) Act to be *ultra vires* the Constitution of Zimbabwe; or alternatively-
b) section 2 (2) of the Act a nullity – and
c) the President's actions of publishing the regulations to be *ultra vires* the Act.

He, in short, moved the court to make the declarations and set aside the Act as well as the regulations which flow from the same.

The respondent is the President of the Republic of Zimbabwe. He opposes the application. He states that the regulations which he published were necessitated by the biometric voter registration exercise which the country adopted in preparation for the July/August 2018 election. He says everyone who was on the old voters roll was expected to register through the newly adopted voter registration system. He avers that he did not act outside the law. Section 2 (2) of the Act, he says, confers authority upon him to publish the regulations as he did. He submits that he did not go beyond the powers which the Constitution of Zimbabwe confers upon him. He drew my attention to his executive functions which are contained in section 110 (1) of the Constitution. He denies that his conduct in publishing the regulations violated the Act or the Constitution. He submits that, under the common law, he has always enjoyed prerogative powers which allowed him to make temporary legislation in urgent situations. He states that the current constitution did not abolish his prerogative powers. He insists that the Act conferred power on him to make law in the general public interest. He avers that the Act recognizes Parliament's law-making function. He denies that the Act confers sweeping powers upon him. He moved the court to dismiss the application with costs.

The application was well-researched, well-argued as well as presented. It drew my attention to a number of important case authorities which, in a large measure, addressed the concerns of the applicant. It cited six cases of the South African Constitutional Court, four case authorities from the courts of the United States of America, four cases which the Privy Council decided and two case authorities which the Supreme Court of India decided, among others.

The cited cases brought to the fore such pertinent matters as the supremacy of a country's constitution, the doctrine of separation of powers, rule of law and issues which pertain to procedural and/or substantive legality by such state actors as the respondent *in casu*. The cases were, no doubt, rich, informative, thoroughly persuasive as well as educative.

That having have been said, sight must not, however, be lost of the fact that each case to which the applicant drew my attention was decided in context. The decision was not plucked from thin air and placed on paper. It was based on the country's constitution and other pieces of legislation which were relevant to the case. The court was, in each case, interpreting the law as it existed in its jurisdiction as measured against the facts of the matter which was then before it.

I mention, at this stage, that the facts of the cases to which the applicant drew my attention remain unknown to me. I also state that the constitutions and other pieces of legislation which influenced the decision of the court in each cited case were not availed to me. My attention was only drawn to the important *dicta* which the courts pronounced in each case.

The above stated matters make it hard, if not impossible, for me to go along with the decided case authorities. That is so notwithstanding their persuasive value. I cannot, in other words, conclude that what the court in America, or India or South Africa pronounced should apply to the case which is before me.

Judicial work does not work in a vacuum. It operates upon a set of rules chief among which is a country's constitution and any legislation which is relevant to a case which is being decided. It interprets the law as it exists in a country's constitution and other law. It interprets those against a certain set of stated matters.

The current application will, therefore, be decided in the context of the Constitution of Zimbabwe Amendment (No 20) Act of 2013 as read with the Presidential Powers (Temporary Measures) Act [Chapter 10:20] ["the Act"] and matters which relate to the two pieces of legislation. Amongst such matters is the birth of a new voters roll which the President made mention of in his opposition to the application.

The President made law when he published the 2017 regulations. He rested his law-making conduct on section 2 of the Act. The section allows him to make law, albeit of a temporary nature, in certain circumstances of urgency.

The section reads, in the relevant portion, as follows:

"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 this Constitution and this Act, the President may make such regulations as he considers will deal with the situation."

It is evident, from the above-cited portion of the section, that the President's discretion to make regulations is only exercisable by him in the interests of the people of Zimbabwe as a whole. He does not exercise the discretion in the interests of a section of the population of the country. The use of the word *public* which appears in the various facets for which the discretion is exercised says it all.

The President did not publish the regulations for the fun of it. He did not, as the applicant alleges, make an effort to abuse the law making function which the Act confers upon him. He states, and correctly so, that the advent of the biometric voter registration exercise which Zimbabwe contemplated to put into place made it necessary for him to act as he did. His contention, with which l agree, was that the advent of a new voters roll could not properly be covered by a law which Parliament would have introduced, debated and passed into law without interfering with the times-lines of the forthcoming 2018 harmonised election. It was, according to him, out of necessity and urgency that he published the regulations. He insists, and l agree, that the preparation of the new voters roll as measured against the July/ August, 2018 election was not an event but process.

The background of the matter which relates to the publication of the regulations is relevant. I take judicial notice of the fact that, for a considerable length of time in the past, the people of Zimbabwe urged Government to:

i. do away with the old voters roll which they said contained a lot of inconsistencies as well as unnecessary features;
ii. replace it with a new voters roll which was more credible than the old one. A voters roll which was credible in terms of voter population, its density in a particular area and detail;
iii. remove the voters roll from the office of the Registrar-General and place it within the domain of the Zimbabwe Electoral Commission.

It is my view that the applicant and others of a like mind were at the forefront of the stated matter. He made a statement to an equal effect in his founding affidavit. He and other human rights activists urged and encouraged Government to address their abovementioned

concerns. They insisted that its attention to the same would render the forthcoming July/August 2018 election more credible than otherwise.

The President, as Head of State and Government, heeded the call of the people of Zimbabwe. He remained alive to the fact that whatever was to be achieved in response to the people's concerns was to be supported by some law. He, therefore, published the regulations which, in his view, would take the place of the law which Parliament was constrained to make within the time which preceded the election.

That the President complied with the procedural legality of the Act requires little, if any, debate. He, as the applicant stated, published the regulations. He published them on 15 September, 2017. He did so after he had notified the people of Zimbabwe of his intention to publish the same. He, in the mentioned regard, made substantial compliance with s 3 of the Act.

It cannot, in view of the above stated matter, be suggested that the President's conduct in publishing the regulations was *ultra vires* the Act. He published them in terms of an existing law. The law conferred upon him the power to act as he did. He followed the procedural aspects of that law to the letter and spirit. His conduct was above reproach. It was, and it remains, valid.

I have already stated, in the foregoing portions of this judgment, that the regulations are not the subject of this application. The subject, from the perspective of the applicant, is the Act itself. If the regulations were the issue, the applicant would have invoked s 3 (1) (b) of the Act as read with subs (2) of the same. He would, in other words, have objected to the publication of the regulations when the President made his intention known to him and others through Government Gazette Extraordinary, Volume XCV No. 61.

The fact that the applicant did not object to the publication of the regulations at the time that the President's intention appeared in the gazette shows his real intention. The intention is that he wanted to use the regulations, after they had been published, as his entry point into criticizing the substance of the Act. The observed matter, therefore, takes the discourse to the substantive legality or otherwise of the Act.

Whether or not the Act is substantively legal depends on the provisions, if any, of the constitution which relate to it. This, in a nutshell, refers to the constitutionality or otherwise of the Act. The question which we should ask and answer centres on whether or not the law-making function of the President as conferred upon him by the Act violates the constitution of

Zimbabwe. The same question, put differently, would read: did Parliament act within or without the Constitution when it conferred some of its law-making function in the Act to the President. Succinctly and boldly stated, the same question reads: Is the Act in compliance with the Constitution of Zimbabwe (No. 20) Act of 2013 ("the Constitution").

The legislative authority of Zimbabwe is reposed in the Legislature. This comprises Parliament and the President acting in accordance with this Chapter. Sections 116, 117 and subsections (2), (3), 5 (a), 6 (a) and (b), 7 (a), 8 (a) and (b), (9) and (10) of s 131 of the Constitution of Zimbabwe spell out the complimentary roles which Parliament and the President play in Zimbabwe's law-making process. They check and balance each other's work. The one cannot make law without the input of the other and vice-verse.

The fact that the President can, in terms of s 131 (8) (b) as read with subs (9) of the section, refer a Bill to the Constitutional Court for advice on its constitutionality shows that the judiciary is, to some extent, involved in the law-making process. It ensures that all bills which Parliament and the President pass into law must comply with the Constitution of Zimbabwe.

The checks and balances which exist in s 131 of the Constitution also exist in s 4 of the Act. The President does not, therefore, have sweeping powers as the applicant alleges. The regulations which he makes are, as of necessity, subject to Parliamentary review and/or scrutiny. It is within the domain of Parliament to resolve that any regulations which have been laid before it be either amended or even repealed. Once such a resolution has been made, the President has no option but to comply with resolution of Parliament.

It follows from the foregoing, therefore, that complete separation of powers of the three organs of the State – i.e the Executive, the Legislature and the Judiciary – is a myth. It is not achievable in the context of the Constitution of Zimbabwe.

I, in the mentioned regard, associate myself fully with the views which the Constitutional Court of South Africa was pleased to express in *Ex parte* Chairperson of the Constitutional Assembly: In Re: Certification of the Constitution of the Republic of South Africa, 1996 (4) SA 744. It stated at p 810 as follows:

> "There is, however, no universal model of separation of powers and, in democratic systems of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation that is absolute ……..

> The principle of separation of powers, on the one hand, recognizes the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense, it anticipates the necessary and unavoidable intrusion of one branch into the terrain of another. No constitutional scheme can reflect a complete separation of powers: The scheme is always one of partial separation." (emphasis added).

The President's necessary and unavoidable intrusion into the function of Parliament is evident from a reading of s 86 of the Constitution. The section deals with the limitation of the people of Zimbabwe's fundamental rights and freedoms. It reads, in part, as follows:

> "86 Limitation of rights and freedoms
>
> (1) The fundamental rights and freedoms set out in this chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
> (2) The fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including -
> (a) …….;
> (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town, planning or the general public interest…," (emphasis added).

The question which begs the answer is who/which authority has the power to limit the people of Zimbabwe's fundamental rights and freedoms when any of the matters which are stated in s 86 (2) (b) of the constitution has arisen or is about to occur. The applicant does not mention the person or authority who/which, in terms of a law of general application, can limit the people's rights and freedoms. The limitation, no doubt, has far-reaching consequences. It relates to matters which, if left unattended, adversely affect a considerable portion of Zimbabwe's population, if not the people of Zimbabwe as a whole.

The President says the Act and the Constitution confers upon him that power to deal with any of the matters which are stated in s 86 (2) (b) of the constitution when such have arisen or are about to occur. He states, *in casu*, that it was in the interest of the general public of Zimbabwe that he made the regulations.

That the general public interest was real as opposed to having been fanciful requires no debate. That was so given the people's outcry for a new voters roll which had to replace the old

one with which they were not satisfied. Parliament could not make law within the time which remained to deal with the situation which was then at hand. Whatever process which pertained to the introduction into the country of a new voters' roll required some law to be in place before it could be embarked upon. The President, therefore, made that law in line with his law-making function as was provided for in the Act and the Constitution.

The *verbatim* repetition of s 86 (2) (b) of the Constitution in s 2 (1) (a) of the Act confirms the constitution's recognition of the Act. The stated matter confirms further that it is only the President who has the power to limit, through the Act, the people of Zimbabwe's fundamental rights and freedoms which are contained in the Constitution. Those can be limited when certain undesirable occurrences have arisen or are about to arise. The President limits them in the interests of Zimbabwe's public good.

The drafters of the Constitution were, in my view, alive to the existence of the Act. They crafted s 134 of the Constitution to confer power on Ministers of Government and such statutory bodies as the Zimbabwe Electrical Commission to make subsidiary legislation. They state, in the section, that the legislation which these make should not go outside the enabling Act which establishes their law-making function.

Because the President's law-making power exists in the Act, the drafters of the Constitution did not include it in s 134 of the Constitution. Because his powers as stated in s 86 (2) (b) of the Constitution relate to limitation of the people of Zimbabwe's fundamental rights and freedoms in certain unforeseen circumstances, he could not effectively exercise the same under s 134 of the Constitution. Paragraphs (b), (c) and (d) of the section would have disenabled him from effectively dealing with situations of disastrous consequences which he has to address in his capacity of Head of State and Government when such arise. It was for the mentioned reasons, if for no other, that the Act conferred upon him power to deal with any situation which, in his view, would work against Zimbabwe's public interest in an adverse manner. Section 5 of the Act accords to him the leeway to deal with the situation which would have arisen or is about to occur in a very effective as well as conclusive manner. It allows him to over-ride an Act of Parliament where such is necessary in the interests of the public good of Zimbabwe.

It makes little, if any, sense for the applicant to suggest that Ministers whom the President appoints into cabinet can make subsidiary legislations under s 134 of the Constitution

and the appointing authority himself cannot. The applicant's reading of s 134 of the Constitution is misplaced. He overlooks the fact that its application relates to the making of law by Ministers of Government and statutory bodies. He remains oblivious to the fact that the President's law-making function is not covered under the section but under the Act and the Constitution.

The President states, and I agree, that s 110 (1) of the Constitution confers upon him the power to make law. It reads:

> "(1) 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."[emphasis added]

It is his status, as Head of State and Government, which allows him to limit the people of Zimbabwe's fundamental rights and freedoms when a need to do so arises or is about to occur. He will be complying with his duties as the President of Zimbabwe in the mentioned regard. He will be, as is stated in s 90 (2) (a) of the Constitution, promoting unity and peace for the benefit and well-being of the people of Zimbabwe.

It is evident, from the foregoing, that:

(a) the conduct of the President was not *ultra vires* the Act;

(b) the regulations which he published were procedurally and substantively compliant with the law under which they were made- and

(c) the Act is not *ultra-vires* the Constitution of Zimbabwe.

The applicant, in my view, confused the President's ordinary law-making function as it is stated in *Chapter 6* of the Constitution with his law-making function as it exists in the Act as read with ss 86 and 110 of the Constitution. He sought to do away with the President's law-making power as it is contained in the Act. The Act, it has already been observed, is in complete harmony with the Constitution.

The application constituted an interesting exercise of the mind. It was more academic than it was real. It was devoid of merit. It cannot, therefore, stand.

The applicant did not prove his case on a balance of probabilities. The application is, accordingly, dismissed with costs.

Tendai Biti HMB Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners