

REPORTABLE (9)

IGNATIUS CHOMBO

v

(1) PARLIAMENT OF ZIMBABWE (2) THE SPEAKER OF
PARLIAMENT (3) THE PRESIDENT OF THE SENATE (4)
THE CLERK OF PARLIAMENT (5) TANGWARA
MATIMBA (6) HONOURABLE SIMON HOVE

**SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA, GARWE JA,
GOWORA JA & OMERJEE AJA
HARARE, JANUARY 24 & MAY 20, 2013**

T Hussein, for the applicant

S J Chihambakwe, for the respondents

GARWE JA: This is an application brought in terms of s 24(1) of the Constitution of Zimbabwe in which the applicant seeks an order declaring the introduction of the Urban Councils Amendment Bill H.B.5. 2011 (“the Bill”) to be null and void on account of it being inconsistent with ss 18, 18(1a) and Article 20.1.2. of the 8th Schedule of the Constitution of Zimbabwe.

BACKGROUND

In October 2011, the fifth and sixth respondents, who are members of Parliament for the Buhera Central and Highfield West Constituencies respectively, brought a motion in Parliament to introduce a private members’ Bill. Thereafter debate ensued in Parliament on the motion. The motion was accepted and consequent thereto the Bill was introduced into Parliament in early 2012. It is not in dispute that the purpose of the Bill was

to reduce the powers of the Minister of Local Government over municipal and town Councils. In March 2012 the applicant wrote to the second and third respondents expressing his view that it was incompetent for private members to introduce the Bill and that the responsibility to do so now lay with Cabinet. The fourth respondent wrote back expressing the view that it was still permissible for a Member of Parliament to introduce a private Bill and that such responsibility was not solely the responsibility of Cabinet. He further advised that Parliament was to continue with the necessary procedures for debating the Bill, prompting the applicant to make the present application.

THE BASIS OF THE APPLICATION

In his papers the applicant says he brings this application in his capacity as a citizen of Zimbabwe, a duly elected member of Parliament and a Cabinet Minister of the Government of Zimbabwe. He also submits that regard being had to the provisions of Schedule 8 of the Constitution it is legally improper for a private member to introduce a Bill in Parliament and that only Cabinet can do so. In particular he argues that since the right of the individual member of Parliament conflicts with the responsibility of Cabinet to present legislation to Parliament, the provisions of Article 8 must, as a corollary, take precedence.

THE RESPONDENTS' POSITION

The respondents on the other hand argue that since the applicant has brought this application in his capacity as a Cabinet Minister and member of Parliament, no rights that relate to him personally have been infringed. Consequently he has no *locus standi* to bring the present application. The respondents also submit that the relevant Constitutional provisions have not curtailed the rights of members to introduce private bills save “where policies and programmes of the National Executive are concerned”. Lastly the respondents

have submitted that the applicant, being a Minister and therefore part of the State, cannot sue Parliament which is also another arm of the State.

ISSUES FOR DETERMINATION

On a careful reading of the papers before this Court, it seems to me that there are two issues for determination. The first is whether the applicant has *locus standi* to bring this application. Allied to this issue is the question whether as Cabinet Minister the applicant can institute proceedings against another arm of the State. The second is whether a private member can lawfully introduce a Bill in Parliament.

LOCUS STANDI

In his application, the applicant makes it clear that he brings the application in his capacity as a Cabinet Minister, Member of Parliament and citizen of Zimbabwe. As a Cabinet Minister, he does so in his capacity as Minister of Local Government, Rural and Urban Development and not on behalf of Cabinet. This is not a case therefore where Cabinet is suing Parliament but rather one where a Minister is suing in his capacity as such.

That an applicant approaching this Court in terms of s 24(1) of the Constitution must show that his individual right or rights have been infringed or put another way that there has been a contravention of the Declaration of Rights in relation to himself is now settled. He has no right to seek redress on behalf of the general public or anyone else – in this regard attention is drawn to the decisions of this Court in *United Parties v Minister of Justice, Legal & Parliamentary Affairs & Ors* 1997(2) ZLR 254(S), 2 B-C.; *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* 2003(2) ZLR 236(S), 276B-C;

Retrofit (Pvt) Ltd v PTC & Anor 1995 (2) ZLR 199(S), 207G-H; *Law Society of Zimbabwe v Minister of Justice & Anor* 2006(2) ZLR 19(S) 30H-31A.

In this case the applicant is the Minister of Local Government, Rural and Urban Development. In this capacity he is assigned the responsibility of administering various pieces of legislation that govern the activities of local government institutions. In particular he is charged with the responsibility of administering the Urban Councils Act, [Cap 29:15]. The rationale for the introduction of the Bill is stated in the memorandum to the Bill as the need to reduce the powers of central government over municipal and town councils. Municipal and town councils are local government institutions that fall under the aegis of the Ministry of which the applicant is Minister and are accountable to the Minister for the way in which they carry out their activities. The Minister exercises considerable powers under the Act that enables him to control the management of these institutions. The stated intention to reduce the powers of central government suggests that the real intention was to reduce the powers of the applicant as Minister of Local Government, Rural and Urban Development over municipal and town Councils.

In my view the applicant clearly has an interest in this matter as it is his powers as Minister which the Bill intended to proscribe. In a case, such as the present, where it is suggested that the process of introducing the Bill that seeks to reduce such powers is unconstitutional, the applicant would certainly be entitled to the protection of the law. He would be entitled to approach this Court and demand that the respondents act in accordance with the law. I conclude therefore that in his capacity as Minister of Local Government, Rural and Urban Development, the applicant has the same rights as everyone else where his fundamental rights are violated and consequently has the *locus standi* to approach this Court

under s 24 (1) of the Constitution. It follows from this that in an appropriate case a Cabinet Minister can have *locus standi* to sue another arm of the State.

Whether the applicant would have *locus standi* to sue in his other capacities as Member of Parliament and citizen of Zimbabwe is an issue that becomes unnecessary to decide in view of the conclusion that I have reached above.

WHETHER A PRIVATE MEMBER CAN LAWFULLY INTRODUCE A BILL IN PARLIAMENT

The real issue before this Court is whether or not a private member can lawfully move a private Bill in Parliament. To answer this question one must of necessity construe the intention of Parliament from the words used in both Schedule 4 and Schedule 8 of the Constitution.

Section 1 of Schedule 4 of the Constitution provides for the introduction of Bills, motions and petitions into Parliament. Section 1 states, in relevant part, as follows:

“1 Introduction of Bills, motions and petitions

- (1) ...
- (2) ...
- (3) Subject to the provisions of this Constitution and Standing Orders –
 - (a)
 - (b) Any member of the House of Assembly may introduce any Bill into or move any motion for debate in or present any petition to the House of Assembly;
 - (c) A Vice President, Minister or Deputy Minister may introduce any Bill into or move any motion for debate in or present any petition to Parliament.
- (4) Except on the recommendation of a Vice President, Minister or Deputy Minister, Parliament shall not –

- (a) Proceed upon any Bill, including any amendment to a Bill, which, in the opinion of the President of the Senate or the Speaker, as the case may be, makes provision for any of the following matters—
 - (i) Imposing or increasing any tax;
 - (ii) Imposing or increasing any charge on the Consolidated Revenue Fund or other public funds of the State or varying any such charge otherwise than by reducing it;
 - (iii) Compounding or remitting any debt due to the State or condoning any failure to collect taxes;
 - (iv) Authorizing the making or raising of any loan by the State;
 - (v) Condoning unauthorized expenditure;
 - (b) Proceed upon any motion, including any amendment to a motion, the effect of which, in the opinion of the President of the Senate or the Speaker, as the case may be, is that provision should be made for any of the matters specified in subparagraph (a); or
 - (c) Receive any petition which, in the opinion of the President of the Senate or Speaker, as the case may be, requests that provisions be made for any of the matters specified in subparagraph (a).
- (5) The provisions of subparagraph (4) shall not apply to any Bill introduced, motion or amendment moved or petition presented by a Vice President, Minister or Deputy Minister.”

The above provisions are clear and allow of no ambiguity. Any Member of Parliament is at liberty to introduce a Bill into Parliament. Where, however, the proposed Bill by a member makes provision for the introduction or increase of any tax or charge on the Consolidated Revenue Fund or other public funds, or where the Bill makes provision for the compounding or remitting of any debt due to the State, or condoning any failure to collect taxes, or the raising of any loan by the State or condoning unauthorised expenditure, Parliament shall not introduce a debate on such a Bill, except on the recommendation of a Vice President, Minister or Deputy Minister.

In the light of the above provisions, the clear intention must have been to proscribe the right of members to introduce a private Bill that carries financial implications except where such Bill is supported by the Executive.

That this has been the legal position in our law is clear. However the situation changed with the introduction in 2009 of Schedule 8 of the Constitution which incorporated the Interparty Political Agreement between ZANU (PF) and the two MDC formations.

Schedule 8 provides in Article 1 as follows:

- “ *Framework for a New Government*
1 For the avoidance of doubt, the following provisions of the Interparty Political Agreement, being Article XX thereof, shall, *during the subsistence of the Interparty Political Agreement, prevail notwithstanding anything to the contrary in this Constitution –*
“**20. Framework for a new Government**
Acknowledging ...
20.1. The parties hereby agree that:
20.1.1 Executive Powers and Authority
...
20.1.2 The Cabinet
(a) shall have the responsibility to evaluate and adopt all government policies and the consequential programme;
(b) shall, subject to approval by Parliament, allocate the financial resources for the implementation of such policies and programmes;
(c) shall have the responsibility to prepare and present to Parliament, all such legislation and other instruments as may be necessary to implement the policies and programmes of the National Executive;
(d) ...
(e) ...
(f) ...
(g) ...”

The above provisions clearly indicate the intention of Parliament. That intention is that during the subsistence of the Interparty Political Agreement, Article XX of that agreement shall prevail notwithstanding anything to the contrary in the Constitution. The intention must have been to ensure that for the duration of the Inter-Party Political

Agreement, what is contained in Article XX of the agreement would override any provisions in the Constitution inconsistent with it.

In clause 20.1.2 of Article XX Cabinet has specifically been given the responsibility (a) to evaluate and adopt all government policies and consequential programmes (b) to allocate the financial resources necessary for the implementation of such policies and programmes and, most importantly (c) to prepare and present to Parliament all such legislation and other instruments as may be necessary to implement such policies and programmes.

The issue before this Court is one of interpretation. As stated by CHIDYAUSSIKU CJ in *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe* 2003(2) ZLR 236(S), 246E-F:

“It is trite that in interpreting statutes including the Constitution, the golden rule is that in order to ascertain the intention of the legislature, the words of a statute or legislation are to be given their ordinary or primary meaning. It is only where that primary meaning of the words is obscure or leads to absurdity that other principles of interpretation are invoked to assist in the ascertainment of the intention of the legislature.”

The wording of clause 20.1.2. is clear. It is Cabinet that has the responsibility to formulate all government policies and programmes and to fund such programmes. It is Cabinet that has the responsibility to prepare and present to Parliament legislation, including subordinate, as may be necessary, to implement such policies and government.

Whilst I am prepared to accept that the drafting of the Interparty Political Agreement could have been refined and the agreement itself more elegantly worded, particularly when it was decided to incorporate it into the Constitution, it is clear that the use

of the word “responsibility” was intended to give the power of formulating government policies and programmes and the necessary legislation only to Cabinet. The suggestion made during oral submissions that the “responsibility” is shared is certainly not borne out by the wording.

In the result, I find that, where government policies and programmes are concerned, the formulation and presentation of Bills is the responsibility of Cabinet and no-one else. Indeed Mr *Chihambakwe* has conceded as much. In para. 3.2 of his heads he has stated that:

“... where policies and programmes of the National Executive are concerned, the Cabinet has the responsibility to prepare and present to Parliament such legislation and other instrument.”

I would agree with the submission by Mr *Hussein* that what was intended was to get legislation thrashed out and agreed to at Cabinet level and the polished product presented by a Cabinet member in Parliament. I also agree with his submission that since the country was going through a transitional period which was to be steered by three political groupings, the intention was that private members would not be permitted to upset the inclusivity of decisions. I would only qualify these remarks by emphasising that the prohibition is restricted only to proposed legislation that deals with government policies and programmes. The corollary to this therefore is that whilst a private member has no right to introduce a private Bill that deals with government policies and programmes during the subsistence of the Inter-Party Political Agreement, he is however still empowered to do so in two situations. The first is where he introduces a Bill that does not deal with such policies or programmes. The second is where the Bill that he seeks to introduce, in addition to the requirement that it must not deal with government policies and programmes, deals with issues of a financial nature that are covered by s 1 (4) of Schedule 4 of the Constitution and is

supported by a Vice President, Minister or Deputy Minister. It is not correct therefore that a private member's right to introduce private bills has been removed completely. It has only been restricted to the extent just shown.

What remains to be considered is whether the Urban Councils Amendment Bill is one that the fifth and sixth respondents could competently introduce into Parliament. To answer this question one must look at the purpose of the Bill. The explanatory notes to the Bill indicate the purpose is to:

“Amend the Urban Councils Act [*Cap. 29:15*] by reducing powers of central government over municipal and town councils, thereby encouraging democracy at local level...”

Clearly the purpose of the Bill is to reduce the powers of the applicant as Minister of Local Government, Rural and Urban Development. That the Bill intends to amend current government policies is not in dispute. That being the position, there can be no doubt that the respondents had no right in law to allow the introduction and debate of this Bill. The introduction and subsequent debate was therefore unlawful as it was prohibited by the Constitution.

DISPOSITION

The position is now settled that Parliament can only do what is authorised by law and specifically by the Constitution – *Biti & Anor v Minister of Justice, Legal & Parliamentary Affairs & Anor* 2002 (1) ZLR 177 (S) at 192F-G and 193C. In terms of s 18(1a) of the Constitution, the second, third and fourth respondents have a duty to exercise their functions in accordance with the law and to observe and uphold the rule of law. Where they act contrary to the law, as they did in this case, then their conduct becomes illegal.

In his draft order the applicant seeks an order declaring the introduction of the Bill to be null and void. The applicant also seeks an order of costs. I see no reason why both cannot be granted.

In the result therefore I make the following order:

1. The introduction of the Urban Councils Amendment Bill HB.5.2011 before either House of the first respondent is declared to be inconsistent with the provisions of ss 18(1) and 18 (1a) of the Constitution in that it is *ultra vires* clause 20.1.2. of the 8th Schedule of the Constitution of Zimbabwe and therefore null and void.
2. The respondents shall pay the costs of this application jointly and severally, the one paying, the others to be absolved.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

GOWORA JA: I agree

OMERJEE AJA: I agree

Hussein Ranchod & Co., appellant's legal practitioners

Chihambakwe, Mutizwa & Partners, respondents' legal practitioners