

PRECIOUS GWATIDZO
and
CLEVER RAMBANAPASI
versus
MINISTER OF HEALTH AND CHILD CARE
and
MINISTER OF LOCAL GOVERNMENT RURAL AND URBAN DEVELOPMENT
and
MINISTER OF TRANSPORT AND INFRASTRUCTURE DEVELOPMENT
and
ZIMBABWE UNITED PASSENGER COMPANY

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 3 & 11 March & 30 June 2022

Opposed Application

Mr T Biti, for the 1st and 2nd applicants
Ms J Shumba, for the 1st, 2nd and 3rd respondents
No appearance for the 4th respondent

DEME J: The first and second applicants approached this court seeking the following relief:-

- “1. Section 4(2) of the Public Health (COVID 19 Prevention, Containment and Treatment, National Lockdown) Order published in SI 83/2020 as amended be and is hereby declared *ultra vires* Section 8 of SI 77/2020 and Section 68 of the Public Health Act Chapter 15:17.
2. Section 4(2) of Public Health (COVID 19 Prevention, Containment and Treatment, National Lockdown) Order published in SI 83/2020 is *ultra vires* the Constitution of Zimbabwe.
3. 1st Respondent to pay costs of suit.”

I will firstly give the background of the matter before dealing with the analysis of the facts and the law. The President of Zimbabwe declared COVID-19 a state of disaster in respect of the whole of Zimbabwe in terms of s 27(2) of the Civil Protection Act [*Chapter 10:16*]. In addition, the first respondent enacted the Public Health COVID- 19 (Containment and Treatment) Regulations published in SI 77 of 2020. This SI was published in terms of s 68 of the Public Health Act [*Chapter 15:17*]. Multiple Statutory Instruments were promulgated thereafter to enhance the measures of containing

of combating the disease of COVID-19. Statutory Instrument 83 of 2020, together with subsequent amendments made thereafter, introduced various measures including the restricting of transport operators and only the fourth respondent was to provide services. Any other private operator which wishes to provide transport services was to register with the fourth respondent. This restriction was introduced by s 4(2) of SI 83 of 2020. It is the case of the applicants that the restriction of transport services is irrational and is not legitimately connected to the issue of containing the pandemic of COVID-19 as provided for by s 68 of the Public Health Act [*Chapter 15:17*] as read with s 8 of SI 77 of 2020.

The first and second applicants further contended that s 4(2) of SI 83 of 2020 violates the freedom of profession, trade or occupation established in terms of s 64 of the Constitution of Zimbabwe. The applicants also argued that the restriction of transport services is discriminatory and unfair and flies against the provisions of s 56 of the Constitution which guarantees the right to equal protection and benefit of the law.

The first applicant is a female business person based in Mutare. She alleged that she does have two commuter omnibuses which prior to the restriction plied the route from Hob-house to Mutare City Centre. The first applicant also maintained that her livelihood solely depended on her business of transport services which she ran before the introduction of the restrictions. According to the first applicant, she employed five people including two drivers, two conductors and another person who provides administrative and mechanical services. The first applicant further affirmed that she does have a large extended family which she has to look after. It is the first applicant's case that commuter omnibus operation is her profession and her trade. The first applicant further asserted that since the introduction of COVID-19 restrictions, she had not been able to operate her business which forced her to live on assistance from her relatives

The first applicant further claimed that she tried to register her two vehicles with the fourth respondent but was directed to pay US\$200 per vehicle as registration fee which she could not afford. According to the first applicant, the fourth respondent enjoys the monopoly which is irrational, unreasonable and

unconstitutional. It is the first applicant's case that the commuter omnibuses were supposed to be allowed to ply their routes subject to the observation of social distancing and other World Health Organisation (WHO) guidelines as was happening in South Africa. The first applicant further averred that there is nothing that could prevent commuter omnibus operators from observing WHO guidelines in their daily operations as was being done by the fourth respondent.

It is the first applicant's affirmation that the fourth respondent does not have the capacity to satisfy the transport needs of the public due to its limited fleet. The first applicant also maintained that the commuters become stranded as a result of limited transport facilities offered by the fourth respondent. The first applicant also claimed that some commuters are forced to walk to and from workplaces while others are forced to sleep at their workplaces due to non-availability of transport service providers. The first applicant, in addition, contended that some commuters, particularly women, got abused at the time of boarding fourth respondent's vehicles. The first applicant further alleged that the transport facilities had been inadequate even prior to the introduction of COVID-19 restrictions but the restrictions worsened the situation. The first applicant suggested that the transport problems can only be alleviated by complementing such services through the introduction of modern trains.

The second applicant is a male adult who is based in Highfield, Harare. The second applicant associated himself with the contents of the first applicant's affidavit. The second applicant affirmed that he is employed by Suxel Investments, a company involved in pig farming. According to his averments, his work involves a lot of movement from one place to another for purposes of searching for inputs and accessing other pig farming projects outside Harare. The second applicant further asserted that transport is essential to his daily operations of employment. The second applicant regretted that the fourth respondent is unable to provide adequate transport services. According to the second applicant, he would, sometimes, be forced to sleep at his workplace due to non-availability of transport to take him to his residential area. He further submitted that he occasionally failed to report at his workplace due to transport shortage. It is the second applicant's case that the COVID-19 restrictions allowing only the fourth

respondent to operate are an infringement to his right to trade and his right to equal protection of the law. According to the second applicant, this application is brought in terms of s 85(1) (a) of the Constitution of Zimbabwe.

The application was opposed by the first and second respondents. The first and second respondents denied that s 4(2) of SI 83 of 2020 violates s 64 of the Constitution of Zimbabwe. According to the first and second respondents, s 64 of the Constitution of Zimbabwe provides that the right to profession, trade or occupation must be regulated by law. They further argued that Statutory Instruments may be put in place to regulate such right. The first and second respondents further highlighted that buses and commuter omnibuses are not prohibited from operating as they are required to register with the fourth respondent for them to operate. The first respondent maintained that registration with the fourth respondent is in the public interest and will ensure that monitoring of compliance with COVID-19 guidelines will be made possible. Further, according to the first respondent, this regulation promotes the safety of the people. The second respondent further averred that the first respondent is empowered by SI 83 of 2020 to set conditions and measures he may deem necessary to prevent, contain and treat the COVID-19 disease. It is the second respondent's case that the country was not yet free from the pandemic at the time this present application was filed. Thus, the measure went a long way in preventing and containing the local transmission of COVID-19, according to the second respondent.

The second respondent further alleged that SI 83 of 2020 remains lawful, regular and valid as it was properly enacted as a logical operationalization of SI 77 of 2020. The second respondent also affirmed that the decision to allow the fourth respondent as the only service provider was taken given the circumstances of the declaration of COVID-19 as a formidable epidemic disease in terms of s 3 of SI 77 of 2020. The second respondent highlighted that the decision for the restriction was justified on the basis that most of the kombi operators especially those that are not registered have a clear track record of not complying with the stipulated passenger load and that compliance with the current 50% capacity loading would virtually render the non-subsidised private kombis non-viable. The SI protects the right to life for the commuters, according to the second respondent. The second respondent also averred

that the fourth respondent increased its fleet after realising that the demand for transport had increased. Further, the second respondent maintained that the buses registered with the fourth respondent are disinfected in compliance with WHO guidelines. It is the second respondent's submission that the fourth respondent does comply with WHO guidelines unlike the private operators who may be difficult to monitor. The third respondent did not oppose the application and he made an undertaking that he will abide by the decision of the court.

Responding to the opposing affidavits, the second applicant insisted that the decision to compel all private transport operators to register with the fourth respondent is irrational and unconstitutional. He further contended that there is no justification for the imposition of such restrictions. Further, the second applicant argued that there must be a rational connection between means and ends. According to the second applicant, failure to establish a rational connection between means and ends makes the decision for the imposition of the restriction arbitrary. The second applicant further wondered why the monopoly of transport operation was given to the fourth respondent ahead of other transport operators.

The applicants' counsel, Mr *Biti*, submitted that s 4(2) of SI 83 of 2020 is *ultra vires* s 8 of SI 77 of 2020 and s 68 of the Public Health Act [*Chapter 15:17*]. Section 4(2) of Statutory Instrument 83 of 2020 provides as follows:-

- “(2) Transport services, whether intracity or intercity, for the carriage of passengers shall be restricted to those provided by—
- (a) the parastatal company known as the Zimbabwe United Passenger Company (ZUPCO);
 - (b) omnibuses and other passenger service vehicles operated by or on behalf of the Public Service Association, the Police Service, the Defence Forces and the Civil Protection Authorities;
 - (c) commuter omnibuses and other passenger service vehicles operated or chartered by local authorities for the carriage of staff for essential services, the carriage of sick persons to hospitals and other health care providers, and the transport of water, food, fuel, basic goods, medical supplies needed to combat COVID-19 and other medical supplies.”

Section 68 of the Public Health Act [*Chapter 15:17*] provides as follows:-

“68 Regulations regarding formidable epidemic diseases and conditions or events of public health concern

- (1) Subject to the provisions of this Act, in the case of the occurrence or threatened outbreak of any formidable epidemic disease, condition or event of public health concern, the Minister may make regulations as to all or any of the following matters, namely—
- (a) the imposition and enforcement of quarantine and the regulation and restriction of public traffic and of the movements of persons;

- (b) the closing of schools or the regulation and restriction of school attendance;
- (c) the closing of churches and Sunday schools and restriction of gatherings or meetings for the purpose of public worship;
- (d) the regulation or restriction or, where deemed necessary, the closing of any place or places of public entertainment recreation or amusement, or where intoxicating liquor is sold by retail, and the regulation or restriction, or, where deemed necessary, the prohibition, of the convening, holding or attending of entertainments, assemblies, meetings or other public gatherings,;
- (e) the prevention and remedying of overcrowding or the keeping of an dwelling or other building or the contents thereof in a state of sanitation posing or likely to pose a public health risk;
- (f) the medical examination of persons who are suspected of being infected with, or who may have recently been exposed to the infection of, such disease, and of persons about to depart from any infected area, and the disinfection of their baggage and personal effects, and the detention of such persons until they have after such examination been certified to be free from any infectious disease and until their baggage and personal effects have been disinfected;
- (g) the keeping under medical observation or surveillance, or the removal, detention and isolation of persons who may have recently been exposed to the infection of, and who may be in the incubation stage of; such disease the detention and isolation of such persons until released by due authority, the use of guards and force for that purpose, and, in case of absolute necessity, the use of firearms or other weapons, and the arrest with or without warrant of any person who has escaped from such detention or isolation;
- (h) the establishment of isolation hospitals and the removal and isolation of persons who are or are suspected to be suffering from any such disease, the accommodation, classification, care and control of such persons and their detention until discharged by due authority as recovered and free from infection, and the establishment, management and control of convalescent homes or similar institutions for the accommodation of persons who have recovered from any such disease;
- (i) inquiries into the cause of death of any person, apart from any inquiry by a magistrate under any other enactment; the ordering, when deemed necessary, of post-mortem examinations or of exhumations; the prohibition in special circumstances of the burial of any dead body except on a certificate by a medical officer appointed to grant such certificates or after compliance with any other specified conditions, the regulation of the mode of disposal, the times and places of burial of dead bodies and the manner of conducting removals and burials thereof;
- (j) the regulation and restriction and, if deemed necessary, the prohibition of the removal of merchandise or any article or thing into, out of or within any specified or defined area;
- (k) the provision of disinfecting plant and equipment, and the disinfection or where disinfection is impossible, the destruction of any article or thing, or the disinfection of any premises which are or are believed to be contaminated with the infection of such disease;
- (l) the inspection of premises and articles and the discovery and remedying of sanitary or other defects likely to favour the spread or render difficult the eradication of such disease;
- (m) the evacuation, closing, alteration or, if deemed necessary, the demolition or destruction of any premises the occupation or use of which is considered likely to favour the spread or render more difficult the eradication of such disease,

- and the definition of the circumstances under which compensation may be paid in respect of any premises so demolished or destroyed and the manner of fixing such compensation;
- (n) in the case of plague, the destruction of fleas and rodents and the removal or improvement of conditions likely to favour the harbourage or multiplication of rodents, and the disposal of the carcasses of rodents or other animals believed or suspected to have died of plague; and such other matters as the Minister may deem necessary for preventing the occurrence of such disease or limiting or preventing the spread thereof or for its eradication and generally for the better carrying out and attaining the objects and purposes of this Part.
- (2) Any person who contravenes any provision of regulations made in in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.
 - (3) Regulations made under subsection (1) shall not apply to persons about to depart from Zimbabwe.”

Ms *Shumba*, on behalf of the first to the third respondents, argued that s 4(2) of SI 83 of 2020 is not *ultra vires* the Public Health Act [*Chapter 15:17*]. She further contended that s 68(1) (n) of the Public Health Act [*Chapter 15:17*] gives the first respondent wide powers to promulgate subsidiary legislation which the first respondent considers necessary. In my view, s 4(2) of SI 83 of 2020 is a necessary provision and a vital tool for containing local transmission of COVID-19. This provision, in my view, is consistent with the objects of the Public Health Act [*Chapter 15:17*] contemplated in s 68(1) (n) thereof. Further, it is apparent that the first respondent is empowered in terms of s 68(1) (a) to regulate and restrict public traffic. Thus, s 4(2) of SI 83 of 2020 is an essential provision which has the effect of combating the spreading of COVID-19. In light of this, it is my considered view that s 4(2) of SI 83 of 2020 is not *ultra vires* the Public Health Act [*Chapter 15:17*].

Section 8 of SI77 of 2020 provides for the enactment of ministerial orders necessary to contain COVID-19. According to paragraph 1 of the draft order, the applicants want s 4(2) of SI 83 to be declared *ultra vires* s 8 of SI 77 of 2020. Section 8 of SI 77 of 2020 provides as follows:-

“Ministerial orders

- 8. (1) In pursuance of the object of these regulations the Minister may (in consultation with the President, and in conformity with any directions the President may give) by orders published in the Gazette—
 - (a) impose restrictions of public traffic and of the movements of persons by means of curfews in any local authority;
 - (b) close schools or regulate and restrict school attendance in any local authority;

- (c) close places of worship and restrict gatherings or meetings for the purpose of public worship in any local authority;
 - (d) regulate, restrict or, where deemed necessary, close in any local authority any place or places of public entertainment, recreation or amusement, or where intoxicating liquor is sold by retail, and regulate or restrict, or, where deemed necessary, prohibit the convening, holding or attending of entertainments, assemblies, meetings or other public gatherings of less than one hundred persons;
 - (e) direct the making of inquiries into the cause of death of any person, apart from any inquiry by a magistrate under any other enactment;
 - (f) order, when deemed necessary, post-mortem examinations or exhumations;
 - (g) prohibit in special circumstances the burial of any dead body in any local authority except on a facility by a medical officer appointed to grant such facility or after compliance with any other specified conditions;
 - (h) regulate the mode of disposal, the times and places of burial of dead bodies and the manner of conducting removals and burials thereof in any local authority;
 - (i) regulate and restrict and, if deemed necessary, prohibit the removal of merchandise or any article or thing into, out of or within any in any local authority or specified or defined area;
 - (j) facilitate the provision of disinfecting plant and equipment, and the disinfection or, where disinfection is impossible, the destruction of any article or thing, or the disinfection of any premises which are or are believed to be contaminated with the infection of such disease;
 - (k) authorise in any local authority the inspection of premises and articles and the discovery and remedying of sanitary or other defects likely to favour the spread or render difficult the eradication of COVID-19;
 - (l) authorise in any local authority the evacuation, closing, alteration or, if deemed necessary, the demolition or destruction of any premises the occupation or use of which is considered likely to favour the spread or render more difficult the eradication of such disease, and define the circumstances under which compensation may be paid in respect of any premises so demolished or destroyed and the manner of fixing such compensation;
- (2) Any person who disobeys or fails to comply with an order made in terms of subsection (1) shall be guilty of an offence and liable to fine not exceeding level 12 or to imprisonment for a period not exceeding one year to both such fine and such imprisonment.”

Section 8(1)(a) of SI 77 of 2020 gives the first respondent power to, in consultation with the President of Zimbabwe, make orders for the restriction of public traffic. Thus, s 4(2) of SI 83 of 2020 is an appropriate ministerial order which is in harmony with the provisions of s 8(1) (a) of SI 77 of 2020. In my view, s 4(2) of SI 83 of 2020 is not *ultra vires* s 8 of SI 77 of 2020.

This matter is brought in terms of s 85(1)(a) of the Constitution of Zimbabwe which entitles persons acting in their own interest to approach the court, alleging that a fundamental right or freedom has been, is being or is likely to be infringed. Mr *Biti* submitted that s 4(2) of SI 83 of 2020 is unconstitutional as it violates the rights of the applicants in the manner specified before. Ms *Shumba* argued that s 64 of the Constitution is a derogable right which can be limited in the manner specified in s 86 of the Constitution of Zimbabwe. Mr *Biti* further argued that s 4(2) of SI 83 of 2020 did not limit the freedoms in the manner contemplated by case law. He relied on the cases of *Retrofit (Pvt) Ltd v Post and Telecommunications Corporation*,¹ *Capital Radio v The Zimbabwe Broadcasting Authority*², *In re Munhumeso and Anor*³, *Nyambirai v NSSA and Anor*⁴, among others. Ms *Shumba* also contended that S 64 of the Constitution of Zimbabwe does allow the regulation of the freedom contained therein by a law. According to Ms *Shumba*, S 4(2) of SI 83 of 2020 is one such law that has been used by the first respondent to regulate the freedom of profession, trade or occupation. She further referred the court to the case of *The Zimbabwe Chambers for Informal Traders & Anor v Minister of Health and Ors*⁵, which held that the Statutory Instrument in question was a necessary step in containing the pandemic.

Section 64 of the Constitution of Zimbabwe provides as follows:-

“Every person has the right to choose and carry any profession, trade or occupation, but the practice of a profession, trade or occupation may be regulated by law.”

It is apparent that s 64 of the Constitution does have self-limiting mechanism for the practice of a profession, trade or occupation as it allows the law to regulate the profession, trade or occupation. Various pieces of legislation have been used to regulate the professions, trades or occupations. Notable examples are Acts of Parliament which fall within *Chapter 27* of the national statute book which regulate different professions. Further, although s 64 of Zimbabwe’s Constitution seems to suggest that every person is entitled to the freedom of profession, trade or occupation, however it is apparent that foreigners may not be entitled to this freedom if they have no work permits required by the Immigration Act [*Chapter 4:02*] or regulations made thereunder. Certain countries like South Africa have ensured that only

¹ 1996 (1) SA 847 (ZS).

² 2003 (2) ZLR 326.

³ 1994 (1) ZLR 49 (S) at 62F.

⁴ 1995 (2) ZLR 1 (S).

⁵ HH537/21.

citizens are entitled to the freedom of profession, trade or occupation⁶ after realising this limitation.

Thus, in my view, s 4(2) of SI 83 of 2020 is a means by which profession, trade or occupation may be regulated especially in times of pandemics or disasters. What is critical is to examine whether or not the restriction imposed by s 4(2) of SI 83 of 2020 is in line with s 86 of the Constitution of Zimbabwe as augmented by established jurisprudence, international human rights instruments and scholarly views. Section 86 of the Constitution provides as follows:

“86 Limitation of rights and freedoms

- (1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
- (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
 - (a) the nature of the right or freedom concerned;
 - (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
 - (c) the nature and extent of the limitation;
 - (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;
 - (e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and
 - (f) whether there are any less restrictive means of achieving the purpose of the limitation.
- (3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—
 - (a) the right to life, except to the extent specified in section 48;
 - (b) the right to human dignity;
 - (c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
 - (d) the right not to be placed in a slavery or servitude;
 - (e) the right to a fair trial;
 - (f) the right to obtain an order of *habeas corpus* as provided in section 50(7)(a).”

Prior to the 2013 Constitution, our jurisprudence had established the manner in which human rights may be limited. In *Nyambirai v National Social Security Authority & Anor*⁷, the court, quoted the Canadian case of *R v Oakes*⁸, which held that:-

⁶ See Section 22 of the South African Constitution.

⁷ 1995 (2) ZLR 1 (S)).

⁸ 1986 19 CRR 308.

“In effect the court will consider three criteria in determining whether or not a limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:

- (i) The legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) The measures designed to meet the legislative objective are rationally connected to it; and
- (iii) The means used impair the right or freedom are no more than is necessary to accomplish the objective.”

The introduction of the 2013 Constitution of Zimbabwe codified the limitation procedure of human rights. PATEL JA as he then was, in *James v Zimbabwe Electoral Commission & Others*⁹, made the following observations:-

“Section 86 (2) of the Constitution is essentially a restatement of the criteria for permissible derogation from constitutional rights as enunciated by the Supreme Court in *Nyambirai v National Social Security Authority & Anor* 1995 (2) ZLR 1 (S)”.

The Constitutional Court in the case of *Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N.O. & Ors*¹⁰, in commenting the case of *James v Zimbabwe Electoral Commission (supra)*, **postulated the following remarks:-**

“I read the view by PATEL JA as holding that the provisions of s 86(2) of the Constitution and the general approach to establishing permissible limitations to constitutional rights are complementary and not mutually exclusive and that both are applicable.”

In the case of *Democratic Assembly for Restoration and Empowerment & Ors v Newbert Saunyama N.O. & Ors (supra)* the Constitutional Court further made the following remarks:-

“Thus, the general approach that has been discussed in cases such as *In re Mhunumeso & Ors* 1994 (1) ZLR 49 (S), *Nyambirai v NSSA (supra)*, *Retrofit (Private) Limited v PTC & Anor* 1995(2) ZLR 199 and *Chimakure & Ors v AG* 2013 (2) ZLR 466 (S) which were decided before the promulgation of the Constitution remains valid as providing general guiding principles while s 86 (2) sets out in detail the factors that a court must take into account in determining whether or not a limitation of a fundamental right is constitutional.”

⁹ 2013 (2) ZLR 659 (CC), at p 666E

¹⁰ CCZ 9-18

Also deserving special mentioning for this object of limiting human rights are various scholarly views which are key for the purposes of enriching our jurisprudence. *Currie and de Waal*¹¹, quoted by Dr I Maja¹², remarked as follows:-

“constitutional rights and freedoms are not absolute. They have boundaries set by the rights of others and by important social concerns such as public order, safety, health and democratic values.”

Further, *Currie and de Waal*¹³, postulate that:-

“This essentially means that not all infringement of rights is unconstitutional. Rights can be limited or justifiably infringed if the reason for infringement is justifiable in an open and democratic society based on human dignity, equality and freedom.”

The limitation of human rights has its origin in international human rights instruments. Such instruments have set parameters which may be used to limit certain rights. For example, Article 19(3) of the International Covenant on Civil and Political Rights, in limiting the freedom of expression, provides as follows:-

“3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.”

The International Covenant on Economic, Social and Cultural Rights also provides for the limiting measures of human rights. Article 4 of the International Covenant on Economic, Social and Cultural Rights provides as follows:-

“The State Parties to the present Covenant recognise that, in the enjoyment of these rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”

¹¹ Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 6th Edition, 150 (Juta & Co. Ltd, Cape Town, 2014).

¹² [Limitation of Human Rights in International Law and the Zimbabwean Constitution](https://ir.uz.ac.zw/bitstream/handle/Maja_Li...), https://ir.uz.ac.zw/bitstream/handle/Maja_Li..., (Accessed on 20 June, 2022)

¹³ Iain Currie and Johan de Waal, *The Bill of Rights Handbook*, 6th Edition, 150 (Juta & Co. Ltd, Cape Town, 2014).

In my view, s 4(2) of SI 83 of 2020 is in harmony with the provisions of s 86 of the Constitution as amplified by case law, scholarly views and international human rights instruments. It is not in dispute that the freedom of profession, trade or occupation is a derogable right as this is not specified as a non-derogable right in s 86(3) of the Constitution. The restriction of the provision of transport service to the fourth respondent was a necessary and temporary measure to battle the spreading of COVID-19. The boundary imposed upon citizens on their enjoyment of their freedom of profession, trade or occupation was an appropriate mechanism meant to enhance the enjoyment of the right to life which was threatened by COVID-19 which saw multitudes succumbing to the pandemic throughout the world. In my view, this restriction was in the interest of public safety contemplated in s 86(2) (b) of the Constitution of Zimbabwe. Further, the restriction was a very key instrument for advancing the general welfare of the public specified in Article 4 of the International Covenant on Economic, Social and Cultural Rights.

Section 4(2) of SI 83 of 2020 is consistent with the limitation criteria established by the case of *Nyambirai v NSSA (supra)*. In my view, the restriction was not excessive. The legislative objective was satisfactorily important to justify limiting the freedom of profession, trade or occupation specified in s 64 of the Constitution of Zimbabwe. Further, the measures employed by the first respondent in restricting the freedom provided in s 64 of the Constitution were rationally connected to the objective. Mr *Biti* argued that the measures were irrational and unreasonable. I do not agree with his sentiments. In light of the fact that the other transport operators wishing to provide transport services during the pandemic era were required to register with the fourth respondent, I consider that the measures were connected to the objective of tackling the pandemic. Further, the measures were only temporary and not permanent. Such measures ceased to be in place in May 2022. I am of the further view that the means used to restrict freedom of profession, trade or occupation were necessary to accomplish the objective for reducing the spreading of the pandemic.

COVID-19 is a public health issue. In terms of s 86(2) (b) of the Constitution of Zimbabwe rights may be limited if such limitation is in the interest of public health, among other grounds specified therein. In my view, it was in the interest of public health to restrict the movement of public traffic in order to fight the pandemic. I am of the considered view that the limitation was fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom as contemplated in s 86(2) of the

Constitution of Zimbabwe. In light of the fact that s 4(2) of SI 83 of 2020 was of general application, I do not agree that the first and second applicants' rights to be protected by the law contemplated in s 56 of the Constitution of Zimbabwe were violated. All other transport operators were equally affected. After judiciously and conscientiously assessing the facts surrounding the present application, I consider that the present application has no merits, in my view. I fully associate myself with the views of TAGU J in the case of *The Zimbabwe Chambers for Informal Traders & Anor v Minister of Health & Ors*¹⁴, where he made the following remarks:-

“In my view, the restrictions imposed on the applicants serve a legitimate purpose and the 1st respondent is empowered in terms of s 68 of the Act to make these restrictions, and accordingly the 1st respondent should be afforded the space to put in place measures necessary to curb the spread of COVID-19 in Zimbabwe. There is therefore no justification at this stage for this court to order the suspension of 1st respondent's order made in SI 83 of 2020 as amended nor to order him to amend it as suggested by the applicants as this would be tantamount to prescribing to government how it should exercise its mandate in preventing and containing Covid-19.”

In the result, it is ordered as follows:-

- (a) The application be and is hereby dismissed.
- (b) There shall be no order as to costs.

Mafume Law Chambers, applicants' legal practitioners
Civil Division, 1st to 3rd respondents' legal practitioners

¹⁴ HH 537/21.