

**REPORTABLE** (68)

(1) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY  
AFFAIRS  
(2) ATTORNEY GENERAL OF ZIMBABWE  
v  
NYASHA CHIRAMBA

**SUPREME COURT OF ZIMBABWE  
GWAUNZA DCJ, MATHONSI JA AND KUDYA JA  
HARARE: 6 JUNE 2023**

Ms *O Zvedi*, for the appellants

Mr *W P Mandinde*, for the respondent

**MATHONSI JA:** By order dated 8 June 2022, the High Court [“the court *a quo*”] issued a *mandamus* in terms of which the appellants were compelled to submit a Bill necessary to give effect to s 106(3) of the Constitution of Zimbabwe [“the Constitution”] for consideration by Cabinet by no later than forty-five days from the date of the order. Section 106(3) requires an Act of Parliament prescribing a code of conduct for Vice-Presidents, Ministers and Deputy Ministers to be promulgated. Given that no such Act of Parliament is currently in existence, the respondent filed an application *a quo* contending that it was the responsibility of the appellants to introduce the Bill necessary to give effect to s 106(3).

The application was strenuously opposed by the appellants but despite such opposition, the court *a quo* granted it aforesaid. Aggrieved, the appellants appealed to this Court.

On 6 June 2023, this court heard submissions from counsel on appeal from counsel after which the court issued the following order:

“IT IS ORDERED THAT:

1. The appeal be and hereby allowed with costs.
2. The judgment of the court *a quo* in its entirety be set aside and substituted as follows:  
“The application for a *mandamus* order be and is hereby dismissed with costs.”

The court indicated that the reasons for judgment would be furnished in due course. What follows hereunder are those reasons.

### **THE FACTS**

The first appellant is the Minister of Justice, Legal and Parliamentary Affairs, while the second appellant is the Attorney General. The respondent, Nyasha Chiramba, is a law student who introduces himself as a firm believer in human rights.

The respondent filed a constitutional application in the court *a quo* for a *mandamus* compelling the appellants to comply with s 106(3) of the Constitution of Zimbabwe 2013 [ “the Constitution”], by initiating the process of enacting the Act contemplated in the subsection. The respondent asserted *locus standi* to bring the application on the basis that he has an interest in enforcing compliance with the supreme law of the land.

Section 106(3) of the Constitution provides:

**“106 Conduct of Vice-Presidents, Ministers and Deputy Ministers**

(1) ...

(2) ...

**(3) An Act of Parliament must prescribe a code of conduct for Vice-Presidents, Ministers and Deputy Ministers.”**

In the court *quo*, the respondent averred that the first appellant is the Minister responsible for overseeing the Constitution, Bills and other legal matters on behalf of the Government. He also averred that the second appellant is responsible for drafting legislation on behalf of the Government of Zimbabwe.

The respondent asserted that even though more than seven years had passed after the promulgation of the Constitution, the appellants have not enacted the Act of Parliament envisaged in s 106(3) of the Constitution. In his view, Parliament could only exercise its prerogative of enacting the Act of Parliament after the introduction of a Bill to it through publication in the *Government Gazette*. Thus, so the respondent stated, the failure to enact the Act of Parliament envisaged by s 106(3) was a breach of the Constitution falling squarely on the shoulders of the appellants.

The respondent strongly advanced the claim that it was the first appellant's obligation to introduce and promote a Bill designed to give effect to s 106(3) of the Constitution. To justify his claim that the Act of Parliament contemplated in s 106(3) was overdue, the respondent made reference to incidents involving Vice-Presidents and Ministers which he considered to have involved questionable conduct, which conduct could have been dealt with in terms of the envisaged Act of Parliament, had it been in place.

### **PROCEEDINGS BEFORE THE COURT A QUO**

In motivating the application, the respondent averred that he had established a right in terms of s 106(3) of the Constitution. To him, the continued delay in the initiation of the process to enact the Act of Parliament potentially leaves public officials unaccountable to the people. Finally, he averred that there was no other remedy available to him which could

move the appellant to give effect to s 106(3) of the Constitution other than approaching the court *a quo*, as he did.

As already stated, the appellants opposed the application for a *mandamus*. The first appellant denied that the President of Zimbabwe assigned to him the specific function of enforcement and harmonisation of the Constitution. He also denied that he has a duty to prepare and initiate legislation, which duty, to him, lies with Cabinet and Parliament. He specifically denied that he has an obligation to initiate the enactment of the Act of Parliament contemplated in s 106 of the Constitution. The first appellant also denied that s 106(3) bestows a right on the appellant and accordingly urged the court to dismiss the application.

For his part, in his own opposing affidavit, the second appellant cited a portion of the respondent's founding affidavit to make the point that no relief whatsoever was sought against him, which assertion was however, controverted by the respondent. The second appellant also noted that in several paragraphs of the founding affidavit and in the first two paragraphs of the draft order, the respondent had sought relief against him even though from his reading of the founding affidavit, the respondent had said he would not seek relief against him. The second appellant denied that he was under a constitutional obligation to enact the law in question.

I have said that the court *a quo*, issued an order on 8 June 2022. It subsequently furnished reasons for judgment to the parties, in which it found that the respondent had the requisite *locus standi* to file the application. The respondent's *locus standi* had been put in issue.

On the preliminary point taken by the appellants that there was a non-joinder of the Parliament of Zimbabwe or Cabinet, the court *a quo* held that the non-joinder of the Parliament of Zimbabwe or Cabinet had no adverse effect on the matter that was before it. In making that conclusion, the court *a quo* relied on the provisions of r 32(11) of the High Court Rules, 2021.

On the merits of the application, the court *a quo* found that the Act contemplated by s 106(3) of the Constitution can only be introduced by a “public bill”. It found it inconceivable that a member of Parliament who is not a Cabinet member can introduce a Bill in the National Assembly which deals with, as well as defines, the conduct of public office holders such as Vice-Presidents, Ministers and Deputy Ministers. The court *a quo* also made a finding that the first appellant did not deny that the responsibility to introduce the Bill in question was one of his functions.

In respect of the second appellant, the court *a quo* held that he could not be treated differently from the first appellant by virtue of his advisory role to the Government. It reasoned that he should have picked upon s 106(3) of the Constitution and rendered the necessary advice to the Government on its remit. Accordingly, the court *a quo* stated that both appellants “stood convicted of serious dereliction of duty in so far as the actualisation of [s 106(3) of the Constitution] is concerned”. It concluded that the appellants had turned a blind eye to their constitutional obligations and had no defence to the application.

The application was thus granted and the court *a quo* issued an order in the following terms:

“IT IS ORDERED THAT:

1. The respondents be and are hereby ordered to submit to the Cabinet for consideration the Bill envisaged by section 106(3) of the Constitution of Zimbabwe within forty-five days from the date of this order and
2. No order as to the costs.”

### **PROCEEDINGS BEFORE THIS COURT**

Aggrieved by the judgment of the court *a quo*, the appellant noted this appeal on the following sole ground of appeal:

“The court *a quo* misdirected itself and erred in law in finding that the Appellants either individually or collectively have an obligation to initiate a Bill of Parliament for submission to Cabinet which will give effect to section 106(3) of the Constitution of Zimbabwe, in circumstances where the Constitution itself does not place such a duty on the appellants, either individually or collectively.”

The sole issue arising for determination is whether or not the appellants have an obligation of initiating the enactment of the Act of Parliament envisaged in s 106(3) of the Constitution either individually or collectively. This issue stems from a consideration of the first requirement of a *mandamus*, being, whether or not the respondent established a clear right.

Ms *Zvedi*, for the appellants, submitted that s 106(3) of the Constitution does not, in any way, make it the duty of the appellants to initiate the law contemplated by it.

She contended that the decision of the Constitutional Court in the case of *Chironga and Anor v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ 14–20 relied upon by the respondent did not support the proposition that it was the responsibility of the two appellants to initiate the law in question. In her view, the *Chironga* case simply outlined the process of law-making and the point that it is Cabinet that makes a policy that a certain law is to be made. Counsel submitted that the references to the “relevant minister” in the law-making process arise when Cabinet has come up with a decision to make

a law and the principles are referred to the Minister responsible for the administration of the particular legislation.

More importantly, Ms *Zvedi* noted that Statutory Instrument 108 of 2018, being the Assignment of Functions [Minister of Justice, Legal and Parliamentary Affairs] Notice, 2018, on which the respondent placed reliance to impute an obligation on the appellants was repealed. She noted that the subsequent Statutory Instrument that is Statutory Instrument 226 of 2018 does not assign the administration of the Constitution to the Minister of Justice. Instead, so it was argued, the obligation to come up with the Bill to be enacted is on Parliament.

Regarding the question of whether the second appellant has a duty to initiate the Bill in question, Ms *Zvedi* referred to s 114 of the Constitution which provides for the duties of the Attorney General. She submitted that the Attorney General has not been assigned the duty sought to be imputed on him in any legislation. Accordingly, Ms *Zvedi* prayed that the appeal be allowed.

In response, Mr *Mandinde* conceded the point that the Assignment of Functions [Minister of Justice, Legal and Parliamentary Affairs] Notice, 2018 [Statutory Instrument 226 of 2018] did not include the Constitution of Zimbabwe as an Act of Parliament assigned to the first appellant for administration. He conceded that s 106(3) of the Constitution does not place an obligation on the appellants to come up with the legislation in question suggesting instead that the obligation is given to Cabinet.

Mr *Mandinde* sought, however, to argue that there is an Inter-Ministerial Task Force for Legislation, which the first appellant's Ministry is responsible for. He submitted that

the second appellant, as Attorney General, was the leader of the Inter-Ministerial Task Force. He added that the first appellant's Ministry is also in charge of constitutional affairs. On this basis, counsel was of the view that the removal of the Constitution from the list of Acts of Parliament under the administration of the first respondent did not remove the responsibilities pertaining to constitutional affairs from him. In respect of the second appellant, Mr *Mandinde* submitted that he retains the duty of legal drafting.

Although counsel for the respondent could not point out the second appellant's obligation, if any, in respect of the Act of Parliament contemplated by s 106(3), he surprisingly did not concede the appeal but stuck to his guns, even though they had long stopped blazing.

### **THE LAW**

It is not in dispute that the application placed before the court *a quo* was essentially for a *mandamus*. The principles governing the issuance of mandatory interdicts in constitutional matters were discussed by Du Plessis, Penfold and Brickhill in *Constitutional Litigation*, 2013, at 123. I recite the observations by the authors:

“In constitutional cases, a court may grant a final interdict (either prohibitory or mandatory) whenever it is just and equitable to either compel a person to do something or to refrain from doing something. Although they are not bound by the common-law test for final interdicts, our courts generally apply the common-law test in constitutional matters.”

The position outlined above was followed by our Constitutional Court in the case of *Chironga & Anor v Minister of Justice, Legal & Parliamentary Affairs & Others* CCZ– 14–20. HLATSHWAYO JCC, at pp. 15 – 16, held that:

“A mandamus is a judicial remedy available to enforce the performance of a specific statutory duty or remedy the effect of an unlawful action already taken ... The requirements the applicants must prove for a *mandamus* are that:

- (1) A clear or defin[ite] right—this is a matter of substantive law.
- (2) An injury actually committed or [reasonably] apprehended—an infringement of the right established and resultant prejudice.



(3) The absence of a similar protection by any other ordinary remedy.”

In respect of the first requirement for the grant of a mandatory interdict itemised above, the learned Judge of the Constitutional Court instructively discussed the law as follows:

“With regard to the first requirement, according to *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5<sup>th</sup> Edition*, at p 1457, whether the applicant has a right is a matter of substantive law. The authors state that one has to prove a clear and definite right in terms of substantive law, a right which can be protected, a right existing at common law or statutory law. The applicants’ right is derived from constitutional law. Section 167(5) of the Constitution gives the applicants a right to enforce compliance with s 210 to ensure that the Act contemplated by the section is enacted. The applicant’s rights also arise automatically in law, through s 210. According to the authors, it is unnecessary for the applicant to allege any facts in order to establish the rights, when a right arises automatically at law, more so in the case of constitutional rights. In that regard, the first requirement for a constitutional *mandamus* has been established.”

Where the requirements of a *mandamus* are satisfied in a constitutional matter, a court is bestowed with the power to make any order that is just and equitable in terms of s 175(6)(b) of the Constitution. The section reads:

“(6) When deciding a constitutional matter within its jurisdiction a court may—  
(a) ...;  
(b) make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity and an order suspending conditionally or unconditionally the declaration of invalidity for any period to allow the competent authority to correct the defect.” (*The underlining is for emphasis*)

In constitutional matters in which a *mandamus* has been sought, what is just and equitable ultimately depends on the circumstances of the entire case including the constitutional duty that must be performed as well as the reasonable means by which it may be performed. Quite recently, HLATSHWAYO JCC, writing for a unanimous court in *Gonese v President of the Senate and Others* CCZ–2–23 at p. 24, para. 67 stated:

“The progressive implementation of the rule of law would be greatly undermined without s 175(6) of the Constitution. When one considers the endless list of circumstances over which declarations of unconstitutionality could possibly be passed, the potentially disruptive effects of such declarations can become overwhelming. Acts that were believed to be legal today would suddenly be illegal and invalidated. People

who had legitimately enjoyed certain rights could suddenly lose them. Those who were in credit before a declaration of invalidity could suddenly become debtors. Couples who were legally married to each other for years would suddenly be deemed to be living 'in sin'. Thus, s 175(6) is inserted into our constitution to ensure just and orderly enforcement of the Constitution. It prevents the winding back of hands of time beyond our capacity to cope with the retrospective effects of declarations of unconstitutionality." (*The underlining is for emphasis*)

Therefore, what all this means is that any person seeking a *mandamus* in a constitutional matter must prove that his or her case satisfies its requirements. Thereupon, the Court is enjoined to consider the relief that would be just and equitable in the circumstances of the case.

### **EXAMINATION**

The first enquiry to be made is whether or not the respondent established a clear right. As was stated in the *Chironga* case *supra*, the determination of whether or not a clear right exists is a matter of substantive law. It is, therefore, apt to make reference to the case of *Oil Blending Enterprises (Pvt) Ltd v Minister of Labour* 2001 (2) ZLR 446 (H) at 450B–E, where it was held, *per* CHINHENGO J, that:

“A *mandamus* or mandatory interdict is a judicial remedy recognised under our law: see *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S). It is applied against public authorities. It is an order which requires a public authority to comply with a statutory duty which requires a public authority to perform some act which remedies a state of affairs brought about by its own unlawful administrative action (L Baxter on *Administrative Law* at p 687). It is, therefore, a judicial remedy available to enforce the performance of a specific statutory duty or to remedy the effects of an unlawful action already taken. In this application, I am concerned with the former — to order or not to order the respondent to perform a specific statutory duty placed upon him. The remedy will be granted where the public authority is under a clear duty to perform the act ordered. In *Moll v Civil Commissioner of Paarl* (1897) 14 SC 463 at 468, it was stated that:

‘But it is obvious that relief (mandatory interdict) will not be given where such rights are of a doubtful nature or where the public officer has acted in exercise of a discretion left to him, but only where the existence and continued infringement of an absolute right have been clearly established.’” [*Emphasis added*]

The remedy of a *mandamus* against a public authority necessarily demands the existence of a clear duty imposed on the public authority. This much is evident from the *dicta* of this Court in *Chavunduka and Anor v Commissioner of Police and Anor* 2000 (1) ZLR 418 (S) at 422F and 424C:

“What then is the appropriate remedy where it has been shown that the police have not done something which obviously it is their duty to do — where there has been a dereliction of duty owed to the public? The answer is that in such a clear case the court will grant an order of *mandamus*. But where the police have arrived at the decision not to take any action in good faith and on the basis of a proper appreciation of the applicable law, they will not then incur the risk of judicial intervention. ...

In this matter, I am satisfied that the requirements for a *mandamus* are satisfied. See *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at 56B-D. There is no other judicial remedy which is equally or more appropriate. But it is not for this court to instruct the Commissioner of Police as to the manner in which he is to perform his duty. It is only necessary to direct him to do so.”

From the above, one can safely say that where a public official has no duty to give effect to a right sought to be enforced, then the remedy of a *mandamus* cannot be relied upon. The existence of a duty on the part of a public official to give effect to the right in question is an inherent precondition embedded in the requirement for a clear right.

The question that thus arises is: do the appellants have an obligation to initiate a Bill designed to give effect to s 106(3) of the Constitution? To obtain the answer to this question, one must interpret s 106(3) of the Constitution. It is settled law that in constitutional interpretation, the ordinary meaning of the words employed in a statute should be strictly adhered to unless that would lead to an absurd result. See *Mavedzenge v Minister of Justice, Legal & Parliamentary Affairs and Others* CCZ–5–18 at p. 6 and *Shumba and Others v Minister of Justice, Legal and Parliamentary Affairs and Others* CCZ–4–18.

Turning to s 106(3) of the Constitution, one notes that there is nothing in that provision suggesting that either of the appellants has an obligation to initiate the contemplated Bill. The provision simply states that there must be an Act of Parliament that must prescribe a code of conduct for Vice-Presidents, Ministers and Deputy Ministers. Apart from this, there is hardly any other provision in the Constitution suggesting that the appellants have an obligation to initiate a Bill necessary to give effect to s 106(3).

In attempting to establish a basis upon which he could impute the obligation to initiate the Bill in question on the appellants, and notwithstanding that he had not pleaded this in his application, the respondent belatedly sought to argue before this court that the administration of the Constitution of Zimbabwe was assigned to the first appellant by the Assignment of Functions (Minister of Justice, Legal and Parliamentary Affairs Notice, 2018 [Statutory Instrument 108 of 2018]). That is correct. However, at the time the application *a quo* was filed the Assignment of Functions (Minister of Justice, Legal and Parliamentary Affairs Notice, 2018) was no longer extant. It had been repealed by the Assignment of Functions (Minister of Justice, Legal and Parliamentary Affairs) Notice, 2018 [Statutory Instrument 226 of 2018].

Statutory Instrument 226 of 2018 omits the Constitution of Zimbabwe as one of the Acts assigned to the Minister of Justice, Legal and Parliamentary Affairs. This means that the administration of the Constitution of Zimbabwe is not assigned to the first appellant. It was, therefore, futile for the respondent to attempt to establish a basis for his application in the Assignment of Functions (Minister of Justice, Legal and Parliamentary Affairs) Notice, 2018 when the current notice provided no such basis.

In the absence of a clear statutory provision imposing on the appellants the responsibility of initiating a Bill designed to give effect to s 106(3) of the Constitution, the respondent had no and could not legally establish a clear right. The respondent could not, as a matter of right, demand the appellants to initiate the Bill in question. The court *a quo*, therefore, erred in granting a *mandamus* in the absence of a clear right.

Once the finding is made that the respondent had no clear right, it becomes unnecessary to establish the other requirements of a *mandamus*, which, in any event, are not in dispute.

For completeness, I note that the Constitution identifies who has the responsibility of initiating legislation. All the respondent had to do was to identify the functionary upon whom the responsibility to prepare, initiate and implement legislation lies. It is only to the functionary on whom the Constitution placed an obligation to prepare legislation that the respondent had to turn for the fulfilment of the provisions of s 106(3) of the Constitution, needless to say in accordance with the set procedural rules.

### **DISPOSITION**

The appellants demonstrated that there is no provision of the Constitution placing an obligation on them to initiate and prepare the Bill that is necessary to give effect to the provisions of s 106(3) of the Constitution. Under the circumstances, there was no basis upon which the appellants could be ordered to initiate the Bill in question. The court *a quo*, thus, fell into error by granting the mandatory interdict in the absence of a statutory basis for doing so. Accordingly, the appeal had to be allowed.

It is for the foregoing reasons, that the court issued the order mentioned above.

**GWAUNZA DCJ:** I Agree

**KUDYA JA:** I Agree

*Civil Division of the Attorney General's Office, appellant's legal practitioners*

*Zimbabwe Human Rights NGO Forum, respondent's legal practitioners*