BEATRICE MTETWA
and
VALERIE INGHAM THORPE
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
and
PARLIAMENT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 3 November and 21 December 2022

Opposed Application

Mr *B T Kazembe***,** for the applicants.
Ms *J T Shumba,* for the 1st and 2nd respondents.
Mr *S Hoko,* for the 3rd respondent.

DEME J: The applicants approached this court seeking an order compelling the first respondent to issue an exemption certificate in favour of Mr Jeremy Gauntlett in terms of s 7 of the Legal Practitioners Act [*Chapter 27:*07] (hereinafter called "the Legal Practitioners Act"). The order sought is expressed in the following way:

> "1. Within 7 days from the date of this order, the 1st respondent, Minister of Justice, Legal and Parliamentary Affairs be and is hereby ordered to grant a certificate of exemption to Mr Jeremy Gauntlett's SC QC, in terms of s 7 of the Legal Practitioners Act [*Chapter 27:07*] so that he may be registered as a legal practitioner of the honourable court of Zimbabwe for purposes of appearing in the matter of *Eric Taurai Matinenga* v *The President of the Republic of Zimbabwe and Parliament of Zimbabwe* - CC14/2021 and in any other related proceedings including interlocutory or criminal proceedings.
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> 2. The 1st respondent pays costs of suit."

I will firstly deal with the background of the matter. The applicants herein are co-applicants in the Constitutional Court's case of *Eric Matinenga and Others* v *The President of the Republic of Zimbabwe and Anor* filed under case number CCZ 14/21 (hereinafter called "the pending Constitutional Court case"). The first respondent has been cited in his official capacity as he is responsible for issuing exemption certificates provided for in terms

of s 7 of the Legal Practitioners Act. The second and third respondents are cited as the first and second respondents respectively in the pending Constitutional Court case. The applicants, in paragraph 12 of the Founding Affidavit filed in the present application averred that in the pending Constitutional Court case, they are seeking the following relief:

> "1. That the 2nd and 3rd respondents failed to fulfil constitutional obligations in passing Constitutional Amendment No 1 of 2017 and Constitutional Amendment No 2 of 2021 in breach of Section 167(2)(d) of the Constitution
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> 2. Constitutional Amendment No 1 of 2017 passed by Senate on the 6th of April 2017 and gazetted as law on the 7th of September 2017 and Constitutional Amendment No 2 of 2021 gazetted into law on the 7th of May 2021 be and are hereby set aside and be declared to be unconstitutional amendments on the basis that:
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> (a) they are a fundamental breach of the basic structure and principles of the Constitution founding values and principles of the Constitution contained in s 2 and 3 of the Constitution of Zimbabwe, and or;
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> (b) they breach the provisions of s 117(2) (b) of the Constitution of Zimbabwe.
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> 3. That in any event Constitutional Amendment No 1 of 2017, gazetted on the 7th of April 2017 be and is hereby declared a nullity for being in breach of S147 of the Constitution of Zimbabwe.
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> 4. That the part of the order in the judgment of the Constitutional Court in the matter of *Innocent Gonese and Another* v *The Parliament of Zimbabwe* judgment No CCZ 4/2020 extending the time in which the Senate could pass Constitutional Amendment No 1 be and is hereby set aside on the basis that it breaches Section 147 of the Constitution of Zimbabwe.
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> 5. That the 3rd respondent pays cost of suit."

The applicants, through their legal practitioners, wrote to the first respondent in February 2022 requesting for the granting of exemption certificate to Mr Gauntlett but the first respondent delayed to respond the request which prompted the applicants to approach this court on an urgent basis under case number HC 1602/22. Under this urgent chamber application, the first respondent was compelled to respond to the letter of the applicants. Numerous correspondences were thereafter exchanged between the applicants' legal practitioners and the first respondent. At one time, the first respondent demanded the authentication of the certificates of Mr Gauntlett and that such authentication must be executed by the country of origin of such certificates and by the respective institutions which issued such certificates. According to the applicants, the documents which they submitted to the first respondent for consideration were authenticated in terms of R 85 of the High Court Rules, 2021 and they, through their legal practitioners, advised the first respondent of this fact. The applicants later approached the court seeking an order highlighted before after further attempt to secure the exemption certificate proved unsuccessful.

According to the applicants, the main basis for the present application is an attempt to uphold the right to fair trial established in terms of s 69 of the Constitution of Zimbabwe which confers, on every citizen, the right to a legal practitioner of one's own choice. Further, the applicants argue that by refusing to grant the exemption certificate to Mr. Gauntlett, their right to choose their legal practitioner is violated by the acts of the first respondent.

The application was opposed by the first and second respondents who alleged that Mr Gauntlett is not from a reciprocating country as contemplated by s 7 of the Legal Practitioners Act. More particularly, s 7(1), of the Legal Practitioners Act, which is relevant for this purpose, provides as follows:

> "(1) Where the Minister, after consultation with Council for Legal Education, is satisfied that, having regard to the importance, complexity or special circumstances of the matter, it is just and reasonable for a person to obtain the services of a legal practitioner who has special or particular experience relating to such matter and that such legal practitioner is not normally resident in Zimbabwe but is from a reciprocating country, he may grant a certificate exempting the legal practitioner concerned from satisfying the requirement of subparagraph (iii) of paragraph (a) of subsection (1) of section five of being normally resident in Zimbabwe or a reciprocating country."

Reciprocating country has been defined in terms of s 2 of the Legal Practitioners Act in the following way:

> "reciprocating country' means a country declared to be reciprocating country in terms of subsection (2)".

Section 2(2) of the Legal Practitioners Act, which empowers the first respondent to declare any country a reciprocating country, provides as follows:

> "Where the Minister is satisfied that the law of any country other than Zimbabwe permits the admission to the practice of law in the country, whether generally or in particular cases or for particular purposes, of legal practitioners normally resident in Zimbabwe he may, after consultation with the Chief Justice and Council for Legal Education, declare such country by statutory instrument to be a reciprocating country."

The first and second respondents' counsel, Ms *Shumba*, further argued that the present application was prematurely filed as the first respondent had requested from the applicants additional documentation for him to consider the request. She referred the court to the letter dated 18 May 2022 on p 67 of the record, marked Annexure J, authored by the first respondent. The relevant part of the letter is as follows:

> "Furthermore, note that the Minister of Justice, Legal and Parliamentary Affairs can only consider an application of this nature if documents that constitute the petition are properly before him. Therefore, kindly take note of the concerns raised thereof and resubmit your

application in the appropriate manner as indicated in our letter dated 13 May 2022. Substitution and addition of any document thereof constituting the application is at the discretion of the applicant.

The Minister of Justice, Legal and Parliamentary Affairs reserves his discretion to determine the appropriateness of the application before him until such a time when all documents constituting the application are properly before him."

The relevant portion of the letter dated 13 May 2022, marked Annexure H and quoted above, which also attempted to interpret the provisions of R 85 of the High Court Rules, 2021, is as follows:

"It is our interpretation that the provision was envisioned to cater to scenarios wherein the signing of the document is affected by the witness of the authenticating authority. The presumption is that the authenticating authority would have considered the identity of the person endorsing the document and thereby acquaint themselves with the signature of the deponent or endorser of the document. Consequently, the authenticating authority attesting to the veracity of the signature should be attested in the country where the document originated. Furthermore, the authenticating authority should attest to the authenticity of the signature appearing on the documents to prove legitimacy.

Kindly note the following issues identified in the application:-

1. The authenticating authority has failed to attest to the genuineness of the signatures appearing on the documents. Rather, the authority has merely compared the alleged original documents with copies of the documents for purposes of certifying the documents as true copies of originals without verifying the veracity of signatures appearing before the documents. It would be satisfactory for administrative purposes if the authenticating authority furnishes proof that he or she has been acquainted with the signature of the deponent or endorser of the document in order to certify conformity with R 85(1) as read with R 85(2) of the Rules.
2. In addition, the authenticating authority inappropriately authenticated documents issued by other jurisdictions such as:-

   A. the University of Oxford's Bachelor in Civil Law dated 24 June 1976;

   B. The High Court Order issued in Namibia dated 23 April 1992;

   C. The High Court Order issued in Lesotho dated 15 July 1992; and

   D. A letter of admission to the Bar of Ireland dated 25 February 2019.
3. Furthermore, despite specific direction being indicated in our letter dated the 29th of March 2022, you have attached certificates in foreign languages not recognised in Zimbabwe without also attaching as an *addendum* a translated copy of the document issued by a certified translator.
4. Kindly, also note that the notarial certificates attached in reference to *addendums* to the application all refer to an annexure marked "A" in error. We propose that the error be corrected before resubmission for consideration.
5. Furthermore, submit in triplicate the original authenticated copies for ease of reference and processing of the application. "

Ms *Shumba* also submitted on behalf of the first and second respondents that some of the documents submitted by the applicants to the first respondent were not in English. She referred the court to p 48 of the record. According to her submission, that document was supposed to have been translated into English for the first respondent's benefit who could not understand the language of such document.

The first and second respondents, through their opposing affidavit, also opposed the present application on the basis that Zimbabwe does have qualified and highly skilled lawyers who are competent enough, including Mr *Biti* one of the legal practitioners for the applicants, to prosecute the pending Constitutional Court case. However, during oral submissions this point was not pursued any further by the first and second respondents' counsel despite the fact that this line of argument was persistently attacked by the counsel for the applicants during oral submission. This led the court to make an inference that the first and second respondents were now abandoning this line of reasoning.

The counsel for the third respondent submitted that the third respondent will abide by the decision of the court. Consequently, he asked to be excused from remaining in attendance, a request which was granted by the court. The third respondent did not file opposing papers to the present application.

The sole issue for determination is whether the first respondent, by acting in the manner he did, properly exercised his discretion.

The exercise of discretionary power by an administrative authority is regulated by the principles of administrative justice enshrined in s 68 of the Constitution as amplified by the Administrative Justice Act [*Chapter 10:28*]. The jurisprudential undertone of basic requirements of such discretionary exercise have been resolved in our jurisdiction. These include:

(a) Whether the discretion is exercised lawfully.
(b) Whether the discretion is exercised rationally.
(c) Whether the discretion is exercised consistently.
(d) Whether the discretion is fairly exercised.
(e) Whether the discretion is exercised in good faith.

In discussing these principles, MATHONSI J, as he then was, in the case of *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe and Others*[1]made the following germane remarks:

[1] HH446/15.

> "In terms of s 68 of the constitution the applicant has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. In terms of s 69 it has a right to a fair hearing in the determination of its civil rights. Those rights cannot be derogated from at the whim of an impatient and overzealous regulatory authority.
> The concept of administrative justice is now embedded in our constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised. The elements are:
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> 1. Lawfulness in that official decisions must be authorised by statute, prerogative or the constitution.
> 2. Rationality in that official decisions must comply with the logical framework created by the grant of power under which they are made.
> 3. Consistency in that official decisions must apply legal rules consistently to all those to whom the rules apply.
> 4. Fairness in that official decisions should be arrived at fairly, that is, impartially in fact and appearance giving the affected persons an opportunity to be heard.
> 5.Good faith in the making of decisions in that the official must make the decision honestly and with conscientious attention to the task at hand having regard to how the decision affects those involved."

Initially, Mr. *Kazembe* insisted that South Africa qualifies to be one of the reciprocating countries as provided for by the Legal Practitioners Act before withdrawing his submission. Both counsel agreed that Namibia was a reciprocating country. In this respect, Mr *Kazembe* submitted on behalf of the applicants that the exemption should have been granted in any event since Mr Gauntlett is also registered as a legal practitioner in Namibia. He referred the court to p 54 of the record. The court made a follow-up question to Mr *Kazembe* of whether the Namibian documentation is sufficient to enable the first respondent to make a determination. The counsel for the applicants replied in the affirmative manner.

Having made a finding by inference that the first and second respondents abandoned their line of argument that the applicants can be represented by legal practitioners who are based in Zimbabwe who are highly skilled, I am of the view that the first respondent acted in accordance with the dictates of administrative justice. Assuming that my inference is wrong and that the first and second respondents are still persisting with this line of argument, the basis for their contention is not consistent with the prescriptions of administrative justice as the applicants do have their entitlement to the legal practitioner of their own choice as correctly submitted by the counsel for the applicants, Mr *Kazembe*. With the exception of this, the first respondent acted within the commands of administrative justice by demanding additional documentation for him to be able to make a decision. By giving more time to the applicants to submit further documents and correct errors in their application, the first respondent ensured that the applicants are afforded right to be heard and make further

representations to him which is in harmony with the tenets of administrative justice. He could not make a decision based on documents some of which were not translated into English while some of them had patent but curable errors. The first respondent did not demand too much from the applicants under such circumstances as there was no proper application placed before his attention. In my view, the first respondent's decision in that regard was fair, rational, consistent and lawful and was done in good faith.

Consequently, it is in the interest of justice that all documents that are not in English should be translated into English for the first respondent to be able to be properly informed. In translating such documents, the applicants must pay due regard to the provisions of Section 17 of the Civil Evidence Act [*Chapter 8:01*] as read with para 3 of the provisions of the letter dated 13 May 2022 authored by the first respondent addressed to the applicants.

Further, the Legal Practitioners Act is clear that only a person from a reciprocating country can qualify to be granted an exemption certificate to practise law in Zimbabwe for a specified period. Given that at the time of making a decision, the first respondent was labouring under the assumption that Mr Gauntlett's application for exemption certificate was solely based on the South African documentation, one could not find fault with the first respondent's exercise of discretion in the manner that he did as this decision was made lawfully in terms of s 7 of the Legal Practitioners Act.

A perusal of the document filed on p 54 of the record reveals that Mr Gauntlett was registered as a legal practitioner in Namibia on 23 April 1992. I am of the view that the first respondent should be given an opportunity to consider the request of the applicants based on the Namibian documentation and other documents which have been specified by the first respondent in para(s) 3-5 of the letter dated 13 May 2022 marked Annexure H and attached to the founding affidavit. At the time of making the decision, the first respondent was acting under the supposition that the application for the exemption certificate was based on the South African documentation of Mr Gauntlett. The issue of Namibia being a reciprocating country was never put to the first respondent's attention before. All documents which are before the court do not suggest that the request was based on the Namibian documentation.

Further, the counsel for the applicants, Mr *Kazembe*, could not ascertain whether the request to the first respondent was based on the Namibian documentation. Resultantly, the court may not be able to make a determination substituting the first respondent's decision when the first respondent was not afforded an opportunity to exercise his mind on the application placed before his attention based on the new information. Additionally, I am not

able to express my opinion of whether or not the first respondent properly exercised his discretion since the first respondent had not been given enough chance to consider the new issue raised by the applicants.

With respect to authentication of documents, it is my considered view that such documents must be authenticated in accordance with the provisions of R 85(2) of the High Court Rules, 2021 which provides as follows:

> "(2) Any document executed in any place outside Zimbabwe shall be deemed to be sufficiently authenticated for the purpose of production or use in any court or tribunal in Zimbabwe or for the purpose of production or lodging in any public office in Zimbabwe if it is duly authenticated at such foreign place by the signature and seal of office—
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> (a) of a notary public, mayor or person holding judicial office; or
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> (b) in the case of countries or territories in which Zimbabwe, has its own diplomatic or consular representative, of the head of a Zimbabwean diplomatic mission, the deputy or acting head of such mission, a counsellor, first, second or third secretary, a consul-general or vice-consul; or
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> (c) of any Government authority of such foreign place charged with the authentication of documents under the law of that foreign country; or
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> (d) of any person in such foreign place who shall be shown by a certificate of any person referred to in paragraphs (a), (b) or (c) to be duly authorised to authenticate such document under the law of that foreign country; or
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> (e) of a commissioned officer of the Zimbabwe Defence Forces as defined in section 2 of the Defence Act [*Chapter 11:02*], in the case of a document executed by any person on active service."

Rule 85(2) of the High Court Rules, 2021 does provide for an expanded list of authenticating authorities able to authenticate key documents for the present application. I do not subscribe to the views of the first respondent's manner of authentication as captured in the letter dated 13 May 2022 addressed to the applicants' legal practitioners, the contents of which have been discussed before. The officials identified in R 85 are carefully selected persons or officers of impeccable credentials, unquestionable integrity and high probity who cannot be doubted. If the first respondent does harbour any suspicion, it should not be an insurmountable task to institute investigations with the use of modern measures in this technologically and digitally advanced age where the whole world has now been converted into a single global village.

Consequently it is ordered as follows:

(a) That the matter be and is hereby remitted to the first respondent for further consideration based on the Namibian documentation.

(b) There shall be no order as to costs.

Tendai Biti Law, applicants' legal practitioners.
Civil Division, first and second respondents' legal practitioners.