

COMBINED HARARE RESIDENTS ASSOCIATION
and
PASSENGER ASSOCIATION OF ZIMBABWE
versus
THE MINISTER OF HEALTH AND CHILD CARE N.O
and
THE MINISTER OF TRANSPORT, COMMUNICATIONS &
INFRASTRUCTURE DEVELOPMENT N.O
and
THE MINISTER OF LOCAL GOVERNMENT PUBLIC WORKS
& NATIONAL HOUSING N.O
and
THE ZIMBABWE UNITED PASSENGER COMPANY LTD

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 5, 6, 13 and 18 August 2020, 4 September & 14 October 2020

**Urgent Chamber Application for Declaration of Rights in terms of s 85 of the
Constitution for an order of invalidity of s 4 (2) of S.I 83/20**

C Damiso, for the applicant
T Shumba, for the 1st, 2nd & 3rd respondents
C Kwirira, for the 4th respondent

CHITAPI J: The first applicant is Combined Harare Residents Association. It describes itself as a common law universitas created by and governed by its constitution. The main objective of the first applicant is that it is a public interest group that seeks to promote and protect the rights and interests of Harare residents in several spheres of their lives for their good. The second applicant is described as Passenger Association of Zimbabwe (PAZ) “a voluntary organisation of commuters with a membership of 4000 members.” Nothing further was pleaded about the legal standing and objectives of the second applicant. In regard to *locus standi*, only the first applicant in para 27 of the founding affidavit pleaded its *locus standi* in terms of s 85 (1) of the constitution to bring this application in the public interest of its members.

The draft provisional order filed by the applicants read as follows

“TERMS OF FINAL ORDER SOUGHT

That you show cause why a final order should not be made in the following terms:

1. The Provisional Order be and is hereby confirmed

2. Section 4 (2) of the Public Health, (COVID-19 Prevention Containment and Treatment) National Lockdown Order, 2020 Statutory Instrument 83/2020 is hereby declared to be an affront of the applicant's right to life protected under s 48 of the Constitution and the right to health provided under s 76 of the Constitution and therefore null and void.
3. Pending confirmation of the declaration of invalidity by the Constitutional Court, the terms of the interim relief shall remain in force.
4. Respondents shall jointly and severally the other one to be absolved bear the costs of suit.

INTERIM RELIEF SOUGHT

Pending confirmation or discharge of this provisional order, the applicant is granted the following interim relief:

5. The operation of s 42 (2) of the Public Health, (COVID-19 Prevention, Containment and Treatment) National Lockdown Order, 2020 Statutory Instrument 83/2020 is hereby suspended
6. The 1st, 2nd, 3rd respondents shall within 3 working days of the issue of this order invite other providers of public transport to offer services subject to conditions imposed by the 1st respondent to implement the rules and protocols on social distancing and sanitation.
7. 1st and 3rd respondents shall monitor the implementation of the safety guidelines on the services operated by the 4th respondent and any other operator permitted to offer public transport services during the lockdown.”

A preliminary issue had to be disposed of. The issue was concerned with the *locus standi* of the applicants to bring this application. It was not clear what the juridical status of the applicants was because no allegation on the legal status of the applicants was pleaded. Counsel agreed that the applicants would provide their constitutions to prove their *locus standi*. I then made an order that copies of the constitutions of the applicants should be filed of record before or at the resumed hearing. The copies of the constitutions were subsequently filed. Both applicants enjoy juristic standing in terms of their constitutions. It is trite that in any proceedings to be instituted by a juristic *persona*, the *locus standi* of the juristic person to sue and be sued should be pleaded and the basis for such *locus standi* must similarly be pleaded. The position is otherwise different where natural persons are concerned because *locus standi* exists when the party instituting proceedings has a direct and substantial interest in the subject matter of the litigation and the outcome see *Ndhlovu v Marufu* HH480/15. Having determined the applicants' competence to bring this application, I deal with the description of the respondents. The first respondent is the Minister of Health and Child Care sued in his official capacity and administers the Public Health Act, [Chapter 15:09]. The first respondent is the one who passed the Public Health (Covid-19 Prevention Containment and Treatment) National Lockdown Order 2020, Statutory Instrument 83/20, published on 28 March 2020. The Statutory Instrument aforesaid is under focus in this application with applicants challenging the constitutionality of sections of the Statutory Instrument.

The second respondent has been described as the Minister of Transport responsible for all matters pertaining to public transport and is insurer of permits and licences for transport operations in Zimbabwe. In fact, the correct citation for the second respondent is that he is the Minister of Transport and Infrastructural Development not just Transport.

The third respondent has been described as the Minister of Local Government, Public Works and National Housing and as the Minister responsible for local government issues. I assume that the third respondent was cited *ex-abundanta cautela* because no relief is sought from him. The third respondent's correct description is Minister of Local Government and Public Works. It is quite surprising that the applicants and the applicants' legal practitioners do not know the correct names of government ministries most probably including the names of Ministers who lead the various ministries. It is also a serious indictment on the level of competency of some legal practitioners to properly prepare court proceedings. The errant legal practitioners who prepared the applicants' papers should learn to be astute and pay attention to detail. Information on Ministers and Ministries which they lead is accessible from the Hansard.

The applicants' case from the founding affidavit is that they make application in terms of s 85 (1) of the Constitution. The applicants do not point to the specific provision of s 85 (1) which they rely upon. In para 29 of the founding affidavit, the deponent to the founding affidavit states—

“29. The fundamental rights of the members of the applicant have been or are likely to be infringed by the conduct of the respondents as detailed below and this application is all about seeking appropriate relief from this honourable court as contemplated in the said s 85 (1).”

The applicants aver as is common cause that the world is reeling from the effects of the global pandemic known COVID-19. The World Health Organisation declared COVID-19 a global pandemic on 11 March 2020. It is also common cause that COVID-19 is highly contagious and has devastated societies globally and there is as yet no cure. The best that the world has resolved to do whilst the scientists work on finding a vaccine and cure for COVID-19 is to arrest or slow its spread. Various measures have been put in place such as social distancing, self-isolation, hygiene and national lockdowns. The key here is for people to adopt measure which insulate them from infecting one another and others. The measures are intended to avoid, minimize and reduce chances of exposure to infection.

The applicants aver that on 27 March 2020, His Excellency The President declared a national lockdown following a cue from other countries. The lockdown was for an initial 21

days and only certain categories of people and certain types of enterprises and businesses were excluded from lockdown. The applicants aver as it is common cause that the Presidential Proclamation was followed on 28 March 2020 by the passing of a statutory instrument made in terms of the Public Health Act. The statutory instrument again as it is common cause is the Public Health (COVID-19 Prevention, Containment and Treatment) National Lockdown Order, 2020 S.I 83/2020. The applicants have taken issue with s 4 (2) of the regulation which s they consider to be, if I may use the wording they have used in the draft of the final order sought as per the draft provisional order—

“... and affront of the applicants’ right to life protected under 48 of the of the Constitution and the right to health under s 76 of the Constitution and therefore null and void.”

There is again confusion in the applicant’s papers in that whilst the founding affidavit of the first applicant specifies that the applicants’ issue is with s 4 (2) (a) of the statutory instrument as to its constitutionality, the draft provisional order filed with the application prays for a declaration of the whole of s 4 (2) of the statutory instrument as null and void on the return date. In the interim relief, the provisional order seeks an order suspending the operation of the whole of s 4 (2) and consequential relief. It is common cause that s (4) subsection (2) of the Statutory Instrument also contain paras (a) to (c) and if s 4 (2) as aforesaid were to be declared null and void on the return date and suspended in the interim, the whole of s 4 subsection 2 would be rendered nugatory. Where there is a conflict between the founding affidavit and the draft order, whether the draft is in an urgent or ordinary application, the court relies on the founding affidavit because the affidavit acts as both the pleadings and the evidence. See *Nashe Family Trust v Chiwara & Ors* HH 476/18 and *Bushu v GMB* HH 326/17.

A draft order is not binding on the court or judge. In urgent applications, r 246 (2) of the High Court Rules provides that, where a *prima facie* case is established upon a consideration of the application, the judge shall grant the provisional order on the terms prayed for by the applicant or as varied. The draft order is just a draft that gives indication on what the applicant desires. The appropriate order to grant is a function of the judge to formulate and issue. It is however, apposite to emphasize that when counsel prepare draft orders they should be meticulous in doing so. It is after all, the order sought, which informs the decision to litigate.

Section 4 (2) (a) of the Statutory Instruments provides as follows—

- “2 Transport services whether intracity or intercity, for the carriage of passengers shall be restricted to those provided by—
(a) the parastatal company known as the Zimbabwe United Passenger Company (ZUPCO).”

The purport of the section is to grant a monopoly to ZUPCO to provide public transport services during lockdown or for the period of operation of the statutory instrument. Although the applicants do not advert to this common cause position, the ZUPCO monopoly has since been relaxed to allow the participation of other transport providers provided however, that they do so under the auspices of ZUPCO. The idea of allowing them to operate under the ZUPCO umbrella is to ensure order and for only registered and certified public transport vehicles to be allowed on the roads. Requiring the vehicles to operate under ZUPCO is meant to ensure that COVID regulations are observed rather than allow for a free for all.

The applicants’ cause to seek the declaration of nullity of s 4 (2) (a) aforesaid arises from the following facts as averred by them. They aver that following the relaxation of the regulations on 4 May 2020,

“... it has been observed that (sic) number of people moving around in violation of the lockdown rules have increased. This has seen an increase in the volume of commuters and with that a concomitant increase in the demand for for public transport”

In para(s) 40 and 41 of the founding affidavit, the deponent stated as follows:

- “40. The fourth respondent has not been able to cope with the demand. Results of fourth respondent’s failure to cope are:
- (a) The ever lengthening queues at bus termini across the country. Commuters are spending inordinate amounts of time waiting for transport in situations where the rules on social distancing are not consistently observed.
 - (b) Failure to observe the seating arrangements for optional social distancing.
41. It is clear that while the original intention behind limiting public transport services to those provided by the fourth respondent was to curb the spread of the corona virus by ensuring that these services would be provided only by a service provider who was deemed most likely to enforce the sanitary rules, this measure has backfired and the consequences of not revising this position as a matter of urgency can be devastating.”

The applicants aver that after receiving complaints from their members, they wrote a letter to the fourth respondent ZUPCO bringing to its attention instances of the fourth respondent’s failure to comply with COVID-19 guidelines and health protocols on its buses. The contents of the letter dated 30 June, 2020 were as follows:

“The combined Residents Association (PAZ) would like to bring to your attention that public transportation (buses and kombis) has become a potential area of risking residents of contracting or spreading the COVID-19 due to the following reasons:

- (1) The introduction of occupation of all seats by passengers in buses and your kombis carrying 17 passengers flouting the 1 metre physical guideline with some buses carrying standing passengers.
- (2) Overcrowding of passengers at bus termini due to shortage or unavailability of buses or kombis.
- (3) Non disinfection of buses and kombis soon after completing trips.

In terms of respecting the right to health and the right to life we call upon you to take necessary measures in addressing the issues alluded above. We also call upon you to be consistent in the provision of buses following time tables and increase the fleet of your buses since you are operating as a monopoly.

We await to hear your response on steps you intend to take in order to address issues we raised above in reasonable time.”

The fourth respondent responded to the letter on 6 July 2020 as follows:

“Reference is made to your letter dated 30 June, 2020 where you highlighted potential areas of risk regarding the spread of COVID-19 as a result of using public transportation.

1. Occupation of all seats by passengers and omnibuses

The introduction of occupation on all seats in buses and omnibuses from the previously used social distance of one metre was as a result of the need to increase capacity to carry our travelling passengers. However, over buses are carrying seated passengers only, they are no standing passengers at all. Each bus has been equipped with a thermometer and hand sanitizer to enable the screening of high temperature cases and sanitization of hands before entry into our buses and omnibuses.

2. Overcrowding of Passengers at Bus Termini

We take note of your point and we will add more buses and omnibuses to ensure that there is no overcrowding at the bus termini.

3. Non-Disinfection of Buses and Omnibuses

We would like to notify you that our buses are actually disinfected twice a day. Before deployment in the morning as well as in the afternoon when they come for re-fuelling.

We thank you very much for your contribution towards the noble cause of providing safe and affordable transport to the travelling public in Zimbabwe.”

It will be apparent from the exchange of correspondence as quoted above that the applicant’s concerns were directed at the shortcomings of the fourth respondent in the discharge of its mandate given in s 4 (2) (a) of S.I 83/2020.

In para 43 of the founding affidavit, the applicants averred that the fourth respondent had not lived to its promise in that it did not increase the number of buses and omnibuses to

avoid overcrowding. The situation thus remained unabated. In para 44 of the founding affidavit, the following is stated:

- “44. Although in its letter fourth respondent insists that it is complying with all the other COVID-19 guidelines, and protocols aboard its buses, this is disputed by the commuters and they have deposed supporting affidavits which narrate the ordeals they are facing daily.”

In regard to supporting affidavits referred to in the founding affidavit, there is one by Roda Ben who stays in Glen Norah A. high density suburb of Harare. She deposed that there are insufficient buses serving Glen Norah A and to use her words ...” ... passengers end up crowding at the bus terminuses waiting for the unreliable ZUPCO buses. There are very few buses leaving women having to push with vigor in order to gain access into the bus.”

The deponent further averred that the shortage of busses had resulted in the emergence of illegal transport operators who do not comply with COVID 19 guidelines hence, exposing the travelling public to risk infection with the COVID 19 virus. She also complained that there are no temperature checks nor sanitization done as one boards the bus. She further bemoaned that being a woman, the awkward times (which she did not state) that she boards the bus, exposed her to ‘sexual violence, nagging and gender based violence in the home’ (own underlining. I should comment that the supporting affidavit is so generalized as not to be capable of acting as evidence of the experience that the deponent commuter experienced. The affidavit contains theory on risks which can befall any commuter even where guidelines are not implemented. I was not able to appreciate what her specific experience was, where and when. She does not even place herself in the category of an essential service worker who should be commuting. Again the filing of the generalized affidavit speaks to the ineptitude of the applicants’ legal practitioner in failing to ensure that the supporting affidavit achieves the intended purpose.

Paragraphs 7 and 8 of the supporting affidavits needs restating. The deponent deposed as follows:

- “7. It is my plea that the government of Zimbabwe take action in ensuring that ZUPCO fully follows the COVID-19 Guidelines and Protocols such as the compulsory wearing of masks in the bus and maintaining physical distancing as people in the bus by reducing the number of passengers being carried.
8. Moreover, ZUPCO must provide more buses that ferry residents to Glen Norah A, the ZUPCO personnel should have thermometers for checking temperature to minimize the spread of COVID-19.”

It is apposite to note that the deponent to the supporting affidavit did not advocate for the suspension of the operation of s 4 (2)(a) of S.I. in the interim nor its striking down as unconstitutional on the return date. The deponent simply bemoans the scarcity of buses and the non-observance of COVID-19 guidelines by the fourth respondent. Her plea is that the government should take steps to ensure that there is compliance by fourth respondent with COVID-19 guidelines and protocols so that the spread of the virus is minimized. To this extent therefore, the supporting affidavit does not support the part of the relief which seeks a suspension of the operation of s 4 (2)(a) of S.I 83/20.

Another supporting affidavit was deposed to by David Sibanda who resides in Kambuzuma Section 2, High density suburb, Harare. Again, the deponent does not place himself within the class of people who are exempted from staying at home during lockdown because the S.I 83/20 excuses essential services and employees and other persons concerned therewith from staying at home. He averred that there is one ZUPCO has which services ss 1 and 2, Kambuzuma. He deposed that two other buses that ply the same route will be from Joshua Nqabuko area. He complained that the buses are very few and cannot cope with “people in need of transport in Kambuzuma considering that Kambuzuma has an estimated population of 15000 people. The deponent further alluded to congestion of commuters at bus termini especially at Seke ZUPCO rank hence increasing the spread COVID 19 virus. Further he deposed to the failure by ZUPCO to check commuters for temperatures and to provide sanitization. The deponent also pointed out to the failure by ZUPCO to ensure safe spacing of passengers on the buses. Again the affidavit is too generalized. I make the same comments I did in regard to the supporting affidavit of Roda Ben as regards the inadequacy of the affidavit.

Notwithstanding the inadequacy of the supporting affidavit of David Sibanda as aforesaid, I took note of para 7 of the affidavit wherein the deponent deposed as follows:

“7. I call upon the government to ensure that ZUPCO complies to social distancing guidelines in the sitting arrangement in the buses and provide more buses to Kambuzuma in order to decongest bus terminuses.”

I again make the same observations and comment I made in regard to the supporting affidavit of Roda Ben that the deponent does not move for the suspension of the operation of s 4 (2) (a) of S.I 83/2020 nor its striking off as invalid on the return date. The supporting affidavit advocates for government intervention to ensure that the COVID-19 guidelines and protocols are observed as well as to ensure the provisions of more buses to service the Kambuzuma route.

Everyjoy Kuvarega deposed to a supporting affidavit. She stays in Eastview 2 Kambuzuma. Again she does not categorize herself as a person authorised to commute into the City or whether she is in the essential services. She makes a general complaint on the inadequacy of ZUPCO buses which leads to crowding at bus termini and her being squeezed and shoved by male commuters upon the arrival of a bus. The deponent would be violated of her right to dignity by the squeezing and shoving aforesaid. She also complained that ZUPCO did not carry out temperature checks for buses who board the buses. Despite the generality of the supporting affidavit, paras 7 and 8 of the affidavit are apposite. They read as follows:

- “7. I plead with the government to take action in ensuring compliance to COVID-19 Guidelines and Protocols in ZUPCO buses in particular wearing of masks in the bus and maintenance of physical distancing arrangements by reducing the number of passengers being carried.
8. Furthermore, ZUPCO should allocate more buses to Caledonia and the conductors must have thermometers for temperature check in order to minimize the spread of COVID-19”

Edward Gramu stays in Mabvuku. He deposed to a supporting affidavit. He also complained in general terms as with the other deponents hereinbefore that ZUPCO buses are inadequate and no social distancing is observed. He also averred that hand sanitizers sometimes run out and ZUPCO bus conductors allow commuters to board the buses without hand sanitization having been done. Again despite the generalized nature of the affidavit, I took note of the intervention which he seeks which is neither the suspension of the operation of s 4 (2) (a) of S.I 83/2020 nor the declaration of its unconstitutionality on the return date. I restate paras 9 and 10 of the supporting affidavit as follows:

- “9. Whilst the ZUPCO buses were provided to help prevent the spread of COVID -19, the same buses have become potential hotspots for contraction and spread of COVID -19 due to factors mentioned above.
10. We therefore plead to the government to provide more buses; which will reduce length of queues, time spent in a queue as well as allow for passengers to practice social distancing in the bus by reducing number of people ferried at a time.”

The deponent does not therefore advocate for the suspension of the operation of s 4 (2) (a) in the interim and its striking it off the statute book as unconstitutional on the return date. The deponent pleads instead for government intervention to ensure compliance by the fourth respondent of COVID-19 guidelines and to also ensure increased bus numbers.

Lastly Alice Kasinamunda also deposed to a supporting affidavit. She resides in Dzivarasekwa. She did not state whether or not she is excluded from home lockdown or whether she is in essential services. She however deposed that she uses a ZUPCO bus daily.

She complained that the bus carries commuters to full capacity without observance of social distancing protocols. She also deposed that ZUPCO conductors do not sanitize every commuter awaiting to board a bus at the terminus. She complained of congestion at bus terminuses and no temperature checks. She stated as follows in paras 6, 7 and 8 of the supporting affidavit

- “6. Public transportation by ZUPCO in particular the buses has become a possible area of areas (sic) of contracting COVID-19 due to the issues raised above.
7. I plead with the ZUPCO to increase its bus fleet in order to cope with the high number of passengers in need of public transport since they are the sole provider of commuter public transportation
8. I further call upon the government of Zimbabwe to provide marshals to ensure enforcement of wearing masks at bus terminuses, while the ZUPCO conductor MUST regularly monitor wearing of masks in the buses.”

As already observed in regard to other supporting affidavits, the deponent to the affidavit in this case prays for interventionist measure to ensure observance with COVID guidelines and protocols and not for the staying of the operation of s 4 (2) (a) of S.I. 83/2020 nor the striking down of the provision as unconstitutional on the return date.

The applicants aver that contrary to the provisions of s 134 (b) of the constitution which provides that a statutory instrument must not infringe or limit the rights and freedoms set out in the declaration of rights, s 4 (2) (a) of S.I 83/2020 by limiting public transport services under the current circumstances and environment the effect thereof is to infringe some rights protected under the constitution. The rights which the applicants allege to have been infringed are firstly, the right to life which is protected by s 48 of the constitution. The second right allegedly violated is the right to health care.

In regard to the right to life the applicants averred that a failure by first respondent to implement measures prayed for would result in a failure to protect and promote the right to life of Harare residents. It was averred that the continued use of limited services offered by ZUPCO would in all probability lead to a failure to observe COVID-19 guidelines on disinfecting buses, hence, commuters would be at risk of contracting the COVID-19 virus, fall sick and lose their lives.

In regard to infringement of the right to health care the applicants averred that the right implied that health care services should meet criteria of accessibility, availability and of good quality. It was averred that with developed and technologically advanced countries like “USA, Italy and Spain” struggling with COVID-19, Zimbabwe’s “ailing” health care system could not cope if a fully blown epidemic hits Zimbabwe. It was thus reasoned that Zimbabwe

should concentrate on prevention rather than treatment. The argument was then that the transport system as described by the applicants had the effect of risking commuters to catch COVID 19 rather than to prevent possible infection. I agree that prevention is better than cure even for the named developed countries and in fact for any country. It is a matter of simple logic and common sense to reason that the best defence to any transmissible or communicable disease is to avoid exposure to possible infection.

The respondents have opposed the application. The first respondent being the Minister responsible for the administration of the Public Health Act and the authority that passed S I 83/20 averred as follows in para 38 of the opposing affidavit deposed by the Chief Director of Curative Services, Doctor Maxwell Mareza Hove, duly authorised:

“Applicants contend that section 4 (2) (a) of S.I 83/2020 restricts public transport services for commuters, other than public servants to those provided by the fourth respondent. This is denied because any transporter with suitable transport in terms of the law is allowed to obtain a ZUPCO franchise and provide public transport for commuters.”

The first respondent agreed that the relaxation of the regulations decreed on 4 May 2020 resulted in an increase in the volume of commuters and a concomitant increase in the demand for public transport. First respondent disagreed with the applicant’s contention that violators of COVID regulations had to be assisted by the state in regard to providing transport for them. I must observe that the COVID regulations order that persons not authorized under the regulations to move about during lockdown should stay at home. It is a criminal offence to break the COVID regulations. The government in my view can only control criminal elements by a more sustained presence to monitor the situation and control unnecessary movement and to arrest the violators. The first respondent averred further that the unlawful commuters needed to follow the rules of infection prevention and that this was the solution to containing the increased risk of contamination caused by increased commuters breaking COVID regulations. The first respondent also averred that the intention in limiting public transportation had not backfired contrary to the applicant’s assertions to that effect. The first respondent noted that His Excellency, The President had pronounced more restrictions which included the imposition of a 6 am – 6 pm curfew and other measures. The first respondent argued that the application had been overtaken by events because the tightening of lockdown regulations was intended to reduce the number of people who violated the lockdown regulations and caused unnecessary demands and caused a strain in public transport provision.

The first respondent submitted his conclusions on the application as follows as appears from paras 9 and 10 of the opposing affidavit:

- “9. The applicants are failing to understand that it is not s 4 (2) of statutory instrument 83/2020 that is in violation of the commuting public’s right to life but it is the people who are violating the lockdown rules and causing unnecessary increase in demand for transport. The solution is for the people to comply with lockdown regulations by staying at home and stop community spreading of the virus.
10. In the circumstances no good cause has been made for the Minister of Health and care to amend s 4 (2) (a) of statutory instrument 83/2020. The unlawful commuters should stay at home and stop spreading of the virus.”
- Child

The second respondent Minister Joel Biggie Matiza deposed to the opposing affidavit in person. He averred that his Ministry’s mandate was to issue operating licences for public transport operators who carry goods and passengers in terms of the provisions of the Road Motor Transportation Act [*Chapter 13:15*]. In addition to issuing permits as aforesaid, the Ministry had the mandate and authority to impound unroadworthy vehicles and to demand production of documents of authority to operate the public service vehicle. The Minister further averred that the enforcement of the COVID-19 regulations was a function of the first respondent through the police. The Minister averred that the applicants had failed to show cause why he had been cited inasmuch he has not committed any act which violated his legal mandates as determined and mandated by the laws in the acts and subsidiary legislation which he administers. The Minister’s position is clear. The court cannot sanction the Minister unless he has acted against the law. Equally the court cannot order that the Minister acts in a particular manner unless it is shown that the Minister was obliged to act in a certain manner and has not done so. No case was made by the applicants against the Minister as second respondent to warrant the court to issue any order against him. The interim relief sought that the second respondent should together with first and second respondent “invite other providers of public transport to offer services subject to conditions imposed by the first respondent to implement the rules and protocols on social distancing and sanitation” is vague and lacks legal grounding. In the first instance, there has to be a legal duty on the second respondent to invite public transporters to provide their services. Public administration is achieved through the rule of law. The applicants did not plead the legal basis for the second respondent to make invitations to public transporters to offer services, COVID-19 or no COVID-19. There is no doubt that the decision to cite the second respondent was ill-advised especially so as he was not cited as just an interested party but as a respondent against whom a specific order was sought, such order being incompetent to grant.

As regards the third respondent it filed an affidavit deposed to by its Minister, Mr July Moyo. The Minister averred that the Ministry had advised the fourth respondent as the legally mandated public transporter of commuters to increase its fleet to meet demand. The Minister averred that the fourth respondent had complied with the advice to increase its transport fleet. The Minister averred further that S.I 83/20 interpreted social distancing as keeping a metre or more apart from the next person. The duty to uphold the social distance rule is the responsibility of every citizen according to the Minister. At the same time, the minister averred that the fourth respondent only had to ensure that social distance was maintained on its buses. The fourth respondent was not an enforcement authority. The Minister also reiterated that a window had been opened for the interested public operators to operate under the auspices of the fourth respondent with government subsidizing fuel. The Minister also noted that the supporting affidavits filed did not indicate the number of passengers ferried by the fourth respondent.

The Minister bemoaned the fact that other operators had not registered with the fourth respondent. The need to register with fourth respondent would ensure that the number of buses would be increased for deployment as the need arise. More importantly the fourth respondent would ensure mandatory disinfection of the buses and kombis registered with it and the maintenance and monitoring of the buses and kombis for social distance compliance. The Minister also noted that S.I. 77/20 gave the first respondent power to come up with measures which the Minister deemed necessary to prevent, contain and treat COVID-19.

Lastly, the third respondent noted that efforts to implement measures to curb COVID-19 spread were in place like disinfection, insisting on wearing of face masks in buses and kombis and keeping social distance. The COVID-19 outbreak was according to the Minister, still a threat and it was logical to operationalize S.I 77/20 through passage of S.I. 83/20. In paragraph 17 of the opposing affidavit, the Minister deposed as follows:

“17. The decision to allow fourth respondent to be the only service provider was taken given the circumstances of the declaration of COVID -19 as a formidable epidemic disease in terms of section 3 of S.I 77/20. This decision was also in the public interest with regard to mitigation and control of the spread of COVID-19 taking into account that most kombi operators especially those that are not registered have a clear track record of not complying with the stipulated passenger lead and that compliance with the current 50% capacity loading would virtually render the non-subsidized private kombis non-viable.”

As regard the fourth respondent, Mr *Kwirira*, its legal practitioner indicated that the fourth respondent would abide the decision of the court.

An in depth analysis of the application and the parties' arguments show that the applicants are concerned with the continued in force of s 4 (2) (a) of S.I 83/20. Their grounds for seeking its declaration as unconstitutional are that its provisions infringe on the applicant's rights as protected in the Declaration of Rights under the Constitution. In particular, the applicants aver that the provisions aforesaid infringe the applicants' rights to life which right is protected under section 48 of the Constitution and the right to health care as provided in section 76 of the same Constitution. The above is the main relief to be sought for which interim relief suspending the provisions under attack is prayed for on an urgent basis.

On the merits, the applicants have not impugned the Constitutionality of s 4 (2) of S.I 83/20. By their own admission the applicants aver that the provisions of the section in their application have been overtaken by events in that the partial relaxations of the COVID-19 restrictions have seen an increase in the number of commuters thereby straining the fourth respondent's capacity to safely carry the commuters without exposing them to the risk of contracting COVID-19. The applicants in essence seeks that the court should strike out a valid law for expediency and further order the relevant Minister (first respondent) to invite other transport operators to offer services "subject to conditions imposed by the first respondent to implement the rules and protocols as social distancing and sanitation." I do not intend to debate the question regarding the powers of the court to order the legislature and executive to exercise their functions in relation to a particular law in a particular manner. This is so because the application can be and will be determined without the need to interrogate that issue of law.

For the purposes of the interim relief which I must determine, the applicant's papers must establish a *prima facie* case before the relief claimed can be granted as an interim order. The applicants did not establish such a *prima facie* case to warrant the relief claimed. Firstly, S.I. 83/20 and in particular s 4 (2) thereof are not unconstitutional. Indeed, s 4 (2) as alluded to by the third respondent, Minister July Moyo, rather than violate the applicants right to life and health actually protects the right to life and is in the public interest. It is accepted that the first respondent has authorized other public transporter to offer their services albeit under the fourth respondent's franchise for accountability and supervision of compliance with lock down regulations. I also agree with the Ministers deposition in the founding affidavit to the effect that were unregistered buses and kombis to operate, the right to life would in fact be under treat. In this respect I properly take judicial notice of the rowdy manner in which

kombis in particular operate without control. The drivers pick up passengers from anywhere and they drive dangerously whilst playing cat and mouse games with police and local authority traffic control officials seeking to clamp kombis haphazardly parked. It is noted that the applicants seek an order that the first, second and third respondents should invite other transport operators to operate on conditions imposed by the first respondent. This is what has been done. The other public operators have been invited to register with fourth respondent and operate under its auspices. For reasons discussed that there is need to keep a check on other transport operations, hence they should operate under ZUPCO. I therefore determine that the applicants are asking for interim relief which is already in place. The condition imposed that other operators may register with and operate under ZUPCO is eminently meritorious and reasonable.

The applicants have also sought an interim order that first and third respondents should monitor the implementation of safety guide lines on services operated by the fourth respondent and other operators who offer public transport services. S.I 83/20 as read with the principal

S.I 77/20 has the force of law and provides for criminal sanctions against violators of the lockdown regulations. The enforcement of Criminal Law is the responsibility of the Minister of Home Affairs and Culture as the Minister responsible for the administration of the Police Act. The applicants would have been advised to join the Home Affairs and Culture and the Commissioner of Police so that they make submission on the applicants' complainants which in essence are matters of a failure to enforce regulations which are otherwise in the public interest in content and aims.

In relation to suspending s 4 (2) of S.I 83/20, there are no reasonable grounds established to warrant the granting of such a drastic measure which amounts to a blatant interference with executive function. In this regard, the decision of the Supreme Court in *PF-ZAPU v Minister of Justice* 1985 (2) ZLR 305 (SC) come to mind. It was held in that case that the exercise of the executive prerogative was reviewable by the court. In this application however, the argument is not about reviewing an executive prerogative. The applicants are asking the court to strike out in the main and to suspend in the interim a valid law on the basis that the law has ceased to serve its purpose. The court does not have jurisdiction to suspend the operation of a law on the basis that a person perceives it as being inadequate to serve the intended purpose. The judiciary cannot legislate for the executive unless there is a lacuna in the law to deal with a specific problem which existing laws do not cater for. The court can

strike out an ultra vires or inconsistent law with the constitution to the extent of the inconsistency. The court cannot amend or suspend the operation of a valid law. See *Registrar General of Elections v Combine Harare Residents Association and Samudzimu* SC 7/02.

In casu, s 4 (2) of S.I 82/20 is neither ultra vires the Constitution nor inconsistent with the same. There is nothing in its making which grounds any ground for review. The fact that it may not be effective to remedy a problem which has arisen does not clothe the court with power to set it aside or suspend its operation. I am doubtful as well that a court can suspend the operation of a valid legislation on a *prima facie* standard of proof. I do not find any merit in this application. Whilst the observations made by the deponents to the supporting affidavits of the applicants may be true, the same deponents are concerned with the need for strict enforcement of the social distance aspect of the COVID-19 guidelines and not the constitutionality or effectiveness of S.I. 83/20 itself. It can safely be stated that whilst the applicants advocate for striking down and a suspensions of the operation of s 4 (2) as aforesaid, the directly affected persons who deposed to affidavits explaining the situation on the ground do not find anything unconstitutional with the regulation at play. Further in all the circumstances of this case there has not been established a basis on a *prima facie* standard for the grant of the relief sought in the interim.

The issue of costs arising is the last issue for consideration. Having found no merit in the application and hence determined to dismiss it, it means that the applicants are the losers and the respondents the winners. The first, second and third respondents have prayed for an order of costs. The grant of costs and the level thereof is in the discretion of the court. In this case, the applicants have not abused the court process nor cited the three Ministers in vain. The Minister's attention has been drawn to some areas of transport operations which require to be tightened up and enforced with more strictness. COVID-19 epidemic is a life killer. It sends a shiver down the spine of the citizenry. It is better to remain astute, apprehensive and on guard to avoid or minimize the risk of infection. The court can easily understand the panic in the minds of the citizenry. I do not consider that a costs order is merited given the fact that the applicant's cause of action concerns an alleged constitutional rights infringement on a matter involving an epidemic which has affected the globe. This application though unsuccessful invites the executive to remain on its toes to check on COVID spread. The applicants did not abuse the court process.

Therefore, all having been said, the following order is made:

“That the application be and is hereby dismissed with no order as to costs.”

Women and Law in Southern Africa (WLSA), applicants' legal practitioners
Civil Division (Attorney General's Office), 1st – 3rd respondents' legal practitioners