TENDAI LAXTON BITI
and
CHALTON HWENDE
and
UNGANAI TARUSENGA
and
MURISI ZWIZWAI
and
WILLIAS MADZIMURE
and
SICHELESILE MAHLANGU
and
CASTON MATEWU
and
SETTLEMENT CHIKWINYA
and
AMOS CHIBAYA
and
SUSAN MATSUNGA
versus
JACOB MUDENDA N.O.
and
THE PARLIAMENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 October 2022 & 11 January 2023

Opposed Matter

S M Hashiti, for the applicant
A Demo, for the respondent

MANGOTA J: The applicants are members of Citizens Coalition for Change ("CCC") - a political party which plays opposition politics in Zimbabwe. All ten of them and nine others who are not part of this application were elected into Parliament on the CCC party ticket on 1 April 2022. The colour YELLOW is, in a large measure, associated with the dress code of members of CCC. They wear yellow shirts, dresses and other forms of dress during meetings,

rallies or other gatherings of the party. Yellow, judicial notice is taken, would appear to be the members' uniform, so to speak.

Following the applicants' election into Parliament, they, on 5 April 2022, were invited to Parliament to take their oaths of office. They were, according to them, smartly dressed for the occasion. Men were in smart suits and smart neck-ties. Women were mainly in black formal suits.

As the applicants and others walked into the chamber to take their oaths of office, Honourable Chinotimba who is a Member of Parliament for the Zimbabwe African National Union, Patriotic Front which is known as ZANU (PF), observed the applicants in their yellow neck-ties and he stood up on a point of order. He objected to the colour yellow which he alleged was/is a CCC party symbol.

When the applicants and others had taken their oaths of office, the first respondent who is the Speaker of Parliament ("the speaker") remarked, in part, as follows:

> ".…….I have tolerated to some degree what Honourable Chinotimba raised. So, tomorrow, can Honourable members adhere to the dress code and not to be seen in colours that are aligned to party affiliation. Please, be advised accordingly".

On the following day, the applicants arrived at Parliament only to find that Parliament security personnel had, on the instructions of the speaker, locked them out of the building on the ground that they were wearing yellow neck-ties. They gained entry into Parliament by pushing and overwhelming the security guards who were manning the building. When they entered the chamber, the Speaker directed that they be removed from Parliament. The situation, they claim, was only served when the Clerk of Parliament advised the Speaker to allow them to remain in the chamber pending a decision of the *ad hoc* committee which had been appointed by him to discuss

the issue of members coming into the Chamber of the National Assembly wearing yellow neck-ties. The committee met and resolved nothing.

On the following day, some of the applicants came to Parliament only to be, once more, blocked out of the building for wearing yellow neck-ties. They were requested, and they agreed, to remove their yellow neck-ties after which the Speaker made the ruling which forms the foundation of the current application.

The applicants filed it under r 107 of the High Court Rules, 2021. They premised it on s 85 (1) (a) of the Constitution of Zimbabwe Amendment (No. 20) Act of 2013 ("the constitution"). They complain that the decision of the speaker is a gross violation of their right to equal protection and benefit of the law. They allege that the same is discriminatory. They submit that the speaker acted in violation of subss (1) and (3) of s 56 of the constitution. They move me to declare that the ruling of the Speaker of 7 April 2022 is in breach of their constitutional right which s 56 (1) and (3) protects as well as to set the decision of the Speaker aside.

The Speaker opposes the application. His statements in his opposition to the application are two. They are that:

a) the application is not a constitutional one – and

b) the decision which he made on 7 April, 2022 is not without, but within, the law.

He spoke for the second respondent which is set up in terms of s 118 of the constitution as well as for himself.

The application cannot succeed. It cannot succeed for a variety of reasons. The first of those relates to the *in limine* matter which the applicants raised. They raised it in their answering affidavit. They, in the process, denied the Speaker the right to respond to the same.

The *in limine* matter challenges the Speaker's authority to oppose the application for, and on behalf of, the second respondent. The applicants are the ones who cited Parliament as the second respondent. They do not spell out what relief, if any, they are seeking from Parliament which, in terms of s 118 of the Constitution, comprises the Senate and the National Assembly. Their complaint is not against Parliament. It is against the Speaker only. It is ironical that when he makes the effort to speak for, and on behalf of, Parliament the applicants turn round and accuse him of being on a frolic of his own. The twists and turns which they display in this part of their case leaves a lot to be desired.

Litigation, the applicants are admonished, is not a game of chance. It is very serious business which requires the concerted and consistent effort of the person who is moving the court to accord to him a specific relief. He cannot succeed when he approbates and reprobates as the applicants are doing.

Parliament is, it is evident from the papers which parties filed of record, completely out of the equation in so far as the applicants' case is concerned. The statement which the applicants

are making in para 9 of their answering affidavit is misplaced. They cannot argue, as they are doing, that, because Parliament did not confer authority on the speaker to oppose the application on its behalf, the application is unopposed. The applicants know as much as anyone does that the speaker mounted a strong and sustained opposition to their application. It is therefore a mis-statement for them to allege that the application stands unopposed. It is in point of fact very much opposed.

The second aspect of this matter is whether or not the application qualifies to fall under r 107 of the rules of court. The rule deals with what are often referred to as constitutional applications. Sub-rule (1) of the rule states that any party who intends to raise a constitutional issue shall do so by court application filed with the registrar. The rule does not define what a constitutional application is. It leaves that matter to be understood to mean what it means.

A constitutional application, in my view, is one which challenges the existence of a provision of any piece of legislation which is in any statute book and which is not consistent with the constitution. It also impugns any practice, custom or conduct which is not *in sync* with some provisions of the constitution. It emphasizes the supremacy of the constitution. It insists that any law, practice, custom or conduct which is inconsistent with the constitution is invalid to the extent of the inconsistency.

It is debatable if such a decision which the Speaker made on 7 April 2022 falls within the ambit of what the Constitution states in subs (1) of s 2 of the Constitution of Zimbabwe (No.20) Act of 2013.

As the Speaker correctly states, this application is misplaced. It is misplaced in the sense that it is not a constitutional application. It is one for review of his decision. The Speaker exercised the discretion which is conferred upon him by rules which are known as Standing Orders. These owe their existence to s 139 of the constitution. He exercised his discretion when he ruled as he did in terms of a law of general application the existence of which the applicants have not put into issue. His decision is therefore lawful and the applicants cannot impugn it unless and until they challenge the constitutionality of the Standing Orders in terms of which he made his decision.

It is an exercise in futility for a litigant who knows that he, for his own undefined reasons, failed to file his suit in terms of the applicable rules of court and proceeds to file the

same as a constitutional matter when he knows that it is not such. A litigant who persists with such conduct risks not being regarded as a serious person as he invites the court to walk along with him on a garden path which leads to nowhere. A matter does not change its colour and/or substance simply because the person who files it has chosen to give it a name that does not fit with its substance and/or character. It is to the substance and character of the suit that the court focuses its attention on for it to satisfy itself of whether or not the name which has been given to the suit satisfies the requirements of the suit which has been placed before it.

The applicants knew and do know that theirs is an application for review. They also knew that they could not review the decision of the speaker outside the eight weeks which are stipulated in the rules of court. They do not explain why they failed to act when they should have done so. All they did was to turn an ordinary review application into a constitutional one with full knowledge on their part that it was/is not such. They made every effort to find a law which, in their view, was/is *in sync* with what they intended to achieve. They rested their case on s 85 (1) (a) of the constitution and proceeded to file the application as they did. However, the relief which they are moving me to grant to them has nothing but only the footprints of an application for review. This cannot be condoned let alone accepted.

Standing Order 80 (2) in terms of which the speaker made his decision confers a discretion upon him. It allows him to remove from the chamber a member who, in his opinion, is wearing an attire which is unsuitable or unbecoming to the dignity of the House until the member concerned is suitably dressed. It reads:

> "If the Speaker or the Chairman, as the case may be, is of the opinion that the attire of a member present in the Chamber during a sitting of the House is unsuitable or unbecoming to the dignity of the House, he or she may order that member to withdraw from the precincts of Parliament until such time as the member is suitably dressed".

The above-cited provision of Parliament's Standing Orders confers a complete discretion upon the speaker to remove from the National Assembly any member who, in his opinion, is not suitably dressed for the occasion. The moment that he exercises his discretion in terms of the law, his decision remains, by and large, lawful. It can only be impugned where, in my view, it is objectively wrong in which case the member affected by the same retains the power to review it. He cannot, however, challenge its constitutionality when the constitution, through Standing Orders, gives the discretion to him.

Standing Orders, as was aptly observed in *Saruwaka* v *Speaker of the National Assembly & Ors*, HH 717/17, give the Speaker the discretion on the attire to be worn in the House during National Assembly business. Because the issue of what colours can be worn in the House is not provided for in the rules, this leaves the issue in question entirely in the discretion of the Speaker. The decision which he made as is constituted in this application was/is an administrative one. The applicants who claim to have been aggrieved by the same should have challenged it in terms of administrative law. They misplaced their challenge when they resorted to the constitution in a situation where that was totally inapplicable.

The applicants are part of a group of Honourable men and women who sit in Parliament to make laws for the good governance of Zimbabwe. They know as much as I do that they do not legislate for everything. They know that the laws which they debate in Parliament remain with a lot of gaps which those who administer them, amongst them the Speaker, have a discretion to fill as well as implement. They know further that, where the administrative authority has acted with bias, favouratism, or has acted *ultra vires* the discretion which the law confers upon him, the administrative authority in question is taken on review and not on a constitutional suit as the applicants did *in casu*.

The applicants claim that they are aggrieved by the decision of the Speaker. They ironically do not challenge the wide powers which the law conferred upon the Speaker. They attack his decision which he made in terms of an existing law. Their application remains misplaced. It is misplaced in the sense that they gave it a name which does not belong to it. It is also misplaced in the further sense that they fail to trim his powers as conferred upon him by the law which they themselves passed according the same to him. Their application would have held if they challenged subs (2) of s 80 of Parliament's Standing Orders. Such a challenge would have fallen squarely under Rule 107 of the rules of court. The hybrid application which they filed renders the same to be stillborn. It remains a mixture of nothing from which nothing which is worthy the attention of the court results.

The applicants allege that the Speaker's decision is discriminatory against them. I disagree. They are the ones who started the whole matter when they, as a group of members of CCC, made up their minds to, and did actually, wear yellow neck-ties. If they had not done so, this application would not have been born. It was born because of the statement which they

made. In wearing yellow neck-ties as a group which hails from CCC, they made a statement which distinguished them from other members who sit with them in Parliament. So strong was the statement which they made on the day of their swearing into office that it attracted the attention of Honourable Chinotimba who had to rise on a point of order which the speaker took notice of and, in his magnanimity, allowed the situation to pass in the hope that the remark which he would make at the end of the ceremony would be taken heed of by the applicants who, unfortunately, for him refused to take heed of the same. The applicants' gate-crushing into the August House on the following day of Parliament's sitting only goes to show their unruly conduct in which they acted in a dishonourable manner which was/is not befitting of Honourable members.

By their own statement which is filed of record, the applicants discriminated themselves against other Honourable Members of Parliament. In an effort to whip them into line as the law empowers him to do, the speaker made the ruling which caused them to place their case before me. They turn round and complain that the Speaker discriminated against them. Such conduct is unfortunate. It is not befitting of Honourable Members of Parliament who discriminated themselves against other members of Parliament to claim that the Speaker's decision is discriminatory against them.

Parliament, as the speaker correctly asserts, is not a gathering of political parties. It is a public institution which the applicants and other Members of the House should regard as such. It should not therefore be turned into a political animal which it is not. Its dignity and decorum should be observed by all and sundry.

The applicants cannot have their cake and eat it. They either have it with them or they have eaten it. They cannot move to distinguish themselves from other Members of Parliament as they did and claim, in the same breadth, that the Speaker's decision weighs heavily against them. The Speaker is within his rights as well as within the law to decide as he did. They are either uniform Members of Parliament with others or they are not in which case they refuse to remain in the membership of the August House.

The applicants failed to prove their case on a preponderance of probabilities. The application is, in the result, dismissed with costs.

Tendai Biti Law, applicant's legal practitioners
Chihambakure, Mutizwa & Partners, respondent's legal practitioners