

WALTER MAGAYA  
versus  
ZIMBABWE GENDER COMMISSION

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 16 September & 22 October 2019

### **Urgent Chamber Application**

*T. Mpfu*, for applicant  
*C. Damiso*, for respondent

MUSAKWA J: The applicant seeks a provisional order for the setting aside of investigations instituted by the respondent in terms of General Notice 1444/2019 and published in the Government Gazette of 23 August 2019 pending review of an application that was filed under HC 7347/19.

The background to the present matter is that on 23 August 2019 the respondent published General Notice No. 1444/2019 in the Government Gazette. The Notice reads as follows-

“GENERAL NOTICE 1444 of 2019

ZIMBABWE GENDER COMMISSION ACT CHAPTER 10: 31

Notice of Launch of Investigation of Sexual Harassment By Walter Magaya of Prophetic Healing And Deliverance Ministries.

It is hereby notified that, in terms of section 5 of the Gender Commission Act [*Chapter 10:31*], the Zimbabwe Gender Commission intends to investigate complaints of sexual abuse of women by Walter Magaya of Prophetic Healing And Deliverance Ministries.

Further to the above notice, an invitation is hereby given to any victims or witnesses to any acts of sexual abuse by Walter Magaya who are to furnish the Zimbabwe Gender Commission with written complaints, witnesses’ statements and any other supporting documents or evidence which can assist in the investigation. Oral hearings will commence thereafter on dates to be advised by the Commission.”

Following the publication of the General Notice, the applicant on 3 September 2019 filed an application for review of the decision to investigate him as reflected in the General Notice. The present application is for setting aside investigations instituted by the respondent.

One may pose the question: if the investigations are set aside, what substantive issue would be deliberated upon on the return day? I do not think that the provisional order was well thought out.

The basis of the present application is that the applicant is apprehensive that the investigations by the respondent may irreversibly violate his constitutional rights. The nature of the irreparable harm that is feared by the applicant is that of being put out of pocket and having his dignity impaired. Again, I do not think that this is the irreparable harm that needs to be protected by way of an urgent chamber application. It is also contended that the Constitution and the Zimbabwe Gender Commission Act do not empower the respondent to conduct such investigations. Thus the respondent is set to do what is outside its mandate.

The applicant further contends that even if the respondent has authority to carry out the investigations, the method adopted violates his constitutional rights. This will result in irreversible prejudice to the applicant. The respondent should have publicised its existence to the public to enable anyone with a complaint that fits within its mandate to lodge same with the respondent.

In opposing the application the respondent points out s 246 of the Constitution as the provision that empowers it to carry out what is being resisted by the applicant. The respondent contends that it has been inundated with enquiries from those concerned with the applicant's conduct. The respondent can only conduct investigations in terms of s 5 of the Act if witnesses and complainants bring forward evidence on violations by the applicant. The respondent is cognisant of the need to uphold principles of natural justice when it conducts its investigations.

#### Submissions By Counsel

Mr *Mpofu* submitted that there are strong grounds that the respondent does not have the jurisdiction it purports to exercise. This is because the powers given to the respondent in terms of s 246 of the Constitution are as set out in s 5 of the Act. Section 2 of the Act delineates the powers of the respondent. The respondent has no powers to deal with criminal complaints. It also has no power to deal with issues of consensual sexual intercourse. There is no evidence of systematic barrier prejudicial to gender equality, gender equity or gender mainstreaming as defined in s 5. All the applicant needs to establish is an arguable case. He was of the view that the applicant has managed to establish an unassailable case on the jurisdictional incompetence of the respondent.

Even if there is jurisdictional competency, Mr *Mpofu* submitted that the respondent has exercised it in an illegal manner. This is because the respondent has not approached the matter with an open mind. It has already prejudged the issue.

The other submission was that the process that has been set in motion accords no protection to the applicant against false incrimination. Thus it leaves the doors open for those who want to soil the applicant's name. There is nothing that shows that the respondent is aware of the applicant's rights. Even if the respondent may be held to have jurisdiction it is exercising it wrongly by focusing on a single individual. It would have been different if the respondent was conducting investigations of misconduct within the religious sector in general. The applicant has a right to the protection of the law regarding his reputation and dignity.

Ms *Damiso* submitted that the matter lacks urgency. In my view, the issue of want of urgency could have been successfully raised as a preliminary issue, as is the practice. Nonetheless, she further submitted that the irreparable harm to reputation that is complained of is not well established. Since the applicant claims to have had his reputation soiled already, the investigation by the respondent can do no further harm.

Ms *Damiso* further submitted that an urgent application must demonstrate the absence of a satisfactory remedy. The applicant has the right to seek a review of the investigations in the event that they are not properly conducted.

The respondent's functions should be read together with rights enshrined in Chapter 4 of the constitution. There is nothing to suggest that the investigations will violate such safeguards.

The application for review itself does not allege lack of jurisdiction on the part of the respondent. This does not accord with s 27 of the High Court Act [*Chapter 7:06*]. This is because the application does not contain grounds for review. In any event, the review that is provided for in s 27 relates to completed proceedings. Thus the publication of General Notice 444/19 does not amount to any proceedings having been concluded.

#### Analysis

By virtue of s 26 of the High Court Act the High Court has wide powers of review over proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities. In terms of s 27 the grounds for review are: absence of jurisdiction, interest in the cause, bias, malice or corruption and gross irregularity.

In the broadest sense, the purpose of review is to determine the manner in which a decision by an inferior court of justice, tribunal and administrative authority was made or arrived at.<sup>1</sup>In *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 (HL) it was held by Lord Hailsham that judicial review is aimed at curbing abuse of power by a wide range of authorities. He further held that judicial review is not aimed at taking away the powers and discretions properly vested in such authorities. Thus the purpose is to ensure that there is fairness in the process and that lawful authority is not abused by unfair treatment.

It is now well established that the review of unterminated proceedings is exercised in exceptional circumstances. In *Masedza and Others v Magistrate, Rusape And Another* 1998 (1) ZLR 36 (H), DEVITTIE J having analysed a number of authorities on the subject of review of incomplete proceedings had this to say at 42:

“The principle that emerges from the foregoing is that a superior court will exercise its review jurisdiction to intervene in unterminated criminal proceeding where the irregularity is gross or where it is such that “justice might not by other means be attained”.

Section 246 of the Constitution provides that-

“The Zimbabwe Gender Commission has the following functions—

- (a) to monitor issues concerning gender equality to ensure gender equality as provided in this Constitution;
- (b) to investigate possible violations of rights relating to gender;
- (c) to receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate;
- (d) to conduct research into issues relating to gender and social justice, and to recommend changes to laws and practices which lead to discrimination based on gender;
- (e) to advise public and private institutions on steps to be taken to ensure gender equality;
- (f) to recommend affirmative action programmes to achieve gender equality;
- (g) to recommend prosecution for criminal violations of rights relating to gender;
- (h) to secure appropriate redress where rights relating to gender have been violated; and
- (i) to do everything necessary to promote gender equality.”

Apart from the above powers, the Zimbabwe Gender Commission is required to report to Parliament annually on its operations and activities. In fact, every commission is required to submit reports to Parliament in terms of s 323 of the Constitution.

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<sup>1</sup> *Fikilini v A-G* 1990 (1) ZLR 105 (S)

One can note that the Zimbabwe Gender Commission has powers to investigate possible violations of rights relating to gender. In its broad sense sexual abuse involves violations of rights relating to gender. The Commission also has powers to receive and consider complaints from the public and to take action it considers appropriate.

According to the General Notice the respondent intends to conduct an investigation in terms of s 5 of the Act which provides that-

“Before launching an investigation the Commission shall publish a notice in the Gazette and in any one, or more national newspapers informing the public that, no earlier than fourteen days or later than thirty days after the publication of the notice in the *Gazette*, it intends to investigate any systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming in a specific named sphere of activity or named sector of the society or economy.”

On the other hand, systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming is defined in the Act as –

“(2) In this Act, “systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming” means any barrier, practice, custom, law or other impediment prejudicial to the achievement of gender equality, gender equity or gender main-streaming, including equality of opportunities and outcomes in the following spheres of activity or sectors of the society or economy (whose itemisation here is not to be taken as exhaustive or as limiting the generality of the foregoing)—

- (a) accessing social services, including those relating to education, health and housing;
- (b) accessing resources, including land, capital and finance;
- (c) employment in and upward mobility within the public, private and parastatal sectors and civil society organisations, including the provision of conditions in the workplace conducive to the employment of both genders;
- (d) engagement in and upward mobility of members within the professions and occupations, including the provision of conditions conducive to the engagement of individuals of both genders in the professions and occupations;
- (f) in the sphere of family law (including marriage, divorce and custody and guardianship of minors), children’s rights, succession and inheritance;
- (g) any other sphere or activity specified by the Commission in pursuance of its constitutional mandate.”

It must be noted that the definition itself is not exhaustive as regards what constitutes systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming. Even though the notice that was issued by the respondent relates to s 5 of the Act (hence systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming in a specific named sphere of activity or named sector of the society or economy), the actual purpose of the intended investigation is not specifically related to that aspect. It is actually broader than that

as it is aimed at investigating complaints of sexual abuse of women. This conforms with one of the respondent's mandate of investigating possible violations of rights relating to gender. Since the respondent does not intend to investigate systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming in a specific named sphere of activity or named sector of the society or economy, I do not see why it published a notice in terms of s 5. Section 246 of the Constitution does not require the respondent to publish any notice before it conducts its investigations. The respondent could have simply advertised a notice that it intends to conduct investigations relating to violation of gender rights without any reference to s 5. By virtue of the Constitution being the supreme law of the land, the provisions relating to the Zimbabwe Gender Commission's functions as provided in s 246 of the Constitution thereof are not subordinate to s 5 of the Act.

I do not see how the applicant's rights may be violated by the investigation. He has a right to legal representation. The investigation itself is not of a criminal nature, in the sense that the respondent is not endowed with any power to impose any sanction consequent to an investigation. This can be noted from s 7 of the Act which provides that-

"If, after conducting an investigation, the Commission is of the opinion that the investigation has revealed any systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming, it shall, after having informed the Minister in writing, report to Parliament on—

- (a) the nature and extent of its investigation and its principal findings arising therefrom; and
- (b) the nature, extent and consequences of the barrier or barriers found by the Commission to be in existence; and
- (c) whether the barrier or barriers in question are specifically attributable to any identifiable practice, custom, law or other impediment prejudicial to the achievement of gender equality, gender equity or gender mainstreaming or to the absence of any law or to any deficiency in the law; and
- (d) what legislative, administrative or other practical reforms, if any, should be taken to remove or alleviate the barrier or barriers in question; and
- (e) whether a class action under the Class Actions Act [*Chapter 8:17*] (No. 10 of 1999) or a prosecution for the breach of any law, or a reference or complaint to the Zimbabwe Human Rights Commission or other immediate legal action is appropriate; and
- (f) any other matter or consideration it deems fit to bring to the Minister's attention; and
- (g) a summary of all its recommendations to remove or alleviate the barrier or barriers in question."

Again, s 7 is restricted to investigations relating to systemic barrier prejudicial to gender equality, gender equity or gender mainstreaming in a specific named sphere of activity or named sector of the society or economy which the respondent is supposed to report on. The provision ignores the fact that the respondent, like any other Commission is bound to report annually to Parliament on its activities and has powers to conduct investigations that are beyond the ambit of s 5. I do not think that the Zimbabwe Gender Commission Act is detailed enough to cater for all aspects of the mandate given to the Commission as set out in s 246 of the Constitution. Taking into account the provisions of the Act, there does not appear to be any immediate impact of the intended investigation by the respondent. Even if the respondent wins the present duel, it is akin to a pyrrhic victory.

I am not persuaded that there are any prospects of success in the pending review. Accordingly the application is hereby dismissed with costs.

*Rubaya And Chatambudza, applicant's legal practitioners*