HH-68- 24

HC 2389/22

ELECTRICITY MANAGEMENT SERVICES LIMITED

Versus

PROCUREMENT REGULATORY AUTHORITY OF ZIMBABWE

And

VICE-PRESIDENT OF ZIMBABWE N.O

And

MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT N.O

And

ZIMBABWE ELECTRICITY TRANSMISSION AND DISTRIBUTION

And

INHEMETER CO. LTD

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

Harare, 5 December 2023, 31 January, 7, 12 and 13 February 2024.

T. Zhuwarara, for the applicant

S. Bhebhe, for the first respondent

No appearance for the second respondent

No appearance for the third respondent

C. J Mahara, for the fourth respondent

N.N. Sikosana, for the fifth respondent

OPPOSED APPLICATION

CHIRAWU-MUGOMBA J: The roots of the dispute in this matter lie in tender ZETDC/Inter/O7/21 for the supply and delivery of prepayment meters vending system flighted by the fourth respondent. The applicant submitted a bid and was unsuccessful whilst the fifth respondent was the successful bidder. The applicant sought to challenge the bidding process and was advised that it should pay the sum of US$50 000 for that purpose. The applicant holds a strong view that the requirement to pay security to challenge a bidding process is unconstitutional. It is trite that the applicant is a company registered in England and Wales. It has been registered with the first respondent since 2019.

The applicant thus seeks a declaration of constitutional invalidity of s73(4) of the Public Procurement and Disposal of Public Assets Act [Chapter *22:23*], the 'act' as read with s44 of the Public Procurement and Disposal of Public Assets (general) regulations and the 3rd schedule to the regulations as per the Public Procurement and Disposal of Public Assets (General) Regulations, no. 219 of 2020. The applicant contends that the effect of the provisions limit the realization of the right to administrative justice and judicial review of administrative action in terms of s68(1) and s68(3)(a) of the constitution of Zimbabwe without serving any other rational or legitimate government purpose. This is so through the requirement that any entity that wishes to challenge procurement processes or award must first furnish the procuring entity with a high sum of security for costs. By implication, applicant contends that section 56(1) and 71(3) of the constitution are also breached.

On the 5th of December 2023, I heard arguments in support of the application and also in opposition to it including preliminary issues. During my research and consideration of the matter, an issue relating to the *locus standi* of the applicant as a *peregrini* to challenge the constitutionality of laws of a foreign jurisdiction, arose. I recalled the parties and requested them to file heads of argument addressing this issue. Before a court can go into any other issues, it must be established that the applicant has *locus standi*. See *Chironga and anor vs. Minister of Justice, Legal and Parliamentary Affairs and ors,* CCZ 14/20.

The applicant's, first, fourth and fifth respondents found commonality by averring that the applicant despite being a *peregrini* had *locus standi* to challenge the constitutionality of the impugned law. They contended that the 2013 constitution as well as judicial interpretation has widened the scope of the concept of *locus standi*. The fourth respondent gave a detailed

analysis of the Lancaster House and the current constitution on *locus standi.* The generality of their submission is that while certain sections of the constitution only apply to citizens, for instance right to education, health and freedom of movement, the import of s85(1) being reference to the phrase ‘ any person’ was all encompassing. I was referred to the decisions in *Mupungu vs. Minister of Justice, legal and Parliamentary Affairs and ors,* SC – 07-21 and in particular the following passage,

> “The submission made on behalf of the applicant is that every citizen has a sufficient interest under s 175(3) of the Constitution to approach this Court to vindicate and protect the Constitution. It is also contended that any citizen has an automatic and sufficient interest in any matter relating to the Constitution. It is therefore necessary, so it is argued, to draw a distinction between citizens and non-citizens. This position, in my view, is not entirely tenable. While I agree that being a citizen by birth is a relevant factor, I do not think that citizenship *per se* can invariably be regarded as an automatic and exclusive criterion in order to establish legal standing under s 175(3). It is perfectly conceivable that a non-citizen and even a foreign resident might be entitled to approach this Court as having the requisite sufficient interest in the matter. Each case will depend upon the terms and ramifications of the court order that is the subject of confirmation proceedings as well as the personal attributes and circumstances of the individual applicant concerned. The fact that he or she is not a citizen, whether by birth or otherwise, does not preclude him or her from approaching this Court in order to either vindicate or challenge an order concerning constitutional validity made by any subordinate court”.

The issue at hand is the *locus standi* of a foreigner to challenge a law in Zimbabwe based on its alleged unconstitutionality. In determining this, one has to look at the provisions of law which grant individuals the right to approach a court. In other words, the provisions of the law on standing. Therefore, the first port of call is the Constitution of Zimbabwe, 2013 (“the Constitution”). Section 85(1), which encompasses enforcement of fundamental human rights and freedom, states that:

> “(1) Any of the following persons, namely—
> (a) any *person* acting in their own interests;
> (b) any *person* acting on behalf of another person who cannot act for themselves;
> (c) any *person* acting as a member, or in the interests, of a group or class of persons;
> (d) any *person* acting in the public interest;
> (e) any association acting in the interests of its members;
> is entitled to approach a court alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant

> appropriate relief including a declaration of rights and an award of compensation." (Emphasis added)

The use of the word "person" shows that the intention was not to exclude anyone based on nationality. If foreigners were to be excluded, the Constitution would have specifically mentioned that only citizens of Zimbabwe could approach a court.

Section 175(3) deals with the powers of courts in constitutional matters and provides that:

> "Any *person* with a sufficient interest may appeal, or apply directly to the Constitutional Court to confirm or vary an order concerning constitutional validity by a court in subsection (1)." (Emphasis added)

Although the above provision is confined to applications in the Constitutional Court, the Constitution explicitly mentions the phrase, "any person with sufficient interest". There is no indication that there is an intention to exclude a foreigner from the scope of the word "person". In my view, this must be taken to mean that a foreigner is included.

The fact that the Constitution uses the word "person" in the above-cited provisions and not the word "citizen" is significant. This is so because there are instances where the Constitution specifies that citizens are the only beneficiaries of a right to the exclusion of other persons. Examples of these can be seen in sections 66- freedom of movement and residence and 67- political rights. In the aforementioned sections, the Constitution precisely states that only Zimbabwean citizens can enjoy rights like freedom of movement and

residence and political rights. These sections start with the phrase, “Every Zimbabwean citizen has…”. This was not by accident but deliberate from the framers of the constitution.

The two sections are unlike the other sections such as 69(3) of the Constitution which states that “Every person has the right to access the courts….” Thus, if only citizens were to have the *locus standi* to challenge a law”, the Constitution would have expressed it clearly as it does in other sections.

In addition to the above provisions, there is case law that aligns with the notion that foreigners have the *locus standi* to challenge a law in Zimbabwe based on its unconstitutionality. In the case of *Mawarire* v *Mugabe NO & Others* 2013 (1) ZLR 469 (CC) CHIDYAUSIKU CJ stated as follows,

> “Certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements.”

Similarly, in *Mudzuri and Anor* v *Minister of Justice, Legal and Parliamentary Affairs and Others* 2016 (1) ZLR 101 (CC) MALABA DCJ (as he then was) held as follows:

> "The duty of the Court is to declare legislation which is inconsistent with the Constitution to be invalid" and this case shows that the court has the duty to take in an application and declare the law inconsistent *despite the party that has brought the application*." (Emphasis added)

More recently, in *Mupungu* v *Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ–7–21 at p. 23, the Constitutional Court held that:

> "Under the common law, legal standing in civil suits is ordinarily confined to persons who can demonstrate a direct or substantial interest in the matter. See *Zimbabwe Teachers Association & Ors* v *Minister of Education* 1990 (2) ZLR 48 (HC), at 52F-53B. However, it is now well established that the test for *locus standi* in constitutional cases is not as restrictive but significantly wider. This approach was aptly articulated in *Ferreira* v *Levin N.O. & Others* 1996 (1) SA 984 (CC), at 1082 G-H:
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> > '…….. I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.'
>
> The broad approach to *locus standi* in constitutional cases was also affirmed by this Court in *Mawarire* v *Mugabe N.O. & Ors*, 2013 (1) ZLR 469 (CC), where the applicant's standing was endorsed on the basis that he had invoked the jurisdiction of the Court on a matter of public importance."

In comparison to Zimbabwean law on the *locus standi* of foreigners to challenge laws based on their unconstitutionality, South Africa has similar legal provisions. In *Lawyers for Human Rights and Others* v *Minister of Home Affairs and Others* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) establishes that section 12 in the South African Bill of Rights guarantees everyone physical freedom and protection against detention without trial. Thus, a foreigner arrested was said to have the right to appeal against a decision in terms of the Immigration Act. In the case, it was held that:

> "It is mentioned that anyone listed in section 38 of the South African Constitution has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their own name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

Herbstein and Van Winsen in their book *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, 5 ed, (2009) at pages 154 to 171 mention categories of people who are deemed to not have the legal capacity to institute litigation. These include insolvents, prodigals, mentally challenged people and fugitives amongst others. The authors specifically state at p. 158 that:

> "Persons who are not South African citizens may generally sue and be sued, subject to jurisdictional requirements and the possibility of being required to furnish security for costs. Whether they are legal or illegal immigrants, they have the same standing as South African citizens to enforce rights guaranteed by the Constitution unless the right is expressly limited to citizens."

In my view, the test for *locus standi* of a direct and substantial interest would not change. The foreigner would still be required to prove a direct and substantial interest. To that end, I agree with the submission by the first respondent in their supplementary heads of argument that the applicant carries on business in Zimbabwe and was engaged in procurement processes. They would therefore satisfy the two elements of *locus standi* as espoused by MAFUSIRE J in, *Makurudze and anor vs. Bungu and ors*, 2015(1) ZLR 15 (H).

The first and fourth respondents raised a preliminary issue that has an impact on whether or not the matter should proceed on the other preliminary issues raised and on the merits of the matter. Mr. *Bhebhe* for the first respondent submitted that the applicant being a *peregrini* first had to pay security for costs before coming to the court. No reason had been advanced as to why no such costs had been paid. Mr. *Mahara*, for the fourth respondent associated himself with the submissions by Mr. *Bhebhe*. He drew the court's attention to the provisions of s63 of the Companies and Other Business Entities Act [Chapter *24:01*]. The section reads as follows:-

> **Security for costs**
> Where a company or foreign company or a private business corporation is plaintiff or applicant in any legal proceedings, the court may at any stage, on sufficient proof that there is reason to believe that the company, foreign company or private business corporation will be unable to pay the costs of the defendant or respondent if successful in his or her defence, require sufficient security to be given for those costs and may stay all proceedings till the security is given.

In response, Mr. *Zhuwarara* submitted that the procedure for security for costs is provided for in r75(1) of the High Court Rules, 2021. The party requiring security must deliver at the commencement of proceedings deliver a notice setting forth the grounds upon which the security is claimed. No such demand had been made by the respondents. Additionally a dispute relating to the same issue had been adjudicated already in HH-287-22. This was an

urgent chamber application involving the same parties as in *casu.* Therefore the issue of security for costs falls under the doctrine of issue estoppel.

My reading of that matter shows that in relation to the issue of security of costs, BHACHI-MUZAWAZI J in dismissing this point, stated as follows,

> "On the issue of Security costs, the same argument that the applicant is a company which had prior dealings with the fourth respondent with current equipment and ongoing contracts obtains. In, *Schunke v Taylor and Symonds* (1891) 8 SC 104 at BUCHANAN, J stated,
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> > "This matter of security to be given by litigants is one arising purely out of judicial practice. This practice has been a progressive one, the principle underlying it appearing to be, that justice shall not be denied by unreasonable obstacles being placed in the way of the persons seeking redress. I find nothing turning on this point."
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> In, *Grandwell Holdings Pvt Ltd v Minister of Mines and Mining Developmen*t HH-193-16, it was noted that:
>
> > "…Substantively, an order for security costs is one entirely in the discretion of the court. It is a rule of practice, not substantive law."'

In *Muller N.O and anor vs. Madondo N.O and ors*, HH HH-38-24, MUCHAWA J dealt with this issue as follows,

> "Mr *Zhuwarara* submitted that the applicants are *peregrini* suing an *incola* and they should have paid security for costs to safeguard the respondent's interests. Because there is no such payment it was prayed that the matter be dismissed or be stayed pending the payment of costs as determined by the Registrar. The court was referred to cases such as *Toyn Traillers (Pty) Ltd* v *Gelko Logistics Pvt Ltd* HH 777/22 and *Taiyuan Sanxing Company Limited* v *Philcool Investments Pvt Ltd* HH 32/23.
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> Mr Mutasa countered this by pointing out that the letter in which security for costs was demanded was only served on them at 8:18 am on the date of hearing and they had sent a response in which they denied the obligation to pay security of costs for these proceedings. It was argued that the first respondent was in fact holding USD610 319.47 of the applicant's funds and it would be absurd to grant that security for costs be paid in such circumstances as such costs would only be a few thousand dollars relative to what the first respondent is holding.
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> The court was pointed to r75 of the High Court Rules, 2021 as governing issue of security of costs. What is sought is said to be a provisional order and then the main matter will follow. The first respondent was said not to be a party who would be left with no recourse to recover costs if he succeeds it was stated that there is no determination by the Registrar on whether costs are payable and it would be in the interest of justice for the matter to proceed and have this point *in limine* dismissed.
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> I am indebted to DEME J for his seminal judgment on this subject in the case of *Taiyuan Sanxing Company Limited* v *Philcool Investments (Private Limited* +8 Ors HH 32-23. At p 5 DEME J held as follows:

> "The security of costs of a *peregrine* party has been resolved in our jurisdiction and beyond. A peregrinus, in the majority of cases, is ordinarily required to depost security of costs……

In the case of *Bowes & Ors* v *Monolakakis* HB 103/11, MATHONSI J, (as he then was) beautifully and succinctly propounded the following remarks:

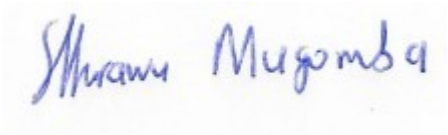
> "The basis of the rule requiring a peregrine to provide security for costs of an incola defendant was set out by SANDURA JP (as he then was) in *Zendera* v *Mcdade & Anor* 1985 (2) ZLR 18 (H) at 20 A-D as follows:
> "The issue relating to the furnishing of security of costs by a plaintiff who is a peregrini is discussed by the learned authors of The Civil Practice of the Superior Courts of South Africa 3rd ed at p 25. There the learned authors had this to say:
> "A peregrinus who initiates proceedings in our courts must as a general rule give security to the defendant for his costs unless he has within the area of the jurisdiction of the court, immovable property with a sufficient margin unburdened to satisfy costs which may arise,…….
> The court, has however a discretion in exceptional cases but should exercise its discretion sparingly."

> The rule is clearly meant to protect the interests of an incola who is sued by a *peregrinus.* In the case of *Redstone Mining Coporation (Pvt) Ltd & 3 Ors* v *Digoil Group Zimbabwe (Pvt) Ltd & 4 Ors* HH 438/15 it was held that the requirement for a *peregrini* to pay security of costs should not be used as a weapon of defence by an incola bent on preventing an approach to the court by a *peregrini*.

Therefore in my view, it is not about issue estoppel but the discretion of the court. Even if the respondents did not raise a complaint by letter, R7 (7) (a) (b) of the High Court Rules, 2021 give me discretion to depart from any provision of the rules and also give directions. Given that the matter is fairly complex and is of great significance on the issue of a *peregrini* challenging the Zimbabwean laws on a constitutional point, in my view the applicant ought to pay security for costs. I deliberately dealt with the issue of *locus standi* because an order as to payment of security for costs is interlocutory. It gives the applicant an opportunity to pay the security for costs and then the other preliminary issues and the merits if warranted will be dealt with. Accordingly, the matter is disposed of as follows:

DISPOSITION

1. Judgment on the remaining preliminary issues and if warranted the merits in Case number HC2389/22, be and is hereby stayed pending the payment of security for legal costs by the applicant.
2. Within seven (7) days from the date of this order, the first, fourth and fifth respondents shall deliver a notice to the court and to the applicant setting forth the amount of security for costs they propose that the applicant pays and the grounds for claiming such an amount as applicable.
3. Within seven (7) days from the date of delivery of such notices, the applicant shall deliver a response to the notices dealing with the quantum of the proposed security for costs.
4. Should the applicant not be in agreement with the proposed amount for security for costs, the matter shall be referred by the applicant, first, fourth and fifth respondents to the Registrar of the High Court who within fourteen (14) days from the date of referral, shall determine the amount, form and manner of payment of the security for costs and the Registrar's decision shall in terms of R75(2) of the High Court Rules, 2021, be final.
5. The applicant shall pay the amount determined by the Registrar as applicable within ten (10) days from the date of the decision and should they fail, refuse or neglect to pay, the first, fourth and fifth respondents may make an application for the dismissal of the applicant's claim.
6. Upon payment, the applicant's legal practitioners shall notify the court in writing.
7. There shall be no order as to costs.



Gill, Godlonton and Gerrans, Applicant's legal practitioners
Kantor and Immerman, First respondent's legal Practitioners
Office of the Attorney-General, second and third respondents' legal practitioners
Muvingi and Mugadza, Fourth respondent's legal practitioners
Hogwe Nyengedza, fifth respondent's legal practitioners