

REPORTABLE (39)

**IN RE: PROSECUTOR-GENERAL OF ZIMBABWE ON HIS
CONSTITUTIONAL INDEPENDENCE AND PROTECTION FROM
DIRECTION AND CONTROL**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JCC, GWAUNZA JCC
GARWE JCC, GOWORA JCC, HLATSHWAYO JCC
PATEL JCC, MAVANGIRA JCC & UCHENA JCC
HARARE 28 OCTOBER 2015**

T Mpofu and *S.Hashiti*, for the applicant
T. Mafukidze, as the first *amicus curiae*
C. Warara, as the second *amicus curiae*

PATEL JCC: After hearing counsel in this matter, we handed down the following order:

“It is ordered that:

1. The application be and is hereby dismissed with costs on a legal practitioner and client scale in favour of both *amici curiae*.
2. It is apparent from the record of these proceedings that orders were issued by the High Court in Case No. HC 10203/12 and by the Supreme Court in Judgment No. SC1/14 which was confirmed by this Court in Case Number CCZ 8/ 14.
3. It is also apparent that the applicant has disobeyed those orders in clear contravention of s 164 (3) of the Constitution of Zimbabwe.
4. In terms of s 165 (1)(c) of the Constitution of Zimbabwe, this Court is obligated to uphold the rule of law and to make such orders as are necessary to achieve that purpose in accordance with its inherent jurisdiction.
5. It is accordingly ordered that:
 - (i) The applicant is committed to imprisonment for a period of 30 days the whole of which is suspended on condition that the applicant complies with the above orders of the High Court and the Supreme Court by issuing the requisite certificates *nolle prosequi* within 10 days of the date of this order.

- (ii) In the event that the applicant fails to comply with this order, he shall in his personal capacity be barred from approaching or appearing as a legal practitioner in any court in Zimbabwe.
6. Full reasons for judgment will follow in due course.”

These are the reasons for the aforestated order.

BACKGROUND

This is an *ex parte* application brought by the Prosecutor-General, duly appointed in terms of the Constitution, for the determination of the question of his constitutional independence and protection from the direction and control of anyone in terms of ss 258, 259 (1) and 260 of the Constitution. It is important to put this application into perspective by looking at the background facts that explain the question to be determined by this Court.

The applicant has brought this application pursuant to orders granted by the High Court and the Supreme Court requiring him to issue certificates *nolle prosequi* in two matters in which he exercised his discretion not to prosecute. The first of these cases was brought as an application under Case NO. HC 10203/12 by one Francis Maramwidze against the Commissioner General of the Zimbabwe Republic Police and the Prosecutor-General, seeking an order directing the prosecution of one Dr Munyaradzi Kereke or, alternatively, a certificate *nolle prosequi*. In this matter, allegations had been made that Kereke had sexually assaulted a minor child whose guardian was Maramwidze. On the same day, on 3 March 2014, Zhou J granted Maramwidze the alternative relief he sought by ordering the applicant to grant him a certificate *nolle prosequi* in terms of s 16 (1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. On 14 May 2014, the written reasons for judgment were delivered by the learned judge in HH 208-14.

The applicant has not complied with that order given by Zhou J as at the hearing of this application. Maramwidze brought a contempt of court application against the applicant under Case No. HC 480/15 on 20 January 2015, which application is opposed by the applicant. The basis of his opposition in that matter is that the order of Zhou J is unconstitutional as s 260 of the Constitution makes him absolutely autonomous in the discharge of his prosecutorial functions and exercise of prosecutorial discretion and that such exercise is not susceptible to judicial review. On 16 October 2014, the Supreme Court struck off an appeal by Kereke which sought to have the order by Zhou J directing the issuance of the certificate *nolle prosequi* set aside. The applicant himself did not appeal against the order or judgment given by Zhou J and, even though the appeal by Kereke was dismissed, he has persistently refused to comply with the judgment of the High Court.

The second case involved Telecel Zimbabwe (Pvt) Ltd. The applicant decided not to prosecute the suspects in a matter involving Telecel, prompting it to seek a certificate *nolle prosequi* which was declined. A review of that decision was dismissed in the High Court on the ground that a company had no right to institute a private prosecution. Telecel appealed against that judgment, which appeal was heard on 22 July 2013 under Civil Appeal No. SC 254/11. The Supreme Court overturned the High Court decision by allowing the appeal, thereby setting aside the decision not to grant a certificate *nolle prosequi*, and unanimously ordered the Prosecutor-General to issue a certificate *nolle prosequi* to Telecel within 5 days of the grant of its order. Aggrieved by the Supreme Court decision under SC 1-14, the applicant filed an application to this Court, purportedly brought in terms of ss 167 (1) and 176 of the Constitution. He sought the setting aside of the order of the Supreme Court. On 8 October 2014, this Court dismissed the application

with costs under Case No. CCZ 8-14. That judgment also confirmed the decision in SC 1-14. The effect of such dismissal is that the order of the Supreme Court is still extant. The applicant has, yet again, not complied with that order.

The applicant has not complied with both orders but has approached this Court in an *ex parte* application to challenge the constitutionality of those orders as juxtaposed with s 260 of the Constitution. This he attempts to do without making mention of the High Court and Supreme Court cases which the present application clearly stems from. The application is *ex parte* notwithstanding that the very root of this constitutional application are the two cases involving Maramwidze and Telecel. It is not known why the applicant did not join these parties, despite their clear interest in the matter, instead of making this application on an *ex parte* basis.

It is the applicant's contention that both orders in the High Court and the Supreme Court are a direct violation of his independence. The basic argument by the applicant is that he should not be forced to issue a certificate *nolle prosequi*. Such absolute independence, he argues, is provided for in terms of s 260 (1) (a) and (b) of the Constitution in the exercise of his duties, which are defined in s 258 as read with s 259(1). Section 260 of the Constitution, which the applicant strongly relies upon, provides as follows:

- “(1) Subject to this Constitution, the Prosecutor-General—
- (a) is independent and is not subject to the direction or control of anyone; and
 - (b) must exercise his or her functions impartially and without fear, favour, prejudice or bias.
- (2) The Prosecutor-General must formulate and publicly disclose the general principles by which he or she decides whether and how to institute and conduct criminal proceedings.”

The applicant's constitutional mandate is to head the National Prosecuting Authority, as provided for in s 259 (1) of the Constitution. The National Prosecuting Authority's functions are set out in s 258:

“There is a National Prosecuting Authority which is responsible for instituting and undertaking criminal prosecutions on behalf of the State and discharging any functions that are necessary or incidental to such prosecutions.”

The applicant argues that his reading of these sections is that, in the discharge of his prosecutorial functions and exercise of prosecutorial discretion, he is absolutely independent and not subject to the control of anyone else. He cites as examples that he is independent of the police, Cabinet, victims of offences and the courts. He contends that this independence is the core constitutional tenet that binds the office of the Prosecutor-General, that the eventual decision of whether or not to prosecute rests with the Prosecutor-General and that he should not be pressurised by anyone else. The applicant also argues that any judicial interference is against the doctrine of separation of powers and the legitimate autonomy that is conferred on the Prosecutor-General by the Constitution. He accepts only the ground of irrationality, as *per* the *Wednesbury* principles, as the basis upon which the exercise of his duties can be susceptible to judicial review. He argues that the decision to withhold a certificate *nolle prosequi* is a function that falls within the purview of his prosecutorial discretion and is not open to review by the courts.

There is no respondent in this matter but there is the intervention of the two *amici curiae*, Mr *Mafukidze* and Mr *Warara*, who urged this Court to dismiss this application as an abuse of its process. Mr *Mafukidze* placed reliance on the cases of *Rogers v Rogers*¹ and the oft-quoted case

¹ 2008 (1) ZLR 330 at 337E-F

of *Smyth v Ushewokunze*² to demonstrate the expectations of public prosecutors, as being dedicated to the achievement of justice and being above reproach and impartial, and to emphasise the higher standard of conduct expected of the Prosecutor-General as leader of the National Prosecuting Authority. Mr *Mafukidze* contends that this application is strange in that it flows from an unlawful disobedience of two extant court orders. This is contrary to s 164 (3) of the Constitution which states that an order or decision of a court binds not only the State but all persons, institutions and agencies to whom it applies and must be obeyed by them.

It was further argued that, without a direct challenge to s 16 (1) of the Criminal Procedure and Evidence Act, this Court must find that it is unable to determine this application on the merits. To substantiate this position he relied on the case of *ANZ (Pvt) Ltd v Minister of State for Information and Publicity*.³ He also took issue with the fact that the applicant did not make full disclosure of the Maramwidze and Telecel cases, which are quite obviously the cases from which this matter emanates.

Mr *Mafukidze* argued that, even if the Court were to determine this application on the merits, it should fail in that prosecutorial independence is itself subject to the Constitution and the law. He urged the Court to find in favour of the constitutionality of s 16 (1) of the Criminal Procedure and Evidence Act which imposes a statutory duty upon the applicant to issue certificates *nolle prosequi*. It was also argued that the power to issue authoritative interpretations of the Constitution and the law in general lies with the courts and that any attempt to negate that power

² 1997 (2) ZLR 544 (S)

³ 2005 (1) ZLR 222 (S).

undermines the rule of law. Moreover, the relief sought effectively outlaws private prosecutions. In addition, it would amount to a declaration finding s 16 of the Act to be unconstitutional.

COMPLIANCE WITH THE LAW

The primary question before this Court is whether there is a law that compels the Prosecutor-General to issue certificates *nolle prosequi*. In answering that question, it is important to acknowledge the well-known canons that the Constitution is the supreme law and that the rule of law is a founding principle of our nation.⁴ The quintessence of the rule of law is this, and simply this, that where there is a law it must be complied with. In *National Director of Public Prosecutions and Others v Freedom Under Law*⁵ the court cited the *dictum* of Ngcobo J in *Affordable Medicines Trust & Others v Minister of Health & Others*⁶:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution.”

The Constitution itself makes the Prosecutor-General’s independence subject to the Constitution and the law through the strictures of s 261 (1) which states that:

“The Prosecutor-General and officers of the National Prosecuting Authority must act in accordance with this Constitution and the law.”

⁴ Section 3(b) of the Constitution

⁵ 2014 (4) SA 298 (SCA)

⁶ 2006 (3) SA 247 (CC) para 49

This is also seen in the very s 260 (1) which the applicant relies upon to bolster his independence. This provision makes it crystal clear that the Prosecutor-General's independence and autonomy in the exercise of his functions and powers are "subject to this Constitution". It follows that the applicant is enjoined at all times to observe both the Constitution and the rule of law.

At the relevant time, before ss 13 and 16 of the Criminal Procedure and Evidence Act were amended in 2016, it was obligatory for the Prosecutor-General to issue a certificate *nolle prosequi* in any case where he declined to prosecute and the party requesting the certificate was able to show some substantial and peculiar interest in the matter. See the decision of the Supreme Court in the *Telecel* case (SC 1-14) referred to earlier. See also the decision of this Court in *Norman Sengeredo v The State*⁷. There is no magic about the interpretation of ss 13 and 16 of the Criminal Procedure and Evidence Act. Section 16 uses the word "shall" which connotes being compelled to do as provided. Once the Prosecutor-General declines to prosecute and it is found that the private prosecutor has a substantial and peculiar interest in the matter in terms of s 13, the former is peremptorily required to issue a certificate *nolle prosequi* to the latter.

Section 12 (1)(d) of the National Prosecuting Authority Act [*Chapter 7:20*] also provides to the same effect:

"(1) The Prosecutor-General –

(a)...

(b)...

(c)...

(d) shall issue certificates *nolle prosequi* in accordance with the Criminal Procedure and Evidence Act [*Chapter 9:07*], to persons intending to institute private prosecutions, where the Prosecutor-General chooses not to prosecute".

⁷ CCZ 11-14

While this law was enacted after the underlying matters had already been instituted, two things remain clear. The first is that this section merely solidifies the position already in existence in s 16 of the Criminal Procedure and Evidence Act to which it alludes. Secondly, when this provision came into existence, the applicant should simply have complied with it and issued the requisite certificates *nolle prosequi*.

The question before this Court is not the constitutionality of s 16 as read with s 13 of the Criminal Procedure and Evidence Act or of s 12 of the National Prosecuting Authority Act. The question is whether or not there is a law that compels the applicant to issue the certificates *nolle prosequi*; and this question must be answered in the affirmative. There are unambiguously crafted statutory provisions that compel him to do so and he must comply with them. The rule of law demands that a law that is in existence must be complied with. The law is an instrument for the regulation of all conduct, both public and private. The performance of his prescribed duties by the applicant is no exception. It is subject to regulation by law, *i.e.* the governing statutory provisions as interpreted by the courts.

The time-honoured doctrine of separation of powers that the applicant himself has invoked is equally applicable in this matter. The doctrine distinguishes three arms of State: the Legislature which has the power to make, amend and repeal rules of law; the Executive which has the power to execute and enforce rules of law; and the Judiciary which is endowed with the power, if there is a dispute, to determine what the law is and how it should be applied in the dispute.⁸ Lord Mustill,

⁸ IM Rautenbach: *Constitutional Law* 4th edition (2003) at p. 78.

in *R v Home Secretary, Ex parte Fine Brigades Union*⁹, defined the doctrine as formulated in England as follows:

“It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.” (my emphasis)

Where a court interprets a law, it fulfils its role under the separation of powers framework. When it interprets a certain law to compel someone to do something, it is not the court but the law that compels that person to do so. This application is founded on the wrong premise that the applicant must not be compelled to abide by the law, whether by an order of *mandamus* or otherwise. That premise is fundamentally flawed and patently untenable.

The applicant does not want to comply with the law and he has not even challenged its validity, though that would not have entitled him to disobey it. The position of any law that is challenged for alleged invalidity is settled. See *Econet Wireless (Pvt) Ltd v The Minister of Public Service Labour and Social Welfare & Others*¹⁰, where the Supreme Court *per* Bhunu JA held that:

“It is a basic principle of our law which needs no authority that all subsisting laws are lawful and binding until such time as they have been lawfully abrogated. If, however, any authority is required for this proposition, one need not look further than *Black on the Construction and Interpretation of the Laws* (1911) page 10 para 41, where the learned author says:

‘Every act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction that construction will be adopted which will reconcile the statute with the constitution and avoid the consequence of unconstitutionality.’

⁹ [1995] 2 AC 513 at 567; [1995] 2 WLR 464 (HL)

¹⁰ SC 31-16

What this means is that all questioned laws and administrative acts enjoy a presumption of validity until declared otherwise by a competent court. Until the declaration of nullity, they remain lawful and binding, bidding obedience of all subjects of the law.”

What can be gleaned from this is that not only does an unchallenged law compel full obedience but that even a law that is under challenge before it is declared invalid command the same level of obedience. Even if the applicant had properly taken the point that the law operates against his constitutional mandate to be independent, he would still have had to first comply with the law and issue the certificates *nolle prosequi*, because the law remained extant. The applicant in this matter has not done so but has attacked the orders of the High Court and the Supreme Court in the *Maramwidze* and *Telecel* cases as interfering with his independence. This does not exempt him from complying with the law, as it is clearly stated.

In terms of ss 260 (1) and 261(1) of the Constitution, as read with ss 13 and 16 (1) of the Criminal Procedure and Evidence Act, the applicant’s discretion is limited to the decision whether to prosecute or not. Once that decision is made, and the intended private prosecutor has satisfied the criterion of substantial and peculiar interest, he has no further discretion in the matter. The submission by Mr *Mpofu* that the discretion extends to whether or not to issue a certificate *nolle prosequi* after the election not to prosecute is at total variance with the provisions of ss 13 and 16 of the Act. There is no residual discretion which reposes in the Prosecutor-General except as provided for in those sections. The attempt by the applicant to extend his discretion to the issuance of certificates *nolle prosequi* is not supported by the law.

The High Court and the Supreme Court have already issued orders that the applicant is obliged to issue certificates *nolle prosequi* in the two cases in question. Both courts made those orders upon their fully considered interpretation of s 16 of the Act. The applicant has not challenged, not successfully at any rate, the interpretation of that section by those courts. As far as we are concerned, their interpretations are in accordance with s 16 of the Act. In other words, in terms of s 16, the applicant is obliged to issue those certificates as that is what the law requires of him. What the courts have done is to simply interpret what the law says in ss 13 and 16 of the Act. For as long as those sections are not set aside, the applicant is obliged to act in accordance with them.

Furthermore, as I have already observed earlier, there is a presumption of constitutionality as regards any law that has not been challenged for alleged unconstitutionality. Had the applicant approached this Court challenging the constitutionality of ss 13 and 16 of the Act, he would have been afforded the opportunity to rebut that presumption by showing that those provisions are unconstitutional. However, the applicant has not done so. He is simply seeking a declaration that he cannot be directed to issue certificates *nolle prosequi* and that all matters that fall under the broad concept of prosecutorial discretion cannot be subjected to any control by anyone else. In any case, even if he had challenged the constitutionality of ss 13 and 16, he would still have had to comply with them pending their possible invalidation.

There is a law which compels the issuance of certificates *nolle prosequi* and that law is unchallenged and valid. There is a duty upon the applicant to obey any order given pursuant to this law. That duty falls within the ambit of ss 260 (1) and 261 (1) of the Constitution. The applicant's

independence is therefore subject to the rule of law and, more specifically, to s 162 (3) of the Constitution which places a duty upon him to obey court orders and decisions. In defiance of such clear provisions of the Constitution, which he as a public authority is directly and explicitly bound by, he has filed this application, more out of concern for his independence than the general framework under which such independence exists. For all the foregoing reasons, this application is utterly devoid of merit and must therefore fail.

CONTEMPT OF COURT

During the hearing of this matter, the applicant's counsel was asked whether the applicant had issued certificates *nolle prosequi* as ordered by the Supreme Court and the High Court. His simple response was that he had no instructions in that regard and he duly proceeded with argument in support of the present application. Mr *Warara*, who acted for Maramwidze in the High Court case, confirmed that the requisite certificate *nolle prosequi* had not been issued. The simple fact of the matter is that the applicant has not complied with the orders in question and has proffered no explanation whatsoever for such non-compliance. He has for some reason seen it fit to disregard court orders; and yet he expects this Court to overlook his wanton and cavalier nonchalance.

For the applicant to refuse to obey court orders, and then to avoid answering the critical question as to why he has not, is tantamount to exhibiting flagrant contempt for this Court. This type of contempt *in facie curiae* cannot be countenanced by the Court. We have a duty to protect our processes from abuse and scandalous impunity. As was pointedly observed by Chidyausiku

CJ in *Associated Newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity in the President's Office & Others*¹¹:

“The Court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged.... This Court is a court of law, and as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable.”

It is for the foregoing reasons that we *mero motu* found the applicant guilty of contempt of court, as reflected in the order that we handed down pursuant to the hearing of this matter.

COSTS

As regards the issue of costs, it is the usual practice that *amici curiae* are not awarded costs. However, this is an extraordinary case which warrants an extraordinary order as to costs. The manner in which the applicant has conducted himself has left the two *amici* with no option but to intervene and join in these proceedings so as to safeguard their interests. This is so because this application is so intricately linked to the two orders given by the High Court and the Supreme Court requiring the issuance of certificates *nolle prosequi*. The reason why the other parties are here at all is that the applicant has stubbornly, unreasonably, inexplicably and unlawfully refused to comply with both the law as well as extant court orders. In the event, only a punitive order as to costs against the applicant would have sufficed. It was accordingly so ordered.

¹¹ SC 20-03

CHIDYAUSIKU CJ: [RETIRED]

ZIYAMBI JCC: I agree.

GWAUNZA JCC: I agree.

GARWE JCC: I agree.

GOWORA JCC: I agree.

HLATSHWAYO JCC: I agree.

MAVANGIRA JCC: I agree.

UCHENA JCC: I agree.

Mutamangira & Associates, applicant's legal practitioners
Zimbabwe Lawyers for Human Rights, 1st *amicus curiae*'s legal practitioners
Warara & Associates, 2nd *amicus curiae*'s legal practitioners