SHEILA FRANCIS JARVIS
and
ZIMBABWE HUMAN RIGHTS ASSOCIATION (ZIMRIGHTS)
versus
MINISTER OF JUSTICE LEGAL AND PALIAMENTARY AFFAIRS N.O.
and
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT N.O.
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE N.O.
and
PARLIAMENT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 19 February 2021

Urgent Chamber Application

CHINAMORA J:

Introduction:

On 3 February 2021, the applicants filed an urgent chamber application seeking to interdict the enforcement of the Criminal Law (Codification and Reform) (Standard Scale of Fines) Notice 2021 ("SI 25/21"), which was published in an extraordinary Government Gazette on 25 January 2021. Perhaps, it is important to begin by giving the context in which this application was filed and came before me. It is common cause that, on 28 March 2020, the Public Health (Covid-19 Prevention, Containment and Treatment and Treatment) Regulations 2020, Statutory Instrument 77 of 2020 ("SI 77/20") came in force. This piece of legislation contained provisions which restricted travelling, limiting the number of people at gatherings, introducing social distancing and compulsory sanitization, closure of businesses and schools, among other measures. In December 2020, the life span of SI 77/20 was extended by the Public Health (Covid-19 Prevention,

Containment and Treatment) (National Lockdown) (No 2) (Amendment) Order 2021, (No 9) [illegible].

To strengthen the enforcement of SI 77/20, SI 25/21) introduced. The effect of this statutory instrument was to substantially increase the fines that are payable for breaches of the measures and restrictions brought about by SI 77/20.

The applicants attack the validity of SI 25/20 on two grounds, namely:

1. That the statutory instrument was not made in accordance with section 280 (6) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 ("the Act"), which provides that, a statutory instrument may not be made in terms subsection (5), unless a draft has been laid before and approved by Parliament.

2. That it contravenes the Constitution of Zimbabwe (Amendment No 20) Act 2013 ("the Constitution"), in that section 134 (f) provides that: "statutory instruments must be laid before the National Assembly in accordance with its Standing Orders and submitted to the Parliamentary Legal Committee for scrutiny".

The appellants assert that neither provision of the Act and the Constitution was complied with. In the provisional order to their urgent chamber application they seek interim relief which is couched as follows:

> "(1) Pending a determination on the legality of SI 25/2021 and finalization of this matter, the respondents, their agents, subordinates and any other person acting under their control or on their behalf be and are hereby interdicted from implementing or enforcing the fines purportedly authorized by SI 25/2021".

By way of final relief on the return date, an order was sought in the following terms:

> "(1) The Provisional Order be and is hereby confirmed.
>
> (2) Statutory Instrument 25/2021 be and is hereby declared unconstitutional and/or *ultra vires* as it contravenes section 134 (f) of the Constitution and section 280 of the Criminal Law (Codification and Reform) Act [Chapter 9:23], respectively, and consequently is invalid and be and is hereby set aside".

It is evident that the applicants are seeking an interim order which effectively suspends the operation of SI 25/20. On the return day, they seek a declaratory order pronouncing the constitutional invalidity of the statutory instrument.

In light of the Chief Justice's Practice Direction No 2 of 2021, through the Registrar of the High Court, I directed that the respondent file its opposition if it so whished, and that both parties could file heads of argument should they choose to. On 9 February 2021, the respondents, represented by the Civil Division of the Attorney General's Office, simultaneously filed their opposing affidavit and heads of argument. No further document was filed by the applicants. The 4th respondent in a letter written by its legal practitioners, Chihambakwe, Mtizwa and Partners, dated 5 February 2021, advised that it would abide by the decision of the court. However, the application was opposed by the 1st, 2nd and 3rd respondents who raised two points *in limine,* namely, that the relief sought is incompetent, and that the matter, in any event, is not urgent. I now turn to examine those preliminary points. However, I prefer to address the question of urgency first.

Whether the matter is urgent

The respondents argue that the matter is not urgent. In the affidavit deposed to on behalf of the 1st, 2nd and 3rd respondents, they submit that the cause of action arose on 25 January 2021 when the standard scale of fines was gazette, yet the applicants waited for nine days to file their application on 3 February 2021. Given the applicants' explanation that it is only on 29 January 2021 that they came to know that SI 25/21 had been published, I am prepared to accept that the matter was urgent in the sense contemplated in *Kuvarega v Registrar General & Anor 1998* (1) ZLR 188 (H). Having come to this conclusion, I am satisfied that this point *in limine* was ill taken as it lacks merit.

Whether the relief is competent

The second preliminary point raised by the respondents was that the relief sought by the applicants is incompetent. Ms Virginia Mabiza, the Permanent Secretary for the Ministry of Justice, Legal and Parliamentary Affairs, in the affidavit filed on behalf of the 1st, 2nd and 3rd respondents argues that the interim relief has the effect of declaring legislation invalid, yet it is the prerogative of the Constitutional Court. It was submitted that this court does not have such jurisdiction.

Having looked at the papers before me and the law on the subject, I take the view that the relief being sought is incompetent. I am aware that this court has jurisdiction to deal with

constitutional issues which arise before it and can make orders of constitutional invalidity. That is not my quarrel with the provision since that is the position. The problem I have is a legal conundrum. The interim order which I am being asked to grant would effectively suspend the operation of SI 25/25 before it has been declared constitutionally invalid. Yet, if I was to declare the statutory instrument invalid for falling foul of the Constitution, its operation cannot be suspended immediately. In this respect, section 175 (1) of the Constitution provides that where a court makes an order concerning the constitutional invalidity of any law, *the order has no force and effect unless it is confirmed by the Constitutional Court*. This issue has previously come before this court in the case of *Zimbabwe Informal Sectors Organization and Anor v The Minister of Health & Child Care* HH 36-21, and KWENDA J set out the position of the law as follows:

> "In my view, an order of this court suspending operation of SI 10/21 would be a circumvention of section 175 (1) of the Constitution. Section 175 (1) of the constitution is unambiguous in as far as it provides that a declarator of constitutional invalidity made by this court does not take effect unless confirmed by the Constitutional Court. It would therefore defeat the exclusive jurisdiction of the Constitutional Court as expressed in section 175 (1) of the Constitution if … [the suspension]…was to become operational simply because it is clothed as an interim relief or interdict … A proper reading of section 175 (2) of the Constitution reveals that this court cannot competently grant interim relief before an order of constitutional invalidity".

I will not depart from the compelling wisdom of KWENDA J's decision, and respectfully endorse it. In fact, he Constitutional Court has pronounced that until it has declared a law invalid such a law shall remain in force. In *Mayor Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* CCZ 7-14, it was appositely stated:

> "The legal consequences of a decision by the Constitutional Court that a law, regulation or some other provision are unconstitutional are that they lose their legal force on the day of the publication of the Constitutional Court decision. Until then, the law, regulation or any provision has legal force".

Accordingly, on the authorities I have referred to above, it is clear that any order that I might make declaring SI 25/21 unconstitutional must, as a matter of constitutional imperative, be referred to the Constitutional Court for confirmation before it can take effect. In the meantime, the statutory instrument would remain in force. To accept the invitation to issue the interim order required by the applicants is akin to putting the cart before the horse. I have no wish to engage in such a stunt. I therefore uphold the point *in limine* on incompetency of the relief sought.

Disposition

The application is dismissed.

Mupanga Bhatasara Attornes, applicants' legal practitioners
Civil Division of the Attorney General's Office, 1st, 2nd and 3rd respondents' legal practitioners