

RONALD MAGWETA
and
WOMEN'S ACADEMY FOR LEADERSHIP AND
POLITICAL EXCELLENCE
versus
MINISTER OF HEALTH AND CHILD CARE
and
MINISTER OF HOME AFFAIRS & CULTURE HERITAGE
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 26 August, 2020 and 19 January, 2022

Court Application for Review

E T Moyo, for the applicants
E Jaricha with HR Gusten, for the respondents

CHITAPI J: The applicant filed this application seeking and order that, the commencement time for the curfew in force in Zimbabwe and so far as it applied to non-essential services members of the public be altered in its starting time from 6:00 p.m. to 8:00 p.m. In particular the draft order filed with the application read as follows:

IT IS ORDERED THAT:

1. Paragraph 3 of the Public Health (COVID 19 Prevention, Containment and Treatment) (National Lockdown) (Amendment) Order, S.I. 174/2020, and more particularly the inserted s 17(3) to the principal order, is partially set aside in respect of the starting time of the curfew, to wit 6:00 p.m.
2. The first respondent is directed to, within 48 hours from the date of granting of this order, consider extending the time for the start of the curfew by an additional two hours i.e. to commence at 8:00 p.m.
3. The guidelines/press statement issued by the third respondent in respect of S.I. 174/20 are/is unlawful, null and void.

4. Members of the Zimbabwe Republic Police are ordered and directed:
- (i) to desist from indiscriminately assaulting members of the public in the enforcement of S.I. 174/20 or any other lockdown regulations or orders pursuant to Public Health Regulations, to observe the prescribed under Part II of the Public Health (Covid 19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020, and/or arrest of suspected offenders.
 - (ii) To ensure observance of Covid 19 health rules in particular social distancing of arrested persons at all times from their arrest and while in detention.
 - (iii) Recognise circumstances beyond the control of persons as exceptional grounds justifying movement.

By the time that the matter was urged, the issue of the extension of curfew hours had been addressed by s 25(3) of the S.I 200/20 which amended S.I 174/2020. In terms thereof the curfew hours were to commence at 8:00 p.m. daily and end at 6:00 a.m. on the following day. The prayer in paragraph 1 of the draft order having been realized, no order was necessary to be made in relation thereto.

The brief background to the application was that the applicant is a male adult of Harare. The second applicant is a trust organization established for purposes *inter-alia* to identify, groom and nurture women who aspire to run for public office. The second applicant filed an affidavit in support of the application and equally supported the relief sought as in the draft provisional order. The first respondent is the Minister responsible for the passage of the regulations at play in this application. The second respondent is the Minister of Home Affairs and Cultural Heritage. The applicant, did not state in their founding and answering affidavits on what basis the second respondent was cited as a party to the application and no relief was sought against him in the draft order. The third respondent cited in his official capacity is the Commissioner General of the Zimbabwe Republic Police. As against the third respondent the applicants claim that the third respondent issued a press statement which related to the implementation of S.I. 174/2020. The applicant claimed that the statement be declared to be *ultra vires* and therefore unlawful. The applicants did not indicate details of what the press statement was *ultra vires* to. The applicants in particular stated in para 8 of the founding affidavit as follows:

“8. The applicants seek that the press statement issued by the third respondent with respect to the regulations be declared *ultra vires* and therefore unlawful, and further

that members of the police and security sector desist from assaulting people and/or bundling people into trucks without observing social distancing, and that they recognize circumstance beyond the control of persons as exceptional grounds justifying movement.”

The first applicant in the founding affidavit and in relation to the prayer for extending curfew hours, which prayer as I have indicated was answered through legislation before the application was finalized, was based on the following factual allegations in brief. He alleged that the effect of s 8(1) of the Public Health Regulations S.I. 174/20 which imposed a 6:00 p.m. to 6:00 a.m. curfew was to limit vehicle and non-vehicles movement of non-essential personnel outside their homes except for specified purposes. He averred that the curfew was unreasonable because of the acute shortage of transport in Zimbabwe. I would quickly comment that the allegation that the curfew is unreasonable as stated in para 10 of the affidavit does not resonate with the thrust of the applicants averments made elsewhere in the founding affidavit and draft order that it is the limited time given for the commencement of the curfew of 6:00 p.m. which is unreasonable and should be extended to 8:00 p.m. It would in any event be ridiculous for the applicant or anyone to have alleged that the curfew itself was unreasonable given the proliferation of the Covid 19 infectious and the deadliness of the virus to life. There clearly existed ample justification for any reasonable Government to impose a curfew and to monitor and control the Covid 19 spread situation. In fact the court can take judicial notice that many if not all countries of the world imposed a curfew in one form or another as a means to try and control the Covid 19 virus spread.

The applicant averred that the state owned company, ZUPCO was the only public transporter allowed to carry passengers and that its capacity was limited. The capacity was said to be still limited despite other public carriers being allowed to operate under licence of ZUPCO. The applicant averred that since under the curfew, business closed at 3:00 p.m. and the curfew commenced at 6:00 p.m, the gap of three hours was insufficient for ZUPCO buses to have made meaningful trips to places like Ruwa from Harare CBD. The limited trips left passengers stranded at the onset of curfew. The applicant averred that after the onset of curfew, the stranded passengers would be at the mercy of members of the second and third respondents who would assault and molest stranded commuters.

The first applicant gave an example of the experience he went through on 23 July 2020 when curfew set in before he had commuted home. He alleged that he was waiting for transport

with other commuters at the bus station. Whilst waiting, he averred that “members of the second and third respondents” arrived at the scene and started assaulting the stranded commuters who ran away in all directions including running along Chitungwiza road. He averred that people jumped into any transport which was available including transport destined for Seke which was not their direction home. For his part, the first applicant averred that he jumped into “a transport” destined for Seke which was in the opposite direction to where he was going. He averred that other stranded commuters were not so lucky and were bundled into police cars. The first applicant in para 19 of the founding affidavit stated as follows:

“19. In light of the attendant transport situation where the public has no alternative transport other than ZUPCO, the time given for the curfew imposed or at the very least the manner in which it 1 (sic) being enforced is unreasonable and irrational. An extension to 8:00 p.m. would at least allow time for the public to get on the limited transport available.”

The first respondent in the opposing affidavit averred that it was necessary to curb the spread of Covid 19 by putting in place the curfew so that nocturnal community activities which were deemed high risk for Covid 19 could be curbed. The first respondent averred further that the three hour gap between the closing time for business and the onset of curfew at 6:00 p.m. gave sufficient time for commuters to get home from their places of work. The first respondent then placed the blame on the Ministry of Local Government under whose purview ZUPCO falls for failing to provide sufficient buses to carry the commuters’ home. The first respondent questioned whether the first applicant was in the essential services because that was the only class of persons allowed to travel about in the discharge of duty during all hours despite the curfew. The first respondent advised the applicant to seek redress from the relevant Ministry in relation to transport shortages. In my view, the first respondent cannot justifiably place blame on a brother Ministry. The government is one. It is expected that when decisions are made in the public interest as indeed the imposition of the curfew having been done in the public interest, an impact assessment which involves relevant Ministries is jointly carried out so that the just ends or objectives of the curfew are effectively realized.

Little further needs be said on the issue of extension of curfew hours. The summary of evidence which I have set out is intended to relate the applicants’ prayer to the amendment of the curfew regulations S.I. 174/2020 by S.I. 200/2020 which were promulgated on 20 August 2020. S.I. extended the onset of curfew to 8:00 p.m. The applicants’ prayer was therefore provided for

by law. The court cannot therefore make an order that the curfew hours commencement time be extended to 8:00 p.m. when the law to that effect was put in place during the course of the hearing. The claim was resolved by legislation.

In relation to second part of the order that calls upon the court to declare police directives as set out in a press statement invalid, the facts on which the relief sought as founded were these. Assistant Commissioner Nyathi an officer in the Zimbabwe Republic issued a press statement. I do not intend to set it out *ex tenso*. The press statement set out requirements for police to enable service providers in various categories of business, government ministries, parastatals, farmers and non-governmental organisers to be allowed passage through road blocks and check points monitored by police in line with S.I. 174/2020. The applicants submitted that the third respondent or better still, police did not have legislative powers and could not extend or narrow the scope and application of S.I. 174/2020. In the press statement police listed documents and other things like where applicable the wearing of uniforms by people purporting to be employed in exempted essential services and those on general exempted movements like going out to buy groceries and medicines. Police in the same statement reminded members of the public that they should conduct their permitted activities between the times provided for in the curfew regulations whilst observing all lockdown measures so that law and order could be maintained.

The first applicant in the founding affidavit did not allege how the measures or guidelines listed by the police affected him. For example the applicant did not allege and establish that he falls into the category of persons exempted to move about and be susceptible to police checks and roadblocks. The applicant simply averred that he was an adult male person whose address was that of his legal practitioners. He did not plead anything further about how his regrets were or would be affected by the police requirements. A careful analysis of the press statement shows that police required persons who purported to be exempted to carry with them and produce upon request, proof of identity connected with the exempted undertaking which the person would profess to belong to. In cases where the persons belonged to an undertaking that wears uniforms, police would require the persons to put on their uniforms. In my view there was nothing unreasonable in police requesting members of the public to carry with them such information and documents as proved that they fell within the exempted classes of people under the Covid 19 lockdown regulations in force.

The third respondents in his affidavit stated that police were working in an abnormal situation where it was necessary to strictly ensure strict adherence to Covid 19 regulations. He averred that the press statement consisted in setting out operational guidelines to assist the public to discharge the duty or *onus* to show that they were exempted to be up and about during the lockdown and curfew hours. The third respondent averred that it was the duty of the individual to convince the police that the individual is exempted to travel during lockdown and that the individuals' movement was justified. Police are responsible for enforcing the lockdown. For them to ask for production of identity and attachment to the exempted undertaking makes eminent sense. There was also nothing in the press statement to suggest that the police could not exercise a discretion to allow passage of movement to persons who would not be carrying documents listed but could still convince the police that they are exempted from the curfew. For example one could phone an employer to confirm to the police that the person was indeed employed by the exempted organisation and was required at work. In my view, the press statement did not go beyond what was envisaged or sought to be achieved by S.I. 174/2020 in its alleged limitation of movement of the members of the public. The regulations did not limit movement beyond what S.I. 774/2020 provided for. Police simply advised the public of what the public should provide to the police to ensure easy passage in their policed movements as police strived to comply with the restrictions to movement imposed by the Covid 19 lockdown regulations

The last issue pertained to alleged police brutality. The first applicant averred that police indiscriminately assaulted members of the public instead of arresting them according to the law. The first applicant further averred that police arbitrarily rounded up members of the public into trucks thereby exposing them to the harm which the Covid 19 lockdown regulations were intended to arrest or guard against. The rounding up of persons as aforesaid was alleged to defeat the social distancing requirement. The first applicant averred in para 23 of the founding affidavit that:

“Such conduct must be censured.”

The third respondent denied the allegations of assault of members of the public by police. He averred that police had a duty to enforce the law. He denied that police rounded up members of the public but averred that police dispersed people where people would be seen gathered or gathering. Offenders caught violating the curfew regulations were arrested and indeed transported in open cars which were the best form of transport under the circumstances. The third respondent

denied that social distance was not observed by police in transporting arrested persons. He averred that police would be part with the arrested persons and would practice social distance to avoid possible infections by arrested persons.

The first applicant in his affidavit on para 16 thereof averred that he would produce video evidence showing people running along Seke road after they were dispersed by police. The evidence was not produced. The first applicant produced as annexures B to the founding affidavit pictures of members of the public waiting at a bus stop called Copa Cabana in Harare city centre. I assumed that the pictures were intended to demonstrate the need for the authorities to ensure that there are sufficient ZUPCO buses to ferry people home. In this respect the application was supposed to be addressed to the relevant government minister who is charged with the responsibility for transport in Zimbabwe. The court cannot grant an order against a party who is not before it. I must note that in any event the applicants did not seek any order in relation to increasing the numbers of the buses or their frequency.

The court's analysis of the application is determined as follows. In relation to the relief that the first respondent should extend the curfew hours, it is common cause that the extension was granted through legislation. The applicant did not withdraw the application or amend their draft order in the light of the relief sought having been overtaken by legislative intervention. In such situation the court must dismiss the application in relation to that part of the relief sought in the draft order in para 1 and 2 thereof.

In relation to the police guidelines press statement being declared "unlawful, null and void", I have indicated that there is nothing in the guidelines which offend the nor after law. The applicants in their heads of argument appropriately quoted s 4(3) of the principal Covid 19 regulations as set out in S.I 83/2020 as follows:

"Every individual found outside his or her home shall have the burden of proving to the satisfaction of an enforcement officer that he or she is covered by any exception listed in sub (s) (1) or is acting under demonstrable exceptional circumstances."

It is clear from the above provisions that the onus to prove that a person found outside his or her home falls within the exemptions in the regulations rests with that person. The degree of the adequacy of the proof is not defined in the regulations. It is therefore left to the police to be satisfied that the person concerned is covered in the exception. The police then went on to list the documents which they would consider as sufficient to satisfy themselves that the person concerned

is exempted within the exemption classes set out in the regulations. The applicant did not allege that he faced any difficulties to pass police check points. The requirements are as observed, reasonable and do not place any onerous burden on the public wishing to travel about under cover or justification of an exemption. The statement is not invalid and therefore cannot be declared null and void. The applicants did not put up any meaningful argument on their attack of the press statement.

In relation to police assaults and alleged brutality; the third respondent emphatically denied that the situation as described by the applicant existed. He averred that police had not received any report of assault by police from the public. The applicants in the founding affidavit did not provide details of the alleged assaults. I have noted that the applicants did not produce videos of police brutality which they alleged to be in their possession. The applicants in their answering affidavit attached a copy of a report that was published in the Chronicle newspaper dated 3 April 2020. The report showed a picture of a lorry with people standing in its loading tray. Other people appears standing outside the lorry while awaiting their turn to get into the lorry. There are three police officers seen outside the lorry. One is holding a baton stick and speaking with a female member of the public. None of the police officers is depicted assaulting anyone nor molesting the public. The report contains the caption:

“A total of 485 people were arrested country wide yesterday as police cracked down on Zimbabweans who have been wantonly disregarding the 21 day lockdown that requires them to stay at home.”

The report aforesaid was produced by the applicants. The report does not refer to any assaults by police. What the caption shows is that the persons inside the lorry are not keeping the social distance of at least a metre or more. They are not wearing masks which suggests that they were not wearing their masks on arrest. Police do not seem to be wearing masks either. It cannot be expected that the police should keep social distance from persons whom they are arresting. Equally it would be unreasonable to expect that arrested persons keep exact social distances inside the police lorry. The court must consider that the advent of the Covid 19 virus presented the government with an extra-ordinary situation. In such a case, extra-ordinary measures become necessary to take. The court does not oversee operations of an administrative authority contrary to what the first applicant asserts in para 23 of the founding affidavit. The court cannot censure the operations of the police because the police service is a constitutional body which has its own

administrative structures and powers. See *City of Harare v Mushoriwa* HH 195/2014. The courts interpret and enforces law where a person complains that his or her rights have been or are being trampled or interfered with. Thus I am not persuaded to grant the fourth prayer sought by the applicants in the draft order. I cannot order police to desist from indiscriminately assaulting members of the public. It is a criminal offence for police to assault members of the public or anyone for that matter. I can't order police to follow procedures which it is their duty to follow. That is an administrative function. The court will enforce the law where it has been violated. A case must be brought before the court where there has been an infringement and the court gives an appropriate order. The applicants have sought a generalized order. It is not proper to grant such an order. In any event the applicants did not prove on a balance of probabilities that police indiscriminately assaulted members of the public. As regards the court having to order police to observe Covid 19 Health rules on social distance and that police should recognise exceptional grounds justifying movement, the law already provides for that. The courts deal with an infringement of the law but does not assume the role of overseer of who breaks the law. In any event, the applicants did not establish that police do not practice social distance. At best the evidence established that the persons on the newspaper report had been arrested. I have already commented on the impracticalities of enforcing social distance in a forced arrest situation.

In my determination therefore, there was no merit in the application and for the reasons I have given, I must dismiss it. However costs should be in the cause because of the public interest which informs the making of the application. The following order ensues:

1. The application be and it is hereby dismissed with no order as to costs.

Scanlen & Holderness, applicant's legal practitioners
Civil Division, respondent's legal practitioners.