

MARTIN STOBART

SIMILO NCUBE

KENNY KAYENIMPOFU

SIKHONZILE NYATHI

LOICE MAFUSIRE

JUDITH SIBANDA

versus

LUPANE LOCAL BOARD

**THE MINISTER OF LOCAL GOVERNMENT,
RURAL AND URBAN DEVELOPMENT**

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 28 OCTOBER AND 11 DECEMBER 2014

Mr M. Ncube for the applicants

Mr G. Nyoni for the 1st respondent

Opposed matter

MOYO J: The Applicants who are operating market stalls in which they sell non-consumable goods at Lupane Flea market, seek an order as follows:

1. The requirement that market traders at Lupane People's Market trading in non-consumable goods furnish 1st Respondent with medical certificates in terms of Section 5 (2) of the Lupane Local Board (People's Market) by-Laws 2013, Statutory Instrument 134/2013, upon application for a trading permit be and hereby set aside on the basis that:-

“1. The requirement is unreasonable, unnecessary and unjustifiable in a democratic society based on openness, justice, human dignity and freedom

2. 1st and 2nd Respondents pay costs of this application, jointly and severally one paying the other to be absolved”

The Applicants contend that the provisions of the Statutory Instrument are not in keeping

with national values and objectives as provided for in Section 24 of the Constitution of Zimbabwe.

Section 24(1) of the Constitution of Zimbabwe provides as follows:

“The State and all institutions and agencies of government at every level adopt reasonable policies and measures, within the limits of the resources available to them, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families.”

Section 24 2(b) of the Constitution of Zimbabwe also provides that:

“The State and all institutions and agencies of government at every level must endeavour to secure

(a) ----.

(b) the removal of restrictions that unnecessarily inhibit or prevent people from working and otherwise engaging in gainful economic activities.”

In the founding affidavit, 1st Applicant, after quoting Section 24 of the Constitution as quoted herein, he then proceeds in paragraph 10.2 as follows:

“The requirement for a medical certificate to trade in non-consumables is not reasonable, as a policy measure or law and interferes with economic activities, which activities I undertake to try and earn a decent living for myself and my family.”

In paragraph 10.3 he proceeds to state as follows:-

“In keeping with the spirit of Section 24 (2) (b) of the Constitution of Zimbabwe, 1st and 2nd Respondents should therefore be caused to remove the restriction aforesated, for such restriction unnecessarily inhibits or prevents me and my co-applicants from working or otherwise engaging in gainful economic activities.”

The Applicants go further to state that the requirement violates Section 64, Section 84, and Section 56 of the Constitution in so far as it is unreasonable, unnecessary and inhibiting. They further state that that the requirement is not fair, reasonable, necessary and justifiable taking into account all factors as given in Section 86 of the Constitution.

That further, the requirement for a medical certificate on flea market traders when none is required of shop owners trading in similar goods is discriminatory. 1st Applicant concludes his affidavit by stating that Section 5(2) of the Statutory Instrument 134 of 2013 is unreasonable, unnecessary, restrictive or makes unreasonable and unjustifiable demands for compliance, and that they should be set aside.

Firstly, it is the right of every citizen to challenge the constitutionality or otherwise of

every statute or piece of legislation but in my view, upon mounting such challenge, the onus to show the unconstitutionality of a provision rests squarely on them. An Applicant approaching a court in my view to challenge the constitutionality or otherwise of a provision, should in his founding affidavit clearly show to the court why and how the purported piece of legislation infringes on his rights as enshrined in the Constitution. The Applicants have made bold assertions in my view that Section 5 (2) of Statutory Instrument 124/13 is unreasonable, unnecessary, unjustifiable and unconstitutional, but they have not shown this court how they arrive at that conclusion. At the best the Applicants have simply stated in very bold terms their dislike of Section 5 (2) of Statutory Instrument 134/13. They have simply stated in bold terms that Section 5 (2) of Statutory Instrument 134/13 infringes on their rights as enshrined in the Constitution. Applicants have also made bold assertions on the unreasonableness of the provision under attack; they have not shown to this court where the unreasonableness emanates from.

For instance this court would have expected the Applicants in discharging their onus to show the following:-

- a) how obtaining a medical certificate is unreasonable so as to prove why it is unnecessary to obtain same.
- b) show in detail how the provisions of the Constitution alluded to are infringed by the Statutory Instrument.
- c) show the practicalities involved in obtaining the medical certificate so as to show that demanding it makes it impractical to obtain a flea market traders' licence.

We are not told how a medical certificate is obtained so as to find that where it is a requirement from a trader, then it becomes an impediment to trade freely as provided for in the Constitution.

- d) Applicant says obtaining the medical certificate is unnecessary, but he does not tell this Honourable Court why his views are thus and where the lack of necessity is derived from.

Government and all other entities entrusted with administration will make various laws and regulations with a view to securing good order and the well being of the citizens of this country. That authority vests in government and all the entities entrusted with the day to day management of the different organisations of the state. This court should only interfere with this mandate upon good cause having been shown. That is to say in an application of this nature, the Applicants must discharge the onus of presenting before a court of law a comprehensive attack on

any piece of legislation they presume unreasonable or unconstitutional. It would not suffice to make bold declarations of the unreasonableness or unconstitutionality of any piece of legislation without tabulating before this court how that unreasonableness and unconstitutionality are founded. In the answering affidavit an attempt is made to expand on the bold challenges in the founding affidavit but the founding affidavit is the very basis of the Applicants' case and the application stands or falls by it. The inadequacy of the averments as given in the founding affidavit means that the Applicants failed to make a proper foundation for their case.

In fact perhaps Applicants' case could have been well founded, had they before mounting this court action, requested for reasons for this administrative action, once the reasons were given, it would have been a lot easier for Applicants to then formulate the basis of their application by attacking same for the lack of necessity and the unreasonableness and consequently the unconstitutionality of same basing their attack on the reasons given for such a measure.

Delegated legislation can be declared *ultra vires* if it is grossly unreasonable. As laid down in the English case of *Kruse vs Johnson* 1898 (2) QB 91 pieces of legislation can be held to be invalid on the grounds of their unreasonableness:-

“--- if for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive and gratuitous interference with the rights of these subject to them as could find no justification in the minds of reasonable men, the court may well say, “Parliament never intended to give authority to make such rules, they are unreasonable and *ultra vires*.”

Baxter: Administrative Law pages 522-523 states that gross unreasonableness is present when the provisions are discriminatory or disproportionate or are vague and uncertain.

In *S v Delta Consolidated Pvt Ltd and Others* 1991 (2) ZLR 234 SC, the court ruled that it has inherent jurisdiction to declare null and void subsidiary legislation on the ground that it is *ultra vires* if it can not be construed so as to accord with the intention of a reasonable legislature. In *Marufu vs Minister of Transport and Others* 2009 (2) ZLR 458 (H) it was held that gross unreasonableness is present when the provisions of an enactment entail discrimination, are disproportionate, vague, and uncertain. The onus of proving that regulations are *ultra vires* on the grounds of unreasonableness is on the person who seeks to challenge them. Refer to the *Delta* case (*supra*). It is my view that in the application before me the Applicants have failed to

discharge the onus on them, of proving the unreasonableness as well as the lack of necessity of the purported regulations.

It is for this reason that this application must fail, I accordingly dismiss the application with costs.

Phulu and Ncube, applicants' legal practitioners

Messrs Moyo and Nyoni, 1st respondent's legal practitioners