

OBEY SHAVA
and
PRESIDENT, REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 2 November 2021 and 12 January 2022

OPPOSED MATTER

T Bhatasara, for the applicant
C Chibidi, for the respondent

MANGOTA J: The applicant is a member of the legal fraternity and, therefore, an officer of the court. He alleges that he has an interest in human rights and the rule of law. He moves me to declare Statutory Instrument 127 of 2021 [“the instrument”] which the first respondent who is the President of Zimbabwe made on 26 May 2021 and published in the Government Gazette Extraordinary unconstitutional and to have the same set aside. He filed his application under s 85 (1)(d) of the Constitution of Zimbabwe.

The second respondent who is the Minister of Finance and Economic Development opposes the application. He alleges that the first and third respondents conferred authority upon him to include both of them in his opposition. He, however, produces no evidence which shows that the two authorized him to oppose the application on their behalf. He states, in *limine*, that the applicant does not have the *locus* to apply as he did. He insists that the applicant does not have any direct or substantial interest in the existence or otherwise of the instrument. The instrument, he claims, defines a clear relationship which exists between the Reserve Bank of Zimbabwe, on the one hand, and such classes of people as bankers, foreign exchange dealers and traders, on the other. The rights of the mentioned persons, he insists, are more proximately affected by the instrument than those of the applicant. Such persons, he avers, have better standing than the

applicant has to challenge the constitutionality or otherwise of the instrument. He moves me to dismiss the application with costs.

The applicant urged me to treat the first and third respondents as having not opposed the application. I agree. None of them filed any notice of opposition. None of them filed any affidavit in support of the second respondent's opposing papers. The second respondent's statement which is to the effect that they authorized him to oppose the application on their behalf remains without merit in the absence of any supporting affidavit(s) by the one or the other or both of them.

The issue of the applicant's *locus* is relevant to the determination of this application. *Locus*, in simple terms, refers to the right of the plaintiff or the applicant to sue. It is closely linked to his cause of action which, in turn, rests on whether or not the plaintiff or the applicant has a direct and substantial interest in the matter which is the subject of any inquiry by the court. A plaintiff or an applicant who is remotely connected to the case is said to have no *locus* and he cannot, therefore, competently sue the defendant or the respondent, as the case maybe.

The applicant states in para 5 of his founding papers that:

- “5. I have *locus standi* in the proceedings as required by s 85(1)(d) of the constitution in that:
 - 5.1 I am acting in the public interest which public includes groups or classes of persons being litigants, potential litigants, arrested and detained persons, business people and the legal fraternity as a whole.
 - 5.2 In terms of s 44 of the Constitution of Zimbabwe, I am legally obliged to respect, protect, promote and fulfil such rights and freedoms in its Chapter 4.
 - 5.3 I have a further duty to do all such other things as are necessary to promote and protect human rights, the rule of law and separation of powers in Zimbabwe.”

Locus, it is observed, is not established by argument as the applicant seeks to do. It is evident on the papers which the plaintiff or applicant files. It is not justified. It justifies itself from a mere reading of the papers of the party who is suing.

The grounds which the applicant advances for filing the application are specific to any legal practitioner who represents a litigant at court. Indeed, each legal practitioner has a direct and substantial interest in the cause of the person whom he represents as well as in its outcome. If the applicant was representing any of the persons who have a relationship with the Reserve Bank of Zimbabwe, his *locus* would not have been open to any question. What he cannot do, however, is to stand in the shoes of bankers, foreign exchange dealers or traders, wear the hat of any of those classes of persons and claim to have *locus*. That type of *locus* is a far-fetched one.

It is remotely, if at all, connected to the cause of the persons who have *locus*. He, in short, has no *locus* to stand for, as well as to pretend to be, one of those classes of people or all of them. He is not any such.

It is a clear misstatement for the applicant to claim, as he is doing, that he is acting in the public interest. The court defined the circumstances under which an applicant can apply under the public interest principle which is mentioned in s 85 (1)(d) of the constitution. It stated, in *Trustees of the Makomo E Chimanimani v The Minister of Lands & Anor* 2016 (2) ZLR 324 (H) that:

“The provisions of s 85 are very clear, anyone can literally and practically take action. In their own interests, or on behalf of another who cannot act for themselves, in the public interest, e.t.c as long as the issue pertains to constitutional rights.” (emphasis added).

The applicant, it has already been observed, cannot act in his own interest. He cannot do so when he does not have any direct and/or substantial interest in respect of the instrument. He cannot, in other words, invite me to engage in an academic exercise which brings no meaningful result to him. He does not allege that his rights as contained in the constitution were /are violated by the birth of the instrument. He is, in short, alleging that the rights of bankers, foreign exchange dealers and traders were/are violated when the President of Zimbabwe promulgated the instrument. He does not explain why those whose rights are allegedly adversely affected by the instrument have not sued to right the alleged wrong. He cannot do the bidding for them. They have to do the bidding for themselves, so as to speak.

That bankers, foreign exchange dealers and/or traders have the requisite capacity to sue where, in their view, their constitutional rights have been violated requires little, if any, debate. They do have the financial muscle to engage the services of the applicant and sue, if they are of the view that the instrument which the first respondent put into place operates adversely against their own interest. They have a direct and substantial interest in the same. This is unlike the applicant who asserts, erroneously though, that he has a direct and substantial interest in the matter when he has no such.

The applicant cannot employ s 85 (1)(d) of the constitution to sue for, and on behalf of, the abovementioned classes of persons when, as precedent dictates, the affected persons can themselves sue. They have the capacity to act for themselves.

The Constitutional Court of Zimbabwe clarified the public interest test which constitutes the hallmark of s 85 (1)(d) of the constitution. It stated, in *Mudzuri & Anor v Minister of Justice, Legal & Parliamentary Affairs & Ors* CCZ 12/15 that:

“An infringement of a fundamental right may cause legal injury to an individual or prejudicially affect private interest without being of a nature that adversely affects interests of the community at large or a significant section of the community. The cause of action must show that the proceedings are in the public interest. There are many categories or facets of public interest. The task is to ascertain, among others, the public interest to be served. The test covers the cases of marginalized or underprivileged persons in society who because of sufficient reasons such as poverty, disability, socially and economically disadvantaged positions, are unable to approach a court to vindicate their rights.” (emphasis added)

It is evident, from a reading of the above-cited *dictum*, that the public interest reason which the applicant advances in applying as he did remains inapplicable in the circumstances of the present case. Bankers, foreign exchange dealers and traders are not among marginalized or underprivileged members of Zimbabwe’s society. They are socially and economically able members of the country’s society. They are among the elite of Zimbabweans. They do not suffer such disadvantages as poverty or disability. They are able to approach the court and vindicate their rights, if such is their intention.

The applicant is like a voice which is crying in the wilderness. He is, as it were, moaning more than the bereaved. He invited me to walk with him along a garden path which leads to nowhere. Because he lacks the requisite *locus*, he was only able to lead me to a dead-end area which resulted in the application suffering a still birth.

The applicant failed to prove his case on a balance of probabilities. The application is, in the result, dismissed with costs.

Mupanga Bhatasara Attorneys, applicant’s legal practitioners
Civil Division of the Attorney General’s Office, respondent’s legal practitioners