

REPORTABLE (4)

SAMUEL SIPEPA NKOMO

v

**(1) MINISTER OF LOCAL GOVERNMENT, RURAL & URBAN
DEVELOPMENT (2) MINISTER OF JUSTICE, LEGAL &
PARLIAMENTARY AFFAIRS (3) THE GOVERNMENT OF
REPUBLIC OF ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JCC, GWAUNZA JCC,
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC,
PATEL JCC, GUVAVA JCC & MAVANGIRA AJCC
HARARE, JUNE 17, 2015 & JUNE 29, 2016**

T Biti, for the applicant

M Chimombe, for the respondents

ZIYAMBI JCC:

[1] By reason of an allegation by the applicant of a breach of his fundamental right enshrined in s 56(1) of the Constitution, this application gained direct access to the Constitutional Court (“the Court”) through the front door, which is s 85 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 (“the Constitution”).

THE APPLICATION

[2] The applicant averred that he is a Member of Parliament for Lobengula Constituency in Bulawayo (having been so elected in the harmonised elections held on 31 July 2013) and residing in Bulawayo. He charges the respondents, and in particular the first respondent who is the Minister responsible for issues of local Government, with a violation of s 267 of the

Constitution. This is because of their alleged failure to bring about the enactment of such an Act of Parliament as would give effect to the provisions of Chapters 2¹ and 14² of the Constitution of Zimbabwe thus bringing into operation devolution in Zimbabwe.

He alleges that the failure of the respondents, since 1 August 2013 when the full Constitution took effect, to bring a draft Bill before Parliament for enactment constitutes a breach of ss 2³ and 5⁴ of the Constitution. He therefore seeks the following relief:

“IT IS ORDERED THAT:

1. The respondents’ failure, to enact the law covered and as envisaged in **Chapter 14** of the Constitution, in particular **Sections 267 (2), 273 (4) and 270 (2)** of the Constitution of Zimbabwe, is a breach of the Constitution of Zimbabwe.
2. The failure by the respondents, to enact the laws necessary to operationalize **Chapter 14** in so far as it relates to Provincial Governance is a violation of the applicant’s right to equal protection and benefit of the law as defined by **Article 56 (1)** of the Constitution.
3. The respondents must bring before Parliament such a Bill or Bills as covered by **Sections 273 (4), 267 (2) and Section 270 (2)** of the Constitution of Zimbabwe within 45 days from the date of issuance of this order by the Court.
4. That respondents jointly and severally each paying the other to be absolved pays costs of suit.”

I note here that s 273(4) does not exist. Section 273 in subs (1) and (2) makes provision relating to the establishment and functions of provincial and metropolitan councils and for the filling of vacancies therein.

[3] The application is opposed by the respondents. The first respondent denied any neglect in bringing the Bill before Parliament. He annexed to his opposing affidavit a draft Bill which he termed a working draft. He explained that legislation of such importance cannot be

¹ Which sets out the national objectives.

²Which deals with devolution and setting up of provincial governance

³ Which renders conduct inconsistent with the Constitution invalid to the extent of the inconsistency

⁴ This section defines the tiers of Government in Zimbabwe, one of them being Provincial and Metropolitan Councils.

hurriedly placed before Parliament and that he is still in the process of carrying out the necessary consultations with the various entities as prescribed by s 267 (2) (b) of the Constitution.

The respondents also contend that the applicant has not, save for a mere statement alleging an infringement of his right conferred by s 56 (1) of the Constitution, to equal protection and benefit of the law, demonstrated how that right has been infringed by the respondents. Nor has the applicant adduced any evidence to substantiate his allegation that “the State is limping” because there are no metropolitan and provincial councils as provided for in s5 of the Constitution.

It is further contended by the respondents that the second respondent’s responsibility for bringing legislation before Parliament extends only to those matters which fall under his portfolio and that the bill envisaged by s 267 is not one of those matters.

In any event, so averred the respondents, a reasonable period was required within which to produce the legislation in question and it could not be hurried through within the period of 45 days suggested by the applicant. It was submitted that the application was devoid of merit and ought to be dismissed with costs.

LOCUS STANDI

[4] The applicant states his standing to bring this application as follows:

”9.1 I believe that as an ordinary citizen and more importantly as a Member of Parliament, I have a right to bring this application before this Honourable Court. The issue of devolution is key and central in the part of the country I come from and in the Constituency I represent. I was chosen to represent my Constituency which expects me to serve in the Bulawayo Metropolitan Council and represent their interests. I want to serve in this important institution so that it can perform and execute its developmental roles as defined by the Constitution.

9.2 Moreover, I believe that any citizen has and should have a general right to bring any application before this Honourable Court where the government of the day or any other Constitutional body is disobeying or disrespecting or not enforcing

or implementing any mandatory provision of the Constitution. This right exists and should exist whether or not that breach or omission is outside **Chapter 4**, of the Constitution of Zimbabwe. Put in simple terms, a citizen's right to approach this Honourable Court cannot and should not be restricted to a complaint founded on breach of the declaration of rights that are set out in **Chapter 4** of the Constitution of Zimbabwe.

9.3 Besides, to the extent that I have in fact alleged a breach of a fundamental right, I have a right to approach this Honourable Court as I hereby do in terms of **Section 85 of the Constitution of Zimbabwe. Section 85 (1) (a) and (d)**, being the specific legs that I bring this application should it be restricted to the narrow question of breach of declaration of the rights defined in **Chapter 4** of the Constitution of Zimbabwe.”

[5] The applicant's stance is thus twofold. Firstly, he, as a Member of Parliament is automatically entitled to be a member of the Bulawayo Metropolitan Province. By virtue of s 269(1) (c) all members of the National Assembly whose constituencies fall within the Metropolitan Province concerned, are automatic members of the Metropolitan Council. Thus his constitutional right as bestowed by s 269 has been denied by the respondents' failure to enact the legislation in question. More specifically, the applicant has been denied the “responsibility and duty for the social and economic development activities in the province. This includes the right to co-ordinate and implement governmental programs in the province, the right to plan and implement measures for the conservation, implementation and management of natural resources in the province and of course the right to promote tourism in the province”. Accordingly, so the applicant avers, he has the right to approach this Court for the constitutional *mandamus* sought in the draft order because the respondents are in breach of “not only the provisions of Chapter 14 by default, but are acting against the concept of a paradismic state as defined and captured in s 8 of the Constitution”.

[6] The second ground on which he bases his *locus standi* is that in denying him the benefit of Chapter 14 of the Constitution, the respondents are “in fact breaching not only

Article 56(1) of the Constitution in so far as it protects the applicant but also denigrating the supremacy of the Constitution.” At p 7 of the application he avers:

“In any event, to the extent that Provincial governance as covered by Chapter 14 (of the Constitution) is a right and expectation given to me and other citizens by law, the respondents by their inaction, are denying me equal protection and benefit of the law. This therefore means that their inactions are in breach of my constitutional right to equal protection and benefit of the law as defined by s 56(1) of the Constitution of Zimbabwe.

I would therefore pray that this honourable court must respectfully compel the respondents to respect my right covered under 56(1) of the Constitution, by obliging the same to gazette and bring before Parliament a Bill as covered by the aforesaid sections 267 and 273(1) of the Constitution of Zimbabwe. This is the second leg and basis of my constitutional application to this Honourable Court”.

[7] In terms of s 85 of the Constitution certain persons may approach a court directly for the vindication of a fundamental right allegedly infringed or likely to be infringed. It provides as follows:

“85 Enforcement of fundamental human rights and freedoms

- (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.

- (2) The fact that a person has contravened a law does not debar them from approaching a court for relief under subsection (1).

- (3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that:
- (a) the right to approach the court under subsection (1) is fully facilitated;
 - (b) formalities relating to the proceedings, including their commencement, are kept to a minimum;
 - (c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities; and
 - (d) a person with particular expertise may, with the leave of the court, appear as a friend of the court.
- (4) The absence of rules referred to in subsection (3) does not limit the right to commence proceedings under subsection (1) and to have the case heard and determined by a court.”

The submission by the respondents in their heads of argument that at the time of the hearing the applicant was no longer a Member of Parliament is common cause. I agree with the submission on behalf of the respondents that the applicant could not found his *locus standi* on his former status as a Member of Parliament. The applicant however faces a more serious hurdle. The right allegedly infringed is not a fundamental right enshrined in Chapter 4 of the Constitution. Accordingly, an approach in terms of s 85 to vindicate the alleged infringement of ss 267, 270 and 273 is not available to the applicant.

I find no merit in the applicant’s averment in para 9.2 of his founding affidavit (quoted above)⁵ that anyone should be allowed to bring any constitutional application before this Court. To allow this totally unrestricted approach would be a violation of the Constitution which has restricted the direct approach to the vindication of fundamental rights⁶ and has itself outlined other methods⁷ of approach to this Court. Thus, to use the words of the applicant, ‘the first leg’ on which the application is based cannot stand.

⁵ At para [4]

⁶ s 85 (1)

⁷ See for example s175

[8] In so far as the applicant alleges an infringement of his fundamental right enshrined in Chapter 4 of the Constitution, he may, in the absence of the rules referred to in s 85(3), be permitted to access this Court directly. On this basis he has, *prima facie*, the *locus standi* to bring his application in terms of s 85 (1) (a). But he cannot, as he has sought to do, act in his own interest as well as the public interest. This point was emphasized in *Loveness Mudzuri & Anor v Minister Of Justice, Legal & Parliamentary Affairs N.O & 2 Ors*⁸ where MALABA DCJ, delivering the judgment of the Court, held that an applicant should confine himself to one of the capacities set out in s 85 (1). At p 8 of the judgment the learned judge said:

“What is in issue is the capacity in which the applicants act in claiming the right to approach the court on the allegations they have made. In claiming *locus standi* under s 85(1) of the Constitution, a person should act in one capacity in approaching a court and not act in two or more capacities in one proceeding”

And at page 9:

“The rule requires that the person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom. The infringement must be in relation to himself or herself as the victim or there must be harm or injury to his or her own interests arising directly from the infringement of a fundamental right or freedom of another person. In other words the person must have a direct relationship with the cause of action.”

[9] As to his approach in terms of s 85(1)(d), it is clear that the applicant has made no case for the public interest apart from a bare averment that he has approached the Court in terms of s 85 (1)(a) and (d). Accordingly, the only question properly before the Court for determination, and which I deal with hereunder, is whether there has been an infringement of the applicant’s fundamental right enshrined in s 56(1) to equal protection and benefit of the law.

INFRINGEMENT OF SECTION 56(1)

[10] Section 56(1) of the Constitution provides:

⁸ CCZ 12/2015

“56 Equality and non-discrimination

- (1) All persons are equal before the law and have the right to equal protection and benefit of the law.”

The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons.

In *Van der Walt v Metcash Trading Limited* (CCT37/01) [2002] ZACC 4; 2002 (4) SA 317; 2002 (5) BCLR 454 where reliance on the provisions of s 9(1) of the Constitution of South Africa (which is identical in its terms to s 56(1) of the Constitution) depended solely on the inequality of outcome of two applications to the Supreme Court of Appeal, the Constitutional Court described the right as follows:

”It is clear that the provision means that all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access.”

And in *Sarrahwitz v Martiz N.O. & Anor* (CCT93/14) [2015] ZACC 14; 2015 (4) SA 491 (CC); 2015 (8) BCLR 925 (CC), the same Court said:

“This subsection guarantees everyone the right to equal protection and benefit of the law. The concept of “equal protection and benefit of the law” suggests that purchasers who are equally vulnerable must enjoy the same legal endowments irrespective of their method of payment”.

[11] Clearly the guarantee provided by s 56(1) is that of equality under the law. The applicant has made no allegation of unequal treatment or differentiation. He has not shown that he was denied protection of the law while others in his position have been afforded such protection. He has presented the Court with no evidence that he has been denied equal protection and benefit of the law. The failure by the respondents to enact the legislation contended for has not been shown to discriminate against him in favour of others. In short, the applicant has come nowhere near to establishing that his right enshrined in s 56(1) of the Constitution has been infringed. He is therefore not entitled to a remedy.

In view of this conclusion the issue of a *mandamus* becomes irrelevant. However, since the point was argued before us, I make the following remarks.

THE APPLICATION FOR A *MANDAMUS*

[12] The applicant claims that the failure by the respondents to enact the law envisaged in s 267 of the Constitution is a breach of the Constitution for which he is entitled to approach this Court seeking a *mandamus*.

Section 264 (1) of the Constitution provides:

“264 Devolution of governmental powers and responsibilities

(1) Whenever appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively.”

Section 267 (1) lists the Provinces of Zimbabwe and subs (2) provides;

(2) An Act of Parliament—

(a) must provide for the division of provinces into districts; and

(b) may provide for the alteration of provincial and district boundaries;

after consultation with the Zimbabwe Electoral Commission and the people in the provinces and districts concerned.”

Undoubtedly, it is within the powers of a court before which a constitutional matter is argued to grant, in an appropriate case, a mandatory interdict or *mandamus*. I have already concluded that since the complaint does not relate to the breach of a fundamental right, the applicant is not entitled to approach the Court in terms of s 85. However, even assuming the applicant was properly before the Court, he has not made out a case for the *mandamus* that he seeks.

[13] While not necessarily bound by them, the Court is generally guided by common law principles relating to interdicts. Thus in order to prove his entitlement to a *mandamus* in this case, the applicant would be required to meet the requirements for the grant of a final interdict. These are:

- A clear right;
- An injury actually committed or reasonably apprehended; and
- The absence of a similar protection by any other remedy.⁹

[14] It was submitted by the respondents that the applicant had not satisfied these requirements. I agree. In terms of s 264(1), the division of the provinces into districts is to take place *whenever appropriate*. The section is not cast in mandatory terms. The State has been given a constitutional mandate to decide when it is appropriate and it is not for the applicant to make that decision. Reading all provisions as a whole, as one must in interpreting the Constitution, that decision is a prerequisite to s 267. Once that decision has been made, it can only be implemented by an Act of Parliament after consultations with Zimbabwe Electoral Commission and the persons affected by the proposed change.

While it is true that the Metropolitan Councils form one of the tiers in the order of Government as set out in the Constitution¹⁰ it is also true that no time limits have been set by

⁹ *Tribac Private Limited v Tobacco Marketing Board* 1996(2) ZLR 52 (S)

¹⁰ S5(b) of the Constitution

the Constitution for the devolution of power to the authorities listed therein. Consequently it can safely be said that s 264 contemplates that compliance with its dictates be effected within a reasonable time.

[15] The applicant maintained that the process required little time and indeed 45 days was suggested as the time within which the enactment should be gazetted and placed before Parliament for consideration. However, on behalf of the respondents it was submitted that work is taking place on the proposed bill and that included consultations with various stakeholders especially those mentioned in s 267. It was submitted that an enactment of this nature could not be hurriedly done in the time suggested by the applicant.

DISPOSITION

[16] According to the applicant, although the Constitution was signed into law by the President of Zimbabwe on 15 May 2013, the full document only ‘became law after the general election of 31 July 2013 on 1 August 2013’. This application was brought on 25 March, 2014 less than 12 months after the coming into effect of the Constitution. No evidence on which the issue of reasonableness could be determined was placed before the Court in the applicant’s founding affidavit. The Court would, therefore, have been unable because of the lack of evidence before it, to make a decision on whether or not the respondents had failed within a reasonable time to enact the legislation referred to in s 267 and the applicant would, for the same reason, have failed to establish an infringement of a clear right entitling him to a *mandamus*.

[17] It follows from the above that the application is totally devoid of merit. However, in keeping with the general practice not to award costs in constitutional matters, no award of costs is made.

[18] The application is, for the above reasons, dismissed.

CHIDYAUSIKU CJ: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

PATEL JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA AJCC: I agree

Tendai Biti Law, applicant's legal practitioners

Civil Division of the Attorney –General’s Office, 3rd respondent’s legal practitioners