

JUSTICE DZINGIRAYI
versus
CHALTON HWENDE & 114 OTHERS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 27 & 28 June 2019

Opposed Application

T Chinyoka, for the applicant
L Chimuriwo for 1st – 111th & 114th & 115th respondents
Ms C Siquza, for the 112th respondent

ZHOU J: The applicant instituted this application seeking an order that pending final judgment in the 114th respondent's application/appeal to the African Commission on Human and Peoples' Rights or the installation of the 114th respondent as President of Zimbabwe, whichever occurs last, the 112th and 113th respondents be and are hereby interdicted from paying or advancing salaries, allowances, disbursements or vehicle loans to 1st through 111th and 115th respondents. Costs of the application were sought as well. At the commencement of the hearing the applicant through his counsel applied to file an amended draft order in terms of which the following relief is now being sought:

- “1. The effect of paragraphs 306 – 310 of the 112th respondent's 2018 Budget statement is to violate the applicant's right to freedom of association and right to vote in that the proposed vehicle loan scheme is in conflict with the 115th respondent's policy platform on the basis of which the applicant voted for and associates with the 115th respondent.
2. The 112th and 113th respondents may not pay or advance any money in the form of the so-called vehicle loan scheme as described in paragraphs 306 – 310 of the Minister of Finance and Economic Development's Budget Statement for 2018 to 1st – 111th and 115th respondents for as long as 112th respondent or anyone appointed by the current President of Zimbabwe, Emmerson Dambudzo Mnangagwa, is the Minister of Finance and Economic Development.
3. The respondents shall pay costs of suit.”

When the applicant indicated his intention to amend the draft order as recited above the 113th respondent, the Clerk of Parliament, indicated through counsel that he was not contesting

the application anymore and would abide by the judgment of the court. Applicant through his counsel indicated that he would also not seek costs against that respondent who in turn confirmed that he would not seek costs against the applicant. The application was therefore heard as between the applicant and the remaining respondents on the objection *in limine* that the applicant has no *locus standi* to institute the application for the relief that is being sought. In order to make an effective analysis of the submissions made in relation to the objection *in limine* the following background facts are relevant.

The applicant states that he is a member of the Movement for Democratic Change Alliance political party which is cited in this application as the 115th respondent. The 114th respondent is the President of the 115th respondent. The first to 111th respondents are members of the 115th respondent. All of them are either members of the National Assembly or the Senate. The applicant states that he voted for the first respondent who is the Member of the National Assembly for the Kuwadzana East Constituency in which applicant says he is registered to vote. He also states that he voted for the 114th respondent as his choice for the Presidency of the country. He and his political party, according to him refused to recognize the outcome of the presidential election. It is common ground that proceedings instituted by the 114th respondent in the Constitutional Court challenging the outcome of the Presidential election were dismissed. Applicant states that an “appeal” has been noted against the decision of the Constitutional Court. The appeal is said to have been instituted in the African Court which in some papers is referred to as the African Commission on Human and Peoples’ Rights. These are two distinct institutions which the applicant seem to confuse but nothing turns on this for the purposes of the issue to be determined. Applicant states that he “did not recognize the judgment of the Constitutional Court” and the current President of Zimbabwe. He also does not recognize all appointments made by the President. On the basis of his attitude he wants the 112th respondent, the Minister of Finance and Economic Development or any person appointed by the President who has not been cited in these proceedings, to be interdicted from paying or advancing money under the Parliamentary Vehicle Loan Scheme. This is a scheme under which Members of Parliament access loan financing for the purchase of motor vehicles. The applicant wants this court to declare that the cited portions of the budget statements be declared to be violating his right to freedom of association and right to vote in that according to him, the motor vehicle loan finance scheme is in

conflict with the 115th respondent's policy platform on the basis of which he claims to have voted for and associates with the 115th respondent.

The expression *locus standi*, in full known as *locus standi in judicio*, which literally means "place to stand before a court" is used in two contexts. In the first sense it refers to the capacity of a person, natural or juristic to institute or defend proceedings before a court of law. In the second sense it is used to refer to the interest which a party has in the relief sought or the right to claim the relief. See Herbstein and Van Winsen *The Civil Practice of the High Courts and the Supreme Courts of Appeal of South Africa* 5th Ed p 143. It is the latter sense which is relevant in these proceedings. Put in other words, the question is whether the applicant in *casu* has the right to seek the relief that he is applying for .

The principles by which the *locus standi* of a litigant is to be determined are settled in this jurisdiction. In the case of *Zimbabwe Teachers Association & Ors v Minister of Education 1990* (20) ZLR 48 (HC) at 52 F – 53B EBRAHIM J (as he then was) articulated them as follows:

"It is well settled that, in order to justify its participation in a suit such as the present, a party..... has to show that it has a direct and substantial interest in the subject matter and outcome of the application. In regard to the concept of such a direct and substantial interest" CORBETT J in *United Watch and Diamond Co (Pty) Ltd and others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (c) quoted with approval the view expressed in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) that it concerned-

'...an interest in the rights which is the subject matter of the litigation and not thereby a financial interest which is only an indirect interest in such litigation.

And then went on to say (at 415 H):

'this view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions..... and it is generally accepted that what is required is a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court.'

This requirement of a legal interest as opposed to a financial or commercial interest also received judicial endorsement in *Anderson v Godik Organisation* 1962 (2) SA 68 (D) at 72 B - E."

What is evident from the authorities cited above is that not every interest justifies instituting proceedings in a court of law to protect it. For it to be a legal interest it must satisfy the following:-

- (a) It must be a direct interest
- (b) The interest must be substantial

- (c) The interest must pertain to the subject matter and outcome of the matter/litigation.

The personal ego, political idiosyncrasies and financial wishes may be interests but they do not give the affected person the legal standing to seek recourse through the court procedures irrespective of how strongly the affected person feels about them.

It is true that the new constitutional dispensation has widened the scope of *locus standi* in constitutional litigation. But the litigating party must bring himself within the ambit of the constitutionally recognized grounds of *locus standi*, See *M and Anor v Minister of Justice 2016* (2) ZLR (CC) at 53 F – 54 B. Applicant must show that he is directly affected by the conduct complained of.

In *casu* the applicant alleges that he is a registered voter in Kuwadzana East Constituency who voted for the first and 114th respondents who belong to his political party, and that the loan facility subverts his rights under s 67 of the Constitution by allegedly bribing 1st to 111th respondents into accepting the government as legitimate. But the facility is not meant for the applicant which makes his interest indirect and convoluted. The relief being sought is grounded in some perverse assumption that the first to 111th respondents are mere objects which are susceptible to bribing and therefore require protection by interdict at the instance of the applicant as one of the persons who voted for them. The applicant's interest becomes even more obfuscated when tested in relation to the second to 110th respondents. The applicant does not claim to have voted for these respondents. They were cited merely because of the applicant's belief that he belongs to their political party. But belonging to a political party cannot give the *locus standi* to interdict another member of that party through court proceedings from behaving in a manner that is perceived to be inconsistent with the party's interests. It is the affected political party and not the member which would have the *locus standi* to institute the proceedings. In the present case the interdict sought in para 2 of the draft order is not even directed at the first to 111th respondent but at third parties, the 112th and 113th respondents, which makes the interest very remote and the claim vexatious. No stretch of the imagination can link a parliamentary Vehicle Loan Scheme to any of the political rights enshrined in s 67 of the Constitution of Zimbabwe Amendment (No. 20) 2013.

In all the circumstances of this case the applicant has not established any interest, let alone a legal interest, in the subject matter of the litigation.

On the question of costs, it is the policy of the law to excuse the unsuccessful applicant from paying costs where a genuine constitutional issue, particularly one pertaining to an alleged violation of the Bill of Rights, is raised. The issues raised in this application are not genuine and appear to have been raised to satisfy the personal ego of the applicant. What has exercised this court's mind is whether those who legally represented the applicant should be entitled to recover costs from the applicant. But for the fact that the applicant has not shown that he entirely relied on the counsel of his legal practitioners and did not act in common purpose with them this court would have readily made such an order.

However, there are good grounds for ordering that the costs of this application be paid by the applicant and his legal practitioners *de bonis propriis* on the attorney client scale jointly and severally he one paying the other to be absolved. Mr Chinyoka for the applicant did cannot make any meaningful submissions to excuse the legal practitioners from being mulcted with the order of costs. His submissions was that that was a matter within the discretion of the court. The punitive order of costs is justified by the following factors:

Firstly, the respondents have been unnecessarily put a claim which is manifestly vexatious, See *Matamisa v Mutare City Council & Anor* 1998 (2) ZLR 439 (S). The vexatiousness of the application arises from the fact that it was founded upon the ground that a litigant can appeal to the African Court or African Commission on Human and People's Rights against a decision of the Constitutional Court of Zimbabwe. Any lawyer in Zimbabwe would know about the hierarchy of the courts in this jurisdiction and in particular, that those supra national bodies do not fall within that hierarchy. Secondly the founding affidavit shows contempt of court on the part of both the applicant ad the legal practitioners who prepared it, See *John Strong (Pvt) Ltd & Anor v Wachenuka* (1) 2010 (1) ZLR 154 CH at 159A. In para 121 of the founding affidavit the applicant states, inter alia, that "we did not recognize the judgment of the Constitutional Court." The applicant and his legal practitioners ought to understand that the validity of a court judgment does not depend upon recognition by the litigants. Thirdly, the language used in the founding affidavit is reckless, intemperate and unnecessarily scurrilous See *Nyandoro v Sithole & Ors* 1999. ZLR 353 (H) at 357 B. Apart from asserting that he did not

recognize the judgment of a properly constituted court, the applicant refers to a process that was validated by a court judgment as “so called inauguration”. Epithets like “illegal junta”, “running dogs of the junta” illegitimate regime,” “the usurper”, or “defacto President”, in describing an elected President are unacceptable in court documents. The applicant even unjustifiably ascribes “serious mental ill-health” to the 114th respondent. Lawyers must take responsibility for the language used in pleadings and other court documents which the draft on behalf of their client. In this case I would recommend to the Council of the Law Society of Zimbabwe that the lawyer who drafted the founding affidavit in this case presents himself or herself for training on legal ethics and legal drafting courses offered by the Council for Legal Education. The deficiencies in the affidavit, a few of which have been highlighted above, received a genuine need for such training.

In the result, IT IS ORDERED AS FOLLOWS:

1. The application is dismissed for want of *locus standi* by the applicant.
2. The costs shall be paid on the attorney-client scale by the applicant and his legal practitioners *de bonis propriis* the one paying the other to be absolved.

John Mugogo Attorneys, applicant’s legal practitioners
Lawman Chimuriwo Attorney at Law, 1st – 111th & 114th & 115th respondents’ legal practitioners
Civil Division of the Attorney General’s Office, 112th respondent’s legal practitioners
Chihambakwe Mutizwa & Partners, 113th respondent’s legal practitioners.