

THE ZIMBABWE CHAMBER FOR INFORMAL WORKERS  
and  
PASSENGER ASSOCIATION OF ZIMBABWE  
and  
CONSTANTINE CHAZA  
versus  
MINISTER OF HEALTH AND CHILD WELFARE  
and  
MINISTER OF LOCAL GOVERNMENT, RURAL AND URBAN DEVELOPMENT  
and  
MINISTER OF FINANCE AND ECONOMIC DEVELOPMENT  
and  
MINISTER OF PUBLIC SERVICE LABOUR AND SOCIAL WELFARE  
and  
MINISTER OF TRANSPORT AND INFRASTRUCTURE DEVELOPMENT  
and  
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 17 September and 6 October 2021

### **Urgent Chamber Application**

*T. Biti*, for applicants  
*C. Chididi*, for respondents

TAGU J: This case was initially filed on 11 May 2020 as an urgent chamber application. The application was duly set down and argued before my sister DUBE J (as she then was) and judgment was handed down on 26 May 2020 in Case No. HC 2212/20, being judgment number HH 334/20 dismissing the application. Aggrieved by the dismissal of the application the applicants appealed to the Supreme Court attacking certain aspects of the judgment that are contained in the

Notice and Grounds of appeal. The Supreme Court upheld the appeal on 12 March 2021 and made the following order -

“IT IS ORDERED THAT

1. The appeal succeeds with no order as to costs.
2. The judgment of the court *a quo* is hereby set aside.
3. The matter is hereby remitted to the court *a quo* for a hearing *de novo* before a different judge.”

The file landed on my desk. I reset the matter and it was reargued on 17 September 2021. After hearing submissions from the parties’ legal practitioners I reserved judgement. The following is my judgment.

The brief background to this application is that on 11 March 2020 the World Health Organization (WHO) declared Covid-19 a Global Pandemic. As part of the fight against Covid-19, the 6<sup>th</sup> respondent, The President of The Republic 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]. At the same time the 1<sup>st</sup> respondent, the Minister of Health and Child Welfare enacted the Public Health (Covid-19 Containment and Treatment) Regulations 2020 published as Statutory Instrument 77 of 2020 (SI 77/2020) in terms of s 64 (1) (a) of the Public Health Act [Chapter 15.17] having declared Covid-19 a formidable epidemic disease. On 28 March 2020 the 6<sup>th</sup> respondent, the President of the Republic of Zimbabwe announced a 21 day lockdown starting on Monday 30 March 2020 and ending on 19 April 2020. To give legal effect to the lockdown the 1<sup>st</sup> respondent published in a Government Gazette of 28 March 2020 Statutory Instrument 83 of 2020 SI 83/2020 Covid-19 Prevention, Containment and Treatment Lockdown Order of 2020. That order was made with the consent of the President of the Republic of Zimbabwe in terms of s 8 of the Public Health (Covid-19 Prevention, Containment and Treatment) Regulations SI 77/2020.

Thereafter periods of lockdown were extended regularly on a 2 weekly intervals and at each interval a Statutory Instrument was publish to give effect to the extensions and other ancillary issues such as prohibition of business in the informal sector. Finally, SI 99/2020, Order No. 5, made in terms of s 8 of SI 77/2020 was promulgated which imposed substantial amendments which include the following:

- i) That any business defined as formal was now allowed to open;
- ii) That before resuming operations everyone who operates or is employed in the business must, at the direction of an enforcement officer, submit to screening and testing for the Covid-19 disease with employers obliged to arrange for such testing;
- iii) That everyone was obliged to wear face masks;
- iv) That public transport services were to continue but restricted to those provided for the 6<sup>th</sup> respondent, ZUPCO.

It is the applicants' contention that SI 99/2020 affects the rights of its members and the rights of many Zimbabweans. They contended that the orders made by the 1<sup>st</sup> respondent contained in SI 83 of 2020 as amended were:

- i) *Ultra vires* s 8 of the Public Health (Covid-19 Prevention Containment and Treatment) Regulations published as SI 77/2020.
- ii) *Ultra vires* s 68 of the Public Health Act.
- iii) That s 8, of the Public Health (Covid-19 Prevention Containment and Treatment) Regulations published as SI 77/2020 was an unlawful delegation of delegated power and was therefore *ultra vires* ss 68 of the Public Health Act and 134 of the Constitution of Zimbabwe.
- iv) That ss 4.2 and 11 (F) of the Public Health (Covid-19) Prevention Containment and Treatment) Regulations published as SI 83/2020 as amended is *ultra vires* the Constitution and was irrational, unreasonable and unjustifiable in the circumstances.
- v) That the monopoly for all public transport given to the 7<sup>th</sup> respondent the Zimbabwe United Passenger Company Limited (ZUPCO), and the prevention of the opening up of the informal economy is unlawful and illegitimate.

The applicants are therefore seeking a Provisional Order couched in the following terms-

**“Terms of Final Order Sought**

It is ordered that,

1. Section 8 of the Public Health (Covid-19 Prevention, Containment and Treatment Regulations, published as SI 77/2020 is ultra vires Section 68 of the Public Health Act.
2. Section 8 of the Public Health (Covid-19 Prevention, Containment and Treatment) Regulations published as SI 77/2020 is in breach of Section 134 of the Constitution of Zimbabwe.
3. Section 4(2), Section 4(1)(c) and Section 11F (1) of the Public Health (Covid-19 Prevention, Containment and Treatment) of national lockdown order published in SI 83/2020 as amended be and is hereby declared ultra vires both section 8 of SI 77/2020 and s 68 of the Public Health Act [Chapter 15.17].
4. That Section 4(2) (a) and Section 11F (1) of SI 83 of 2020 are ultra vires the Constitution of Zimbabwe.
5. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents each paying the other to be absolved pay costs of suit.

### **TERMS OF INTERIM RELIEF**

1. The 1<sup>st</sup> Respondent's order contained in SI 83 as amended, of 2020
  - (i) Obliging commuters to be ferried by the 7<sup>th</sup> Respondent ZUPCO;
  - (ii) Opening up the formal sector whilst leaving out the informal sector;

be and are hereby suspended.

2. The 1<sup>st</sup> Respondent within 3 days of this order amend its order so as to allow the operation of registered transporters, and other operators, to ferry passengers on their licenced routes subject to compliance with relevant lockdown conditions such as social distancing, temperature testing and the use of sanitizers.
3. Allow informal business to reopen, subject to compliance with lockdown regulations of social distancing, temperature testing and sanitizing.

#### **1. SERVICE OF THE ORDER**

The order must be served by way of delivery on the Respondent's lawyers."

The provisional order is opposed by the respondents.

It is important to mention here and now that some of the reliefs sought by the applicants have since been superseded, that is overtaken by events. For example taking into account and the need to balance competing economic interests, the 1<sup>st</sup> and 6<sup>th</sup> respondents have consistently relaxed the restrictions imposed in terms of s 68 of the Public Health Act. For example, on 12 June 2020 the relief sought by the applicants insofar as it relates to the informal sector was suspended by the promulgation of SI 136 of 2020. The informal sector is now permitted to conduct their business subject to being registered with authorities for presumptive tax. Other transport operators have been permitted to ply inter and intra city routes subject to compliance with conditions stipulated in SI 223 of 2020.

Applicants are seeking interim relief by suspending the 1<sup>st</sup> respondent's order contained in SI 83 as amended of 2020 obliging commuters to be ferried by the 7<sup>th</sup> respondent, ZUPCO and also opening up the formal sector whilst leaving out the informal sector, and on the final the declaration of ss 8 of SI 77/20 as *ultra vires* s 68 of the Public Health Act, s 8 of SI 77/2020 as being in breach of s 134 of the Constitution of Zimbabwe and ss 4 (2) and 4(1) (c) and 11F (1) of SI 83/2020 as *ultra vires* s 68 of the Public Health Act and the Constitution of Zimbabwe.

Having considered the submissions by the counsels and also taking judicial notice of the prevailing situation in Zimbabwe and the world over it cannot be disputed by any right thinking persons that Covid-19 is a highly infectious and novel virus, which has been spreading rapidly across the world. Following the declaration of COVID-19 as a global pandemic, Governments across the world have taken measures to control the spread of the virus and protect human life. It is in line with the above that the 1<sup>st</sup> respondent declared Covid-19 a formidable epidemic disease and in line with the powers conferred upon him in terms of s 68 of the Public Health Act [*Chapter 15.17*], the 1<sup>st</sup> respondent made several regulations aimed at limiting or preventing the spread of COVID-19. It cannot be denied that these regulations indeed infringe on the general rights of the citizens. For example s 8 of the regulations which allow the 1<sup>st</sup> respondent, in consultation with the President, and in conformity with any direction given by the President, published orders in a gazette which:

- (a) impose restrictions of public traffic and the movement of persons by means of curfews in any local authority;
- (b) close schools;
- (c) close places of worship;
- (d) regulate restrictory word in the 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 entertainment assemblies meetings or other public gatherings of less than 100 persons;

- (e) authorize any local authority to evacuate and close or if deemed necessary the demolition or destruction of any premises.

The Supreme law of Zimbabwe, that is, the Constitution allows such limitations of the fundamental rights and freedoms of the citizens listed above under or during certain situations. For this contention I refer to ss 86 and 87 of the Constitution of Zimbabwe. The sections say in full and in part respectively-

**“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 whether there are any less restrictive means of achieving the purpose of the limitation.”

In the South African case of *Esau & Ors v The Minister of Co-operative Governance and Trade Affairs & Ors* (2020) ZAWCHC 56, the court had this to say in dealing with a challenge to the National Lockdown regulations, at paragraphs 253-255 of the judgment:

“The minister’s approach to regulation making under the DMA, has to be in conformity with the purposive and contextual approach to interpretation of the statute. Once she correctly interpreted the purpose of the regulations as granting her the power to use necessary means to manage the national disaster, in this instance, the rapid spread of Covid-19, as well as to manage the consequences that result from the disaster, her approach to regulation making was lawful and in compliance with the Constitution. Therefore, the narrow approach to regulation making which applicants seek to place upon the minister in this instance, operate to limit government’s ability to establish 82 measures necessary to contain the spread of the virus and those required to address consequences that result from the disaster and its management.

I accept that the measures do not satisfy everyone and there is a great deal of criticism levelled against them. The inconvenience and discontent that the regulations have caused the applicants and others

have to be weighed against the urgent object and primary Constitutional duty to save lives. That is the nature of the proportionality exercise which government has had to embark upon. As the Minister of CoGTA state, it involves issues of high policy that have to be made in a polycentric manner. It is not for Courts to prescribe to government how it should exercise its mandate in these circumstances.”

It is therefore clear that fundamental rights are not absolute and they may be limited in terms of s 86 of the Constitution. The riding factor being that the limitation must be fair, reasonable, necessary, and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

*In casu* we are living under trying times due to COVID-19. We are faced with extraordinary circumstances that require extraordinary measures. Hence s 68 of the Public Health Act empowers the 1<sup>st</sup> respondent to regulate and restrict public traffic and movement of persons for purposes of controlling COVID-19. If the monopoly granted to ZUPCO is not a situation covered under the Public Health Act as submitted by the applicants, they have to advance that argument on the return date when the respondents have to justify that the rationale for imposing restrictions on other transport operators is that there is a need to ensure the proper implementation and enforcement of lockdown regulations such as social distancing advanced by the counsel for the respondents. It is my view that the 1<sup>st</sup> respondent is further empowered to make regulations on such other matters as may be necessary to limit and prevent the spread of a formidable epidemic disease.

Section 87 says in part-

**“87 Limitation during public emergency**

- (1) in addition to the limitations permitted by section 86, the fundamental rights and freedoms set out in this Chapter may be further limited by a written law providing for measures to deal with situations arising during a period of public emergency, but only to the extent permitted by this section and the Second Schedule.”

As to whether these regulations are unconstitutional as the applicants allege, or not as the respondents allege, it is only on the return day that the respondents would have to justify their regulations in terms of s 86 of the Constitution and it is on the return day that full arguments would have to be presented and made. Even the issue of the validity of the regulations especially the point that was made by the counsel for the applicants in their heads of argument on the delegation of

delegated power, is an issue to be debated on the return day. What this court is concerned with for now is whether the regulations have been made for the public good, or for public health or not.

In my view, the restrictions imposed on the applicants serve a legitimate purpose and the 1<sup>st</sup> respondent is empowered in terms of s 68 of the Act to make these restrictions, and accordingly the 1<sup>st</sup> 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 1<sup>st</sup> 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.

IT IS ORDERED THAT

1. The application is dismissed.
2. There is no order as to costs.

*Tendai Biti law*, applicants' legal practitioners  
*Civil Division of the Attorney General's office*, respondents' legal practitioners.