

THE ZIMBABWE CHAMBER FOR INFORMAL WORKERS
and
PASSENGER ASSOCIATION OF ZIMBABWE
and
CONSTANTINE CHAZA
versus
MINISTER OF HEALTH AND CHILD WELFARE
and
MINISTER OF LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT
and
MINISTER OF PUBLIC SERVICE LABOUR AND
SOCIAL WELFARE
and
MINISTER OF TRANSPORT AND INFRASTRUCTURE
DEVELOPMENT
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
ZIMBABWE UNITED PASSENGER COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 14 May 2020 & 26 May 2020

Urgent chamber application

T Biti, for applicants,
C Siquoza, for 1st to 6th respondents,
No appearance for the 7th respondent

DUBE J:

Introduction

[1] The applicants have brought an application on an urgent basis seeking an interim order on the following terms;

Terms of the Interim Relief Sought

Pending the final determination of the matter,

1. The 1st Respondent within 3 days of this order amend the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order 2020 published under Statutory Instrument 83 of 2020 to allow the operation of registered transporters and other operators to ferry passengers on their licensed routes subject to compliance with relevant lockdown conditions such as social distancing, temperature testing and the use of sanitizers.
2. Allow informal businesses to reopen, subject to compliance with lockdown regulations of social distancing, temperature testing and sanitizing.

In the final, the applicants seek an order declaring that s8 of the Public Health (COVID-19, Prevention, Containment and Treatment) Regulations, published as Statutory Instrument 77 /20 is *ultra vires* s 68 of the Public Health Act and breaches s 134 of the Constitution. Secondly, a declaration that s 4(2), 4(1) and 11(f) of the Public Health (COVID-19, Prevention, Containment and Treatment) Regulations, published as Statutory Instrument S.I 83\20 as amended be declared to be *ultra vires* the Public Health Act and s 134 of the Constitution of Zimbabwe.

The parties

[2] The first applicant is the Zimbabwe Chamber of Informal Economy Associations, a registered trust representing the interests of workers in the informal industries in particular, vendors, cross border traders, artisanal minors, commuter omnibus operators, and drivers such as hairdressers, backyard mechanics and other informal workers. The second respondent is the Passenger Association of Zimbabwe representing the interests of commuters. The third applicant is an individual and a worker who commutes every day from Chitungwiza to Harare.

[3] The first to fifth respondents are government ministers who hold different portfolios in the Government of Zimbabwe. The sixth respondent is the President of the Republic of Zimbabwe. The respondents are cited in their official capacities. The seventh respondent is the Zimbabwe United Passenger Company (Pvt) Ltd, [ZUPCO], a company in the transport business.

[4] According to the Centre for Disease Control and Prevention of South Korea, this is how the COVID 19 was fuelled in South Korea. A 35 year old Chinese national flew into South Korea feeling well. On 6 February 2020, she was involved in a minor traffic accident. She

decided to go to hospital for a check-up. She had a slight temperature but no physical injuries. The authorities wanted to test her and she declined and said she was not sick and went away. On the 9 and 16 February she attended two church services. After that, her symptoms started to show. She went to a hotel and had a buffet lunch. She was tested for the Corona virus and she tested positive. She was made patient 31 of South Korea. Patient 31 created approximately 60 % of all cases in S Korea. A total of 1200 people were infected at the two church services. Some of the people from the church services went on to attend a funeral and infected some people there. There was a domino effect. Patient 31 created 5382 COVID-19 cases.

[5] This narration comes in the backdrop of the deadly Corona virus disease, officially known as the COVID -19 virus. COVID -19 is a highly infectious disease. The case of patient number 31 of South Korea, is a classic example of how contagious the virus is. It is a severe respiratory disease with no known cure which is spreading wildly across the globe.

[6] Sometime in November 2019 a novel virus broke out in Wuhan, China. On December 31, 2020, the Chinese government alerted the World Health Organization, [WHO], of the disease outbreak. On 11 March 2020, the WHO declared COVID -19 a global pandemic. As at the time of writing this judgment, there are more than 5,548, 858 COVID -19 recorded cases, 347, 858 deaths, 2,327, 338 recoveries and 2,873, 662 active cases worldwide. The COVID -19 has caused more deaths than most epidemics in recent history.

[7] The first case of the COVID -19 virus was reported in Zimbabwe sometime in mid-March 2020. As at 26 May 2020, a total of 56 people have been confirmed infected with the virus. There have been 4 deaths and so far there are 25 recoveries. As part of the fight against the virus, the sixth respondent declared the COVID - 19 a national disaster. The first respondent has declared the COVID -19 a formidable epidemic and put in place measures to tackle the disease. These are the measures under challenge.

Applicants' submissions

[8] The applicants' challenge is targeted at the regulations that allow the opening up of the economy to the formal sector and the restriction of transport services to the seventh respondent.

[9] Applicants submitted as follows. The orders made by the first respondent in consultation with the sixth respondent under the following Statutory Instruments, S.I 83/0F 2020, S.I 83 /2020. S.I 86/2020, S.I 93/2020, S.I 94/2020. S.I 99/2020, S.I 101/2020, S.I 102/2020, S.I 103/2020, are a nullity in that s 8 of S.I 77/2020 upon which they are premised, is

unconstitutional for the reason that it allows unlawful delegation of delegated power to the sixth respondent in breach of s 134 of the Constitution of Zimbabwe. Whilst s 68 of the Public Health Act delegates powers to the first respondent to make regulations, the first respondent may not sub delegate that power to the sixth respondent or in any other manner .The powers exercised are *ultra vires* the powers given to the respondent in s 68 of the Public Health Act, [*Chapter 15:17*], making all the other statutory instruments that follow upon this instrument are illegal.

[10] Secondly, that the power exercised in allowing the seventh respondent and vehicles provided by the Public Service Association to operate to the exclusion all other public transporters creates a monopoly over public transport by the seventh respondent. It affects the rights of their members and infringes upon their right to freedom of profession, trade and occupation codified under s 68 of the Constitution and the right to equal protection and benefit of the law in terms of s 56 (1) of the Constitution .The seventh respondent has only 160 buses and is unable to meet the demand for transport. Their members who are commuter omnibus owners are prejudiced in that they are unable to carry out their businesses, operate and source income to feed their families.

[11] Thirdly, the power exercised in terms of s 11F (1) of S.I 83/20 allowing formal business to open while the informal sector remains closed, is unfair and unreasonable and *ultra vires* s 68 of the Public Health Act and even s 8 of S.I 77/20. The majority of the people of Zimbabwe are in the informal sector and are the hardest hit by the lockdown measures and poverty. Their members have been unable to fend for their families and pay rentals. Safety nets in the form of handouts have not been provided to their members. Whilst they appreciate that the government has a duty to protect the right to health, a balance must be struck between the welfare of the people and the imposition of the restrictions. There is no reason why their members should be prevented from working. It is discriminatory, unfair and unconscionable for the government to reopen formal businesses to the exclusion of the informal sector.

[12] The restrictions imposed affect the applicants' members and infringe upon their rights to health, the right to life in terms of s 48 (1) of the Constitution. The monopoly given to seventh respondent infringes applicants' right freedom of profession, trade and occupation guaranteed under s 64 of the Constitution. The treatment of applicant's members is discriminatory and unfair and is in breach of their rights right to equal protection and benefits of the law as protected by s 56(1) of the Constitution.

Respondents' submissions

[13] The seventh respondent did not defend the application. The first to 6th respondents challenged the application on the basis that it is not urgent. The challenge related to the *locus standi* of the first applicant was abandoned. The respondents submitted as follows. The restrictions under Statutory Instrument 83 of 2020 came into effect on 28 March 2020. The applicants waited for a month before they approached the court for relief. The applicants' urgency is self-created. The applicants failed to act when the need to act rose and failed to assert them timeously. They urged the court to dismiss the application on the basis of lack of urgency.

[14] On the merits, they submitted as follows. Section 68 of the Act gives the first respondent wide powers to make regulations. He may make regulations putting into place restrictions on any matter in order to prevent the spread of the virus. The section gives the first respondent the power to open or close businesses in order to prevent and contain the spread of the COVID-19. The first respondent was alive to the fact that the restrictions impact on the lives of citizens and the most vulnerable and has put social measures and safety nets in place to cushion citizens from the impact of the restrictions.

[15] The respondents refuted that the restrictions discriminate against the applicants. They submitted that the restrictions are being eased gradually taking into account the stage of the pandemic, in a bid to control it. The Mbare vegetable market has as a result been partially opened. One cannot say that there is a blanket discrimination on the entire informal sector.

[16] The seventh respondent was given a monopoly because it is possible to do social distancing in a bus than a commuter omnibus. The other bus operators have been called upon to engage and operate under Zupco and some have heeded the call.

[17] There has to be a balance between the need to protect the health of citizens and the need for citizens to work. If the court finds that there has been any discrimination, such discrimination is fair, reasonable and justified considering that we are in extraordinary circumstances which are not unique to Zimbabwe alone. This is a matter of life and death. The restrictions are necessary to ensure that citizens' health is protected and this includes the health of the applicants.

Urgency

[18] A litigant seeking to have a matter dealt with on an urgent basis must show that the matter is urgent and cannot wait to be dealt with as an ordinary matter in the sense that if it is not dealt with immediately, irreparable harm will occur him. Such litigant must assert himself

when the need to act arises. He must treat the matter as urgent, see *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188; *Madzivanzira v Dextprint Invts (Pvt) Ltd* HH 145/02.

[19] The Public Health (COVID -19) (No 5), S.I 99 of 2020 introduced the following salient amendments. Formal businesses were allowed to open. The informal sector was restricted from operating from the 3rd to the 17th of May 2010. Everyone was required to wear masks and transport services were to continue but restricted to those provided by the seventh respondent. Only the seventh respondent was to be responsible for the ferrying of commuters.

[20] The restrictions under challenge were brought into effect at a time when the country was already under lockdown and still is. In determining whether the applicants asserted themselves timeously, the court has considered that the applicants' movements were, as in the case of everyone else, under nationwide lockdown and restricted. It was not easy to travel from one place to another due to restrictions to movement of people. The applicants' predicament in delaying to file the application is understandable and reasonable in the circumstances.

[21] Although the application may appear not to meet the basic requirements of urgency, the fact of the matter is that the application will not be capable of being dealt with at a subsequent stage should the lockdown be declared over soon. If the application is not dealt with now, it may be rendered *brutum fulmen*. This is not the sort of matter that can wait and be dealt with at a subsequent stage.

[22] Our courts have to be prepared to relax the rules of urgency in deserving cases, in order to avoid injustices to litigants. Each case must be determined on its own circumstances. This matter is in the public interest in the sense that the lockdown affects every Zimbabwean. The circumstances of this case raise matters of national importance. The public have an interest in learning what the outcome of the court's interpretation of the rules will be. This application cannot wait. For these reasons, I have decided to entertain the application on an urgent basis.

Lawfulness of quarantine powers

[23] Section 134 of the Constitution clothes the first respondent with the power to make subsidiary legislation as follows:

“134 Subsidiary legislation

Parliament may, in an Act of Parliament, delegate power to make statutory instruments within the scope of and for the purposes laid out in that Act, but—

- (a) Parliament's primary law-making power must not be delegated;
- (b) Statutory instruments must not infringe or limit any of the rights and freedoms set out in the Declaration of Rights;
- (c) Statutory instruments must be consistent with the Public Health Act of Parliament under which they are made;

(d) The Public Health Act must specify the limits of the power, the nature and scope of the statutory instrument that may be made, and the principles and standards applicable to the statutory instrument;”

Parliament has an obligation in terms of s 29 (3) of the Constitution to enact laws to protect public health. In terms of s 134 of the Constitution, Parliament may in an Act of Parliament delegate power to make statutory instruments within the scope of and for the purposes laid out in an Act.

[24] Section 68 gives the first respondent the power to make regulations that include;

“i) the imposition and enforcement of quarantine

ii) the regulation and restriction of public traffic and of the movements of persons

iii) the closure schools or the regulation and restriction of school attendance

iv) the closing of churches and restriction of gatherings or meetings for the purpose of public worship

v) the regulation or restriction or, where deemed necessary, the closing of any place or places of public entertainment recreation or amusement, or where intoxicating liquor is sold by retail, and the regulation or restriction, or, where deemed necessary, the prohibition, of the convening, holding or attending of entertainments, assemblies, meetings or other public gatherings

vi) the prevention and remedying of overcrowding or the keeping of a dwelling or other building or the contents thereof in a state of sanitation posing or likely to pose a public health risk;

(vii) the medical examination of persons who are suspected of being infected with, or who may have recently been exposed to the infection of, such disease, and of persons about to depart from any infected area, and the disinfection of their baggage and personal effects, and the detention of such persons until they have after such examination been certified to be free from any infectious disease and until their baggage and personal effects have been disinfected;

(viii) the keeping under medical observation or surveillance, or the removal, detention and isolation of persons who may have recently been exposed to the infection of, and who may be in the incubation stage of; such disease the detention and isolation of such persons until released by due authority, the use of guards and force for that purpose, and, in case of absolute necessity, the use of firearms or other weapons, and the arrest with or without warrant of any person who has escaped from such detention or isolation;

(ix) the establishment of isolation hospitals and the removal and isolation of persons who are or are suspected to be suffering from any such disease, the accommodation, classification, care and control of such persons and their detention until discharged by due authority as recovered and free from infection, and the establishment, management and control of convalescent homes or similar institutions for the accommodation of persons who have recovered from any such dis-ease;

(x) the provision of disinfecting plant and equipment, and the disinfection or where disinfection is impossible, the destruction of any article or thing, or the disinfection of any premises which are or are believed to be contaminated with the infection of such disease;

(xi) the inspection of premises and articles and the discovery and remedying of sanitary or other defects likely to favour the spread or render difficult the eradication of such disease;

xii) and such other matters as the Minister may deem necessary for preventing the occurrence of such disease or limiting or preventing the spread thereof or for its eradication and generally for the better carrying out and attaining the objects and purposes of this Part.”

[25] On 23 March 2020 and in response to the pandemic, a state of disaster was declared in terms of S.I 79/20. The first respondent enacted the Public Health (COVID -19 Prevention , Containment and Treatment) Regulations 2020, published in S.I 77/20 in terms of s68 of the Public Health Act, [*Chapter 15:17*], hereinafter referred to as the Act. He declared COVID -19 as a formidable epidemic disease in terms of s 3(1). In s 6(1) he introduced compulsory testing, detention of any person infected with Covid -19, the mandatory quarantine of any person confirmed with Covid -19 and prohibition of public gatherings during the time the declaration is in force.

[26] On 29 March 2020, the first respondent promulgated the Public Health Covid -19 Prevention, Containment, and Treatment) (National Lockdown) Order, Statutory Instrument 83 of 2020 providing for a national lockdown and prohibition of all gatherings. Movement of all citizens was restricted in order to minimize transmission of the virus. Every individual except those employed in essential services were confined to their homes with permission to leave only in order to buy basic necessities, medicines and medical assistance. A 21 day lockdown from 30 March 2020 to 19 April 2020 was announced. Having reviewed the position on the ground on 19 April 2020, it was announced that the lockdown would continue for a further 14 days from 20 April 2020 to 3 May 2020 under S.I 93/20 and later to 17 May under S.I 94/20.

[27] The Public Health (COVID -19 Prevention Containment and Treatment) (Amendment) Regulations, S.I 98/2020 were published and declared the COVID -19 as a formidable epidemic disease and extended the lockdown until 1st of January 2021.

[28] This was followed by the Public Health (COVID -19 Prevention Containment and Treatment) (National Lockdown) (Amendment) Order, 2020 (No 5), published under S.I 99 of 2020 on 2 May 2020. This statutory instrument was made in terms of s 8 of S.I 77/2020. The regulations introduced the changes which are the subject of these proceedings.

Did the First respondent sub delegate his powers?

[29] Regulations stem from delegated power. It is trite law that regulations can only be promulgated when an executive or local authority has been given statutory power to do so by constitutions and parliamentary Acts. Delegated legislation is flexible and any developments or limitations experienced in the practice of the delegated legislation may be cured by amendments.

[30] A person or authority who has been given statutory power to make delegated legislation cannot sub delegate his powers to make legislation to another person or administrative authority without express or implied authority, see *R v Burah* (1873) 3 App Cas 889, where the court remarked as follows;

“When parliament delegates legislative powers, those powers cannot without express authorization from parliament be passed on.... to some other body or person”.

[31] This principle is explained by the latin maxim *delegatus non potest delegare*. The principle prohibits sub delegation of delegated power without authority to do so. Sub delegated legislation is *ultra vires* the enabling Act where it is promulgated without authority and is invalid.

[32] Statutory Instrument 77/20 stipulates as follows in s 8(1);

“8. (1) In pursuance of the object of these regulations the Minister may (in consultation with the President, and in conformity with any other directions the President may give) by orders published in the Gazette-

(a) impose restrictions.....”

The provision goes on to outline the nature of the restrictions that may be imposed. The provision allows the Minister to consult the President and for the President to give directives over the regulations.

[33] Reference to consultation with the President of Zimbabwe does not suggest that the President makes the regulations nor that he makes the regulations together with the first respondent. All things being, one would expect a minister who has been delegated power to make regulations and come up with regulations of this nature, to consult the President of the country regarding the content of the regulations. To consult cannot be to sub delegate nor does consultation entail the making of a thing. There is nowhere in the regulations where the first respondent expressly or impliedly sub delegated his powers to make regulations to the President. There is no evidence of sub delegation of the legislative power reposed on the first respondent.

[34] The fact that the first respondent may have consulted the sixth respondent is neither here nor there. The regulations simply recognize the need to consult the President but the

individual who makes the regulations remains the responsible Minister. Section 8 (1) of S.I 77/20 does not vest the power to make regulations in the President and is not *ultra vires* s 134 of the Constitution and s 68 of the Public Health Act. There was no sub delegation of the power conferred upon the first respondent in terms of the Public Health Act. The court opines that the regulations do not become irregular on this basis.

[35] Section 68 does not confine the first respondent to one set of regulations. It enables him to make all such regulations as he deems fit depending on the situation he wishes to address. No law bars him from amending previous regulations. The first respondent's regulations are regular.

International Rights jurisprudence

[36] A number of international human rights treaties to which Zimbabwe is a party deal with the right to health. Article 16 (2) of the African Charter places responsibility on State parties to;

“take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.”

[37] Article 12 of the International Covenant on Economic Social and Cultural Rights obliges governments to take effective steps for the “prevention, treatment and control epidemic, endemic, occupational and other diseases”.

[38] The Government has an obligation to ensure the realization of the right to health for its citizens. It must ensure that its public health response to epidemics meets the human rights standards required. A margin (of appreciation) is accorded to authorities which permits them to interfere with the rights of citizens to enable their proper functioning. According to the UN International Covenant on Civil and Political Rights (ICCPR), the measures taken to restrict freedom of movement in a pandemic must be lawful, necessary and proportionate to the legitimate aim.

[39] International rights jurisprudence has laid out a step by step test to establish whether a litigant's rights have been infringed. A court dealing with a case of violation of rights must first determine if the right alleged to have been violated exists at law. If the right exists, it must proceed and determine if there was any interference with the right. If the court finds that there has not been any interference with the right, the matter ends there.

[40] Where there has been some interference with the human rights of a citizen, the court must consider the conduct complained of and determine if it impacted on an individual's rights by preventing him from enjoying the right prescribed at law. The court must consider whether the interference is prescribed at law and carried out in accordance with the law. The measures taken must be based on scientific evidence and be not be arbitrary nor discriminatory in application. The court must enquire if the measures taken pursue a legitimate aim. The interference must be necessary in a democratic society to achieve the objective. If the interference is not prescribed at law, the complainant is entitled to a remedy. This approach was followed in *Khauyeza v The Trial Officer and Anor* HH 311/16.

[42] These guidelines take into account the *Siracusa Principles on the Limitation and Derogation of provisions in the ICCPR*. The principles lay down guidelines adopted by the UN Economic and Social Council, 1984.

Limitations on rights

[43] The enjoyment of a human right is not absolute, and may be limited by issues of security, public health, public interest or the need for discipline. Limitations enable governments to effectively carry out their functions. The *Siracusa Principles* give guidance on interpretation of the ICCPR on how restrictions on limitations imposed on human rights to protect public health in public emergencies that threaten the life of a country should be implemented.

[44] The Siracusa principles accept that;

“Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.”

This principle emphasizes the point that public health suffices as a ground for limiting a person's rights in the face of a serious threat to public health. However, the measures taken must have as their legitimate aim the prevention of disease.

[45] The guidelines state that no limitation on a right recognized by the ICCPR shall be discriminatory. Any limitation must be provided for by law and must be necessary and based on grounds justifying limitations, respond to a pressing public or social need, pursue a legitimate aim, and be proportional to that aim. States should use no more restrictive means

than are required for the achievement of the purpose of the limitation. Every limitation imposed shall be subject to the possibility of a challenge and a remedy against its abusive application. No limitation should be applied in an arbitrary manner and must be subject to review

[46] The guiding principles on limitations have been discussed and applied in numerous human rights cases. In *African Commission on Human and People's rights v Republic of Kenya*, Applic 006/12 the court emphasized that the enjoyment of a right may be limited where such a restriction is legitimate, in the public interest, is proportionate and necessary, see. In the case of *Gambia 2000 AHRLR (ACHPR 2000)*, the court held that limitations placed on the enjoyment of rights must not make the right illusory.

[47] Section 86 of the Constitution provides for limitation of rights and freedoms in general. Section 87 of the Constitution allows for limitations to the enjoyment of rights during public emergencies. The fundamental rights and freedoms provided for must be exercised reasonably and with due regard for the rights and freedoms of other persons.

[48] In terms of these provisions, the rights are 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 such as ;

“(a) the nature of the right or freedom concerned;

(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;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;

(e) the relationship between the limitation and its purpose, in particular whether it imposes greater re-strictions on the right or freedom concerned than are necessary to achieve its purpose; and

(f) whether there are any less restrictive means of achieving the purpose of the limitation.”

[49] The rights allegedly violated do indeed exist at law as they are provided for in our Constitution. I agree with the applicants that the stay at home restrictions put in place by the regulations have the effect of limiting public gatherings and commercial activity by the informal and transport sector. The applicants are not able to move freely and conduct their business. The applicants have been restricted from operating in a bid to control the spread of

the COVID-19. The regulations have the effect of restricting the enjoyment of the rights complained of. There has been interference with the constitutional rights of the applicant's members.

[50] Section 68 grants powers to the Minister during formidable epidemic diseases and conditions and events which are of public health concern to impose and enforce a quarantine and the regulation and restriction of public traffic and of the movements of persons, and other restrictions listed in the section among other matters as the Minister may deem necessary for preventing the occurrence of such disease or limiting or preventing the spread thereof or for its eradication and generally for the better carrying out and attaining the objects and purposes of the Act. Section 68 empowers the Minister to make regulations on, "such other matters as the Minister may deem necessary for preventing the occurrence of such disease or limiting or preventing the spread thereof or for its eradication and generally for the better carrying out and attaining the objects and purposes of this Part". The section is wide and gives the first respondent the power to open or close businesses.

[51] The restrictions were employed to facilitate the government's response to the disease. Only essential services are operational. If people are restricted to their homes, the rate of infection will be controlled and the burden on our already overburdened health delivery system lessened.

[52] The limitations are provided for by law. The restrictions imposed by the regulations on the enjoyment of the rights of the applicants are permitted by the Constitution. This is a public health emergency where enjoyment of rights is limited. The limitations are compatible with the objects and purposes of protecting public health. The court has considered that the limitations have no effect of completely taking away the enjoyment of these rights. There is a health disaster at hand. The limitations are necessary and serve to respond to a pressing public and health need and hence pursue a legitimate aim.

[53] The burden is on an applicant in a matter such as this to show that he has been treated unequally, unfairly and in a discriminatory fashion. Once he has so proved, the burden shifts onto the State to justify the discrimination. The courts have recognized that there can be "objective justification for discrimination", see *Glass v UK European Court of Human Rights*, 9 March 2004. The reasons advanced by the State for the discrimination have to be

justified. The reason for the limitation must be proportionate and must be for the purposes of pursuing a legitimate aim.

[54] The informal sector poses a risk in the spreading of the COVID -19. The intervention by the government in ordering that the sectors remain under lockdown for the time being is likely to reduce the risk of the spread of the virus. Re-opening the informal sector at this stage may have the effect of fueling the spread of the disease. It will be difficult to monitor the lockdown rules in the informal sector as opposed to the formal sector.

[55] There is no discrimination against the omnibus operators and other ordinary buses as they are not barred from operating their buses. The commuter omnibus operators have been called upon to engage and operate under the umbrella of ZUPCO. The strategy is to be to ensure social distancing rules and other requirements of the lockdown rules are enforced and monitored. The respondents expressed a difficulty in enforcing lockdown rules in the informal sector. The first respondent has considered that it is easy to do social distancing in a bus than a commuter omnibus. Some operators have heeded the call. The court takes judicial notice of the fact that there is sizable number of commuter omnibuses and other ordinary buses labelled ZUPCO that are operating under the banner of ZUPCO. The restriction that applies to the informal and transport sectors seeks to achieve a legitimate aim. The applicants' members have chosen not to comply with the requirement that they operate under strict monitoring. Even assuming that the court is not correct that there is no discrimination, the restrictions imposed pursue a legitimate purpose of curbing a pandemic.

[55] The limitations imposed on all the rights of the applicants are proportionate to the aim sought to be achieved. The limitations imposed are necessary in the interests of public safety, public order, public morality, public health and the general public interest. Government is entitled in terms of the Public Health Act to make regulations for lockdown and restriction of movement of people. The enjoyment of rights and freedoms by the applicants will impact negatively and prejudice the rights and freedoms of other citizens as the relaxation of the restrictions will fuel the disease. There is a need to balance the applicants' entitlement and responsibility of Government in terms of the Public Health Act and the constitutional liberties provided for in the Constitution.

[56] The measures taken by the government are rational measures to achieve the desired purpose. They serve to protect the rights of every citizen to life, dignity and a safe

environment. The limitations have no effect of completely taking away the enjoyment of these rights. The restrictions on applicants' rights become lawful because they are imposed for legitimate purposes. It is necessary that these rights be enjoyed restrictively during lockdown.

[57] The COVID -19 constitutes a serious public threat. It poses a threat to mankind. The limitation on rights is necessary and reasonable for the containment of the Covid -19 pandemic given the magnitude of the disease. It is necessary that these rights be enjoyed restrictively during the lockdown.

[58] Government has the responsibility to put in place measures to contain the Covid -19 pandemic which goal is legitimate. The appearance is that Zimbabwe may be entering a second wave of the pandemic as the infections are on the increase. The respondents have an obligation to plan for the epidemic and should be afforded the opportunity to do so without interference. It is not the business of the court to interfere with government policy. The Government has the right to govern. It must be afforded an opportunity to govern and plan for the epidemic and put in place adequate measures for the containment of the disease.

[59] If the informal and transport sector are reopened, to allow the operation of registered transporters to ferry passengers and the informal sector to reopen their businesses when the respondents have no capacity to monitor their activities, the development will fuel the pandemic. The restrictions are necessary in a democratic society to protect the health of all citizens. The restrictions in place are not arbitrary or discriminatory in their application and are subject to review. The measures put in place are proportionate to the good that the respondents seek to achieve. There is no other lesser alternative effective remedy that is less restrictive to achieve the same objective. The interference is commensurate with the threat posed.

[60] I must conclude that the Covid -19 is a deadly pandemic and is not an ordinary flu pandemic. It calls for drastic measures. If the economy is reopened in a rush and without proper considerations, the spread of the disease is likely to be accelerated. It would be irresponsible of the court to accede to the request of the applicants at this juncture, when one considers that the pandemic rages on. Without any no know how on how to fight the disease with no cure and vaccine in sight, the consequences of such an approach would be disastrous.

[61] The applicants are not taking this epidemic seriously. They have tried to downplay the severity of the pandemic. If this disease is going to be defeated, that will only happen with the cooperation of everyone concerned, and that must happen despite all odds. People must be united in order to fight this scourge. We must all be part of the solution. Sentiments of *Abhijit Nasker* an international bestselling author of a number of books, are pertinent. He has said ;

“The holy trinity of tackling a crisis is unity, faith and sacrifice. We must stay united as humans above all else, we must have faith in ourselves and in each other and we must sacrifice our self-obsession”

[62] The restrictions imposed by the Government are rational, reasonable and justifiable in the circumstances. No just cause has been shown for the relief sought. The applicants have not shown an entitlement to the interim order sought.

Accordingly,

The application is dismissed.

No order as to costs

Tendai Biti Law, applicant’s legal practitioners

Civil Division of the Attorney General’s Office, respondents’ legal practitioners