

DISTRIBUTABLE: (101)

WALTER MAGAYA
v
ZIMBABWE GENDER COMMISSION

SUPREME COURT OF ZIMBABWE
GOWORA JA, PATEL JA & UCHENA JA
HARARE: 10 MARCH 2020 & 5 OCTOBER 2021

T. Mpfu with S.M Hashiti and E. Chatambudza, for the appellant

C. Damiso, for the respondent

GOWORA JA: The appellant is a clergyman of the Prophetic Healing and Deliverance Ministries, commonly known as the PHD Ministries. The respondent is the Zimbabwe Gender Commission (“the Commission”), an independent commission provided for in accordance with s 245 of the Constitution and established as a body corporate in terms of s 2 of the Zimbabwe Gender Commission Act [*Chapter 10:31*], (the “Act”). Its functions are set out in s 246 of the Constitution as being:

- “(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.”

On 23 August 2019, the Commission issued General Notice 1444 of 2019 which it published in the Government Gazette. The General Notice authorized the respondent to conduct an investigation into complaints of sexual abuse generally made against the appellant.

In response, on 3 September 2019, the appellant filed an application with the High Court for a review of the decision by the respondent to launch the investigation pursuant to the General Notice. He followed this up with an urgent chamber application in which he sought by way of interim relief an interdict against the conduct of the investigation by the respondent.

On 22 October 2019, the High Court dismissed the urgent chamber application with costs. This appeal is against that judgment.

PROCEEDINGS IN THE COURT A QUO

In seeking relief before the High Court, the appellant attached a draft order in which he sought the following:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court, if any, why a final order should not be made in the following terms;

1. General Notice No. 1444 of 2019 published in the Gazette of 23 August 2019 be hereby declared null and void and of no force and effect.
2. That the intended investigations of the applicant for sexual abuse by the Respondent in terms of General Notice No. 1444 of 2019 published in the Gazette of 23 August 2019 be and are hereby permanently stayed.
3. Costs will be costs in the cause.

TERMS OF THE INTERIM RELIEF GRANTED

1. Pending the determination of this matter on the return day, the intended investigations of the Applicant for sexual abuse by the Respondent in terms of General Notice No. 1444 of 2019 published in the Gazette of 23 August 2019 be and are hereby stayed.”

In his application for an interdict, the appellant averred that he had sought the review of the decision to cause an investigation against him on allegations of sexual abuse arising from complaints laid against him. He contended that, in the review, he sought to challenge the jurisdiction of the Commission in respect of the General Notice as well as the intended investigation into the alleged complaints of sexual abuse. He averred that the contemplated investigations were imminent and that, by his reckoning, were due to commence at the earliest by 12 September 2019 by which date his application for review would not have been determined and, that, the mere pendency of the application would not stop the Commission from proceeding with the investigation of the alleged complaints of sexual abuse.

He contended that he had good prospects of succeeding on the review and that his rights from the review process would be rendered nugatory if the investigations were not halted pending the review. His stance was that neither the Constitution nor the Act afforded the Commission the authority to conduct the contemplated investigation. To that extent, any investigation by the Commission constituted an illegality. He contended further that what the Commission intended from the published notice was outside its statutory mandate and as a result, the appellant was entitled to the protection of the law which he was seeking from the court. Thus, it was only right that the court issue an interdict against the Commission.

Over and above the averments referred to in the afore-going, the appellant contended that, even if the Commission had the authority to conduct an investigation, the methodology it had employed violated his constitutional rights and legal principles and rules governing evidence such as that which the Commission wished to gather. The methods adopted would lead to a compromised result which would cause him to suffer irreversible harm.

He averred that the balance of convenience was in his favour and that, if he was not granted the relief sought, he would suffer unconscionable irreparable harm in that he would 'be put out of pocket and suffer permanent impairment of his personal dignity which no other process could remedy'. He did not have any other remedy that he could employ to stop the process which he considered illegal. He opined that the Commission on the other hand would not suffer any prejudice if its intended investigation were halted.

The Commission opposed the application. It maintained that it had investigative functions in terms of the Constitution and its enabling Act. It contended that under the provisions of s 5 of the Act, an investigation is preceded by the promulgation of a notice in the Government Gazette and the publishing of such notice in one or more national newspapers informing the public of its intention to investigate a systemic barrier as provided in the Act.

The Commission contended that the notice it issued was lawful and provided for by law. It averred that it had received numerous complaints of alleged sexual abuse from numerous quarters against the appellant which necessitated the issuance of the notice to facilitate the conduct

of investigations into the said complaints. It denied suggestions by the appellant that it had neither the mandate nor the authority to proceed as intended.

In so far as the prospects of success were concerned, the Commission argued that there were none. It pointed to the averment by the appellant that there were numerous complaints against him, some of which were the subject of police investigations. The Commission averred that an investigation under s 5 of the Act can only be possible where complainants and witnesses have come forward with allegations pointing to the possibility of the existence of alleged violations.

DETERMINATION BY THE COURT *A QUO*

The court *a quo* decided the application on the sole issue of whether or not the applicant's rights were likely to be violated. It said the following:

“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.”

The court *a quo* concluded that the Commission, had, under s 7 of the Act, the power to conduct an investigation and, where the investigation reveals systemic barriers prejudicial to gender equality, etc, after informing the Minister, make a report to Parliament on its findings. The court *a quo* found that there was no immediate impact on the appellant from the investigation as contemplated by the Commission.

THE APPEAL

The grounds of appeal are framed as follows:

- “1. The court *a quo* misdirected itself in totally misconstruing the application before it as one for the setting aside of investigations and so erred when consideration is given to the fact that the application was actually meant to interdict the holding of unlawful investigations.
2. The court further erred in concluding that protection against harm to *fama* cannot at law be sought through urgent interdictory relief and so erred in arriving at a finding which is contrary to established and well-regarded authority.
3. Having found that respondent had instituted an investigation in terms of s 5 of the Gender Commission Act [*Chapter 10:31*] and having concluded that the issues it sought to investigate were outside the remit of the powers contained in that provision, the court *a quo* erred in not concluding that appellant had prospects of success in the review application and was consequently due the remedy of an interdict.
4. *A fortiori*, the court *a quo* erred in failing to appreciate that the principle of legality requires that when challenged, the exercise of public power must be justified on the basis upon which it has been specifically exercised and that for that reason, the notice impugned not having been properly given in terms of section 5 of the Act could not be held valid on the basis of constitutional provisions.
5. Having come to the conclusion that the process which had been instituted by the respondent was pointless and abortive, the court *a quo* erred in not concluding that appellant’s rights were imperilled by having to be required to go through a sham and that he was consequently entitled to protection since the balance of convenience was in his favour.”

ARGUMENTS ON APPEAL

Mr *Mpofu* commenced his argument by challenging the jurisdiction of the Commission to conduct the investigation as set out in the General Notice. He submitted that the General Notice had not been issued in terms of the Act. He added that the court *a quo* had itself queried the necessity by the Commission to publish the General Notice, which it said was inconsistent with the Act and, suggested that the court *a quo* had implied that s 5 of the Act, was inappropriately relied upon by the Commission. Mr *Mpofu* argued that before the court *a quo* the appellant was called upon to establish a *prima facie* case. He stated that the Commission did not have jurisdiction to issue the General Notice. He highlighted to this court that once the judge *a quo* made a finding that the investigation sought to be conducted by the respondent was not an s 5 process, it automatically followed that the court ought to have granted the relief sought by the appellant.

The court engaged Mr *Mpofu* to shed light on what he understood a General Notice to be. To his credit, counsel accepted that a General Notice is in the nature of a statutory instrument and has the force of law. The court also enquired from counsel whether it was possible at law for a court to grant an interdict the effect of which was to suspend the operation of a law that has legal force and effect.

In addition, the court directed Mr *Mpofu*, premised on the relief sought in the court *a quo* wherein the final order sought was the permanent stay of the investigations and enquired of him whether the application for review was not a superfluous process given that the final order sought by the appellant was a permanent stay of the investigations. Once granted by the court in terms of the final order prayed for, the order would render the review application inconsequential. Counsel for the appellant contended otherwise.

Per contra, Ms *Damiso*, counsel for the respondent, submitted that owing to the exchange between counsel for the appellant and the court the issue which arose for determination was whether or not a law can be set aside through an application for an interdict. Ms *Damiso* contended that in view of the promulgation of the General Notice as a law, anything done pursuant thereto must be presumed to be valid. She argued further that a court cannot interdict lawful conduct. For this contention, she sought reliance on *ZIMRA v Packers International* SC 28/16 and *Mayor Logistics v ZIMRA* CCZ7/14, which according to her submissions both underscored the principle that a challenge to law cannot be made in terms of an interdict. She proceeded to argue that the Commission had acted within the ambit of its powers as prescribed in terms of s 5 of the Act in that systemic barrier to gender equality can emanate from the conduct of one person. In this

regard, she argued, the appellant being an influential leader of a great movement, it is that stature and influence that he seeks to protect.

Counsel went on to argue that the Constitution, in s 246, gave the Commission the mandate to carry out such investigations. She conceded that the functions stated in s 246 of the Constitution are not restated in the Act but that this did not take away the Commission's authority to act in the manner that it did because the purpose of the Act is not to restate what is in the Constitution but to augment the contents thereof. Ms *Damiso* submitted that s 246 paras (b) and (c) of the Constitution set out the investigative functions of the Commission. She also referred the court to s 2 of the Act which defines "systemic barriers" and added that a reading of s 2 showed that the definition therein was not exhaustive and, for that reason, the Commission took the view that organised worship is a sphere of activity as contemplated in the Act. In any event, Ms *Damiso* argued, the Commission had decided not to proceed with the investigations and decided to await the outcome of the review application.

In response, Mr *Mpofu* indicated to the court that the authorities cited by counsel for the Commission were irrelevant and distinguishable to the present matter. He argued that the General Notice was inconsistent with the Act and this should have automatically translated to a *prima facie* case for the appellant enabling him to obtain relief from the court *a quo*. He submitted that s 5 does not allow the Commission to exercise the powers it purported to have exercised in terms of the General Notice. He argued that there was no systemic barrier involved *in casu* that prejudiced gender equality or gender equity. Also, the Commission was said to have failed to indicate the section of society that was to be investigated as envisaged by s 2(1) of the Act. In

closing his submissions counsel for the appellant stated that the methodology employed by the Commission was inappropriate and not in conformity with relevant provisions of the Act. Having said that he prayed that the appeal be allowed and the decision of the court *a quo* be set aside.

ISSUE FOR DETERMINATION

The facts of the matter are not in dispute and the appeal falls for determination on the basis of the *ratio decidendi* of the court *a quo*. Although the appellant raised numerous grounds of appeal, there is only one issue that arises for determination and is capable of disposing of this whole appeal. The only issue is whether or not the court *a quo* was wrong in refusing the application for an interdict.

STATUS OF THE GENERAL NOTICE

The Commission is imbued with an investigative mandate, both in terms of the Constitution and the enabling Act. It issued a General Notice, and the appellant seeks to challenge the decision to publish the Notice through the review that he has filed.

What is a General Notice? A General Notice is a public notice published in the Government Gazette. A General Notice is in the same category as a statutory instrument. It is subsidiary legislation. It, therefore, has the force and effect of law. It can also be viewed as a document that has legislative character, and like any other law, it has legal force and effect. It is an essential element of due process and, therefore, once it is issued it must be complied with unless set aside. As a consequence, until and unless it has been set aside, anything done under or pursuant to such general notice is lawful.

It is not necessary in this appeal to determine whether or not the Commission exceeded its powers in issuing the General Notice. Whether or not the Notice is in accordance with the powers bestowed on the Commission is for the court hearing the application for review to decide.

WHETHER THE COURT A *QUO* MISDIRECTED ITSELF IN REFUSING THE INTERDICT

What was before the court *a quo* was an application for a temporary interdict and that is the issue before the court on appeal. In determining the issue it would be prudent to start by looking at what the appellant purported to do. The appellant applied for an interdict through which he sought to set aside the General Notice.

The premise of the interdict was that the intended investigation was illegal from several bases, the first being the want of jurisdiction to conduct an investigation and the alleged illegal exercise of that jurisdiction by the Commission. It was the intention of the appellant to subject the decision to issue the Notice to a review process.

It is pertinent to point out that for every law that is gazetted there is a presumption of validity and appropriate legal mechanisms have been put in place in terms of the law where one intends to challenge the validity of a legal instrument. Until it has been set aside, the General Notice has the force of law and anything done under it is presumed to be lawful and valid.

An application for an interdict is not and cannot by any stretch of the imagination be considered as one of those mechanisms. *In casu*, a case has not been made for the granting of the relief sought for the following reasons.

The appellant has not yet successfully impugned the legal status of the General Notice. That can only be determined after the review is decided. Clearly, in such circumstances, the legality of the notice itself is not in issue. It still stands as law.

In *Mayor Logistics (supra)*, the court said:

“The applicant seeks an order suspending the statutory obligation to pay the amount of the tax it was assessed to be liable to pay to the Fiscus, pending the hearing and finalization of the appeal in the Fiscal Appeal Court. It is in the heads of argument that the applicant reveals that the relief sought is an interim interdict. There is need to have regard to the substance and not the form of the relief sought. The fact that the applicant calls the order sought, an interim interdict does not make it one.

The subject of the application is not the kind of subject matter an interdict, as a remedy, was designed to deal with. An interdict is ordinarily granted to prevent continuing or future conduct which is harmful to a *prima facie* right, pending final determination of that right by a court of law. Its object is to avoid a situation in which, by the time the right is finally determined in favour of the applicant, it has been injured to the extent that the harm cannot be repaired by the grant of the right.

It is axiomatic that the interdict is for the protection of an existing right. There has to be proof of the existence of a *prima facie* right. It is also axiomatic that the *prima facie* right is protected from unlawful conduct which is about to infringe it. An interdict cannot be granted against past invasions of a right nor can there be an interdict against lawful conduct. *Airfield investments (Pvt) Ltd v Minister of Lands & Ors* 2004(1) ZLR 511(S); *Stauffer Chemicals v Monsato Company* 1988(1) SA 895; *Rudolph & Anor v Commissioner for Inland Revenue & Ors* 1994(3) SA 771.”

The view I take is that the lawfulness of the intended investigation is established by the General Notice. It is a legislative instrument with the force and effect of law. As noted above, a General Notice has the force and effect of law, therefore, there is always a presumption of validity

on that Notice and the validity thereof cannot be questioned through an application for an interdict. The appellant cannot seek to interdict lawful conduct.

The court in *Mayor Logistics (supra)* at page 11 of the cyclostyled judgment went on to say:

“There is no basis on which the interim order sought may be granted except the possibility relied on by the applicant that the existing legislation would be held unconstitutional. Any court faced with an application challenging the constitutionality of a statutory provision is required to proceed on the presumption that the legislation is constitutionally valid until the contrary is clearly established.

The principle of presumption of constitutional validity of legislation pending determination of the main application is an important limitation to the exercise of judicial power. *Zimbabwe Township Developers (Pvt) Ltd v Lou’s Shoes (Pvt) Ltd* 1983(2) ZLR 376(S) at 382B-D. By observing the principle, due respect is accorded to the legislative branch of Government consistent with the fundamental principle of separation of powers.”

It is correct that the court *a quo* did not determine the matter on the basis that lawful conduct cannot be interdicted. This is an issue of law that the court can raise *mero motu*. The court did raise the issue with counsel. In my view, once the concession is made that the notice is a law, there is no issue. The contemplated investigation having been preceded by the promulgation of the notice cannot by any stretch of the imagination be referred to as a violation of the appellant’s rights.

The court *a quo* disposed of the matter based on the principle enunciated in *Masedza & Ors v Magistrate Rusape & Anor* 1998 (1) ZLR 36. I am not convinced that the authority is of any assistance in the determination of this appeal. What is at issue is a prayer for an interdict pending the determination of a review. There were no proceedings that were sought to be stayed.

In as much as the court, *a quo* made its determination based on the principle in *Masedza* it misdirected itself. The authority was not applicable to the dispute before the court.

DISPOSITION

In my view, the concession that the General Notice has the force of law is dispositive of the appeal. A General Notice is a legal instrument that has the force and effect of law. And like any other law, there is a presumption of validity upon it until it has been validly set aside through the appropriate legal procedures. Therefore, a litigant cannot through an application for an interdict seek to police lawful conduct given that the validity of the General Notice has not yet been determined by a court. As far as the law is concerned the Notice is law. It, therefore, stands to reason that an interdict cannot lie against lawful conduct.

In the premises, the appeal is devoid of merit and is dismissed with costs.

UCHENA JA:

I agree

PATEL JA: I have read the lead judgment of my learned sister Gowora JA and consider it necessary to briefly analyse and address the nature of the relief sought by the appellant in the proceedings *a quo*.

As regards this aspect, Gowora JA quite correctly observes that in the review application the principal relief sought is that the decision of the Commission in issuing the General Notice be set aside. Again, the provisional order sought in the urgent chamber application simply prays for the intended investigation of the appellant by the Commission in terms of the General Notice to be stayed. It is only in the final order sought that the appellant prays that the General Notice be declared null and void and of no force or effect. Consequently, my learned sister concludes that the appellant cannot seek to police lawful conduct through an interdict, given that the validity of the General Notice, which is presumed to be valid until it is set aside, has yet to be determined. In keeping with the case authorities cited and relied upon by Gowora JA, I fully agree that an interdict cannot ordinarily be granted against conduct that is *prima facie* lawful.

Regrettably for the appellant, he has tactically miscalculated the nature of the relief that he sought in the urgent chamber application before the court *a quo*. He has also failed to correlate and align the draft order in the chamber application with the relief sought in the application for review pending before the High Court.

In the final analysis, the applicant has failed to take into account the formidable hurdle presented by the rule that an interdict cannot in principle be granted against conduct that is *prima facie* lawful and carried out in terms of an extant statutory instrument that is presumed to be valid

until it is duly set aside by a competent court that is properly seized with the question of its validity. In any case, as a matter of procedural correctness, the validity of the impugned General Notice could not properly have been an issue before the court *a quo* until the return day had arrived. By the same token, it cannot be properly ventilated before and determined by this Court on appeal against the judgment *a quo*. For these essentially technical reasons, I would agree with Gowora JA that the present appeal should not be allowed.

Rubaya & Chatambudza, appellant's legal practitioners

The Zimbabwe Gender Commission, legal practitioners for the respondent