

REPORTABLE (117)

(1) MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY
AFFAIRS
(2) PRESIDENT OF THE REPUBLIC OF ZIMBABWE
(3) VICE PRESIDENT OF THE REPUBLIC OF ZIMBABWE
(4) ATTORNEY GENERAL OF ZIMBABWE

v

(1) CONCILIA CHINANZVAVANA
(2) THE NATIONAL PEACE AND RECONCILIATION
COMMISSION

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GUVAVA JA & BHUNU JA
HARARE, 30 SEPTEMBER 2019 & 19 OCTOBER 2021**

K. Chimiti, for the appellants

T. Biti, for the 1st respondent

No appearance for the 2nd respondent

GUVAVA JA:

(1) This is an appeal against the entire judgment of the High Court sitting at Masvingo dated 13 March 2019. In this case the court *a quo* granted a declaratory order sought by the 1st respondent in the following terms:

“The National Peace and Reconciliation Commission that is established in terms of s 251 of the Constitution shall have a tenure of life of ten (10) years deemed to have commenced on the 5th of January 2018 with the gazetting as law of the National Peace and Reconciliation Act [*Chapter 10:32*].”

Aggrieved by the order the appellants have appealed to this court for relief.

BACKGROUND FACTS

2. The 1st respondent filed an application for a declaratory order on the 8th October 2018 before the court *a quo* in terms of s 85 (1)(a) of the Constitution of Zimbabwe, 2013. The 1st respondent grounded her application on an alleged violation of s 56 (1) of the Constitution of Zimbabwe, 2013. She alleged that her fundamental right to equal protection of the law had been violated by the conduct of the appellants who had failed to enact the NPRC Act in time and thus curtailed the life of the commission by five years. As a result of the alleged breach she sought an order that it be declared that the 2nd respondent's life tenure of ten years be deemed to have commenced from the 5th of January 2018 when the NPRC Act was promulgated into law.
3. In the application the 1st respondent's founding affidavit was divided into three parts. The first part related to the history and formation of the 2nd respondent. The 1st respondent averred that the Constitution of Zimbabwe Amendment (No. 20) Act 2013 ('the Constitution') introduced a number of key and revolutionary changes chief amongst them being the creation of several commissions. It was the 1st respondent's argument that the 2nd respondent was one of the commissions that was created. It was to operate for not more than ten years and had the mandate, in the main, of investigating human rights violations that were alleged to have occurred in 2008 in Zimbabwe.
4. The 1st respondent further averred that the Government of Zimbabwe had unilaterally amended s 251 of the Constitution by failing to ensure that the 2nd respondent was established as soon as possible after the coming into operation of the Constitution thereby resulting in the Commission only being established after the NPRC Act was enacted into law on the 5th of January 2018. This was five (5) years after the coming into operation of the Constitution. It was the 1st respondent's contention that this resulted

in the 2nd respondent having an existence of only five (5) years that is to August 2023. It was also the 1st respondent's averment that the failure by the Government of Zimbabwe to ensure that the effective date of the establishment of the 2nd respondent immediately after the coming into effect of the Constitution amounted to a breach of her fundamental right to equal protection of the law as enshrined in the Constitution under s 56.

5. The second part of the founding affidavit dealt with the issue of whether or not the 1st respondent had *locus standi* to make the application and the legal basis upon which the application was before the court *a quo*. The 1st respondent averred that she was a national executive member of the Movement for Democratic Change (MDC) Alliance for Mashonaland West. She further averred that she was making the application in terms of s 85 (1) (a) of the Constitution, acting in her own interest, to ensure peace and reconciliation in Zimbabwe. She further alleged that her rights in terms of s 56 (1) of the Constitution had been violated. She thus alleged that she had the requisite interest in the matter to bring the application in terms of s 85 (1) (a) of the Constitution.
6. The last part of the founding affidavit dealt with an alleged ordeal that the 1st respondent and her family suffered in the hands of state security agents. She alleged that after the 2008 harmonized election, violence erupted in Zimbabwe and left many (including the 1st respondent and her family) displaced or dead. As a result of this violence, the 1st respondent and her husband allegedly fled from their home in Mashonaland West to Harare and stayed at Harvest House and at other MDC Alliance activists' homes. The 1st respondent further alleged that she and her husband and other MDC activists were taken to Braeside Police Station and were detained for fifty-five (55) days. It was in the hands

of the said police officers that the 1st respondent, her husband and other activists were subjected to torture and abuse.

7. The 1st respondent further alleged that they were subsequently taken to Ahmed House where they were charged with terrorism, sabotage and insurgence. The 1st respondent and others were taken to Harare Magistrates' Court where they were remanded in custody. It was also alleged that the 1st respondent, her husband and other activists were released after one *Jestina Mukoko*, successfully filed an application to the Constitutional Court and the Court ordered that they be released as their original arrest was unlawful.

It was on this basis that the 1st respondent sought a declaratory order that the 2nd respondent has life tenure with effect from 5 January 2018 to 5 January 2028 so that it could look into the alleged atrocities alleged in the founding affidavit.

8. Initially, the appellants had only opposed the application based on a preliminary objection to the application without addressing the merits of the matter. The objection was to the effect that the declaratory order sought by the 1st respondent was incompetent at law as she sought to amend the Constitution through a court order. The court *a quo* however directed the appellants to file an opposing affidavit on the merits.
9. In opposing the application, the appellants denied the averments made by the 1st respondent in her founding affidavit with regards to the establishment of the 2nd respondent. Further, it was denied that the appellants amended s 251 of the Constitution as the 2nd respondent was established and was in existence from the effective date when the Constitution was promulgated notwithstanding the absence of the NPRC Act.
10. In dealing with the application, the court *a quo* dismissed the appellants' preliminary objection. On the merits, the court invoked various techniques of statutory interpretation

and found that an interpretation of s 251 (1) of the Constitution showed that reference to ten (10) years was in relation to the life of the 2nd respondent after the effective date and not the period within which it had to be established. With that, the court held that the 2nd respondent ought to have been established immediately after, or as soon as practicable, after the effective date. As a result of this interpretation, the court found that the 1st respondent was entitled to the declaratory order sought and granted the order that I have already set out above.

SUBMISSIONS BEFORE THIS COURT

11. Mr *Chimiti*, for the appellants, motivated the appeal, in the main, on the basis that the court *a quo* erred in granting the declaratory order as it had the effect of amending s 251 (1) of the Constitution.
12. Before the 1st respondent replied to the submissions by Mr *Chimiti*, the Court directed Mr *Biti*, counsel for the 1st respondent, to address it on two issues that were not apparent from the judgment made by the court *a quo*. The first issue related to the manner in which the 1st respondent's right to equal protection of the law was violated. Secondly, whether the court *a quo* made a determination, that such right was indeed violated or was in danger of being violated.
13. Mr *Biti* submitted that the 1st respondent made the application in terms of s 85 (1) (a) of the Constitution on the basis that her fundamental right in terms of s 56 (1) had been violated. He further submitted that in making the application, the 1st respondent's right also emanated from s 324 of the Constitution and as such, the right had to be protected in terms of s 56 (1). He however conceded that the court *a quo* did not make a finding that the fundamental right had been violated. He submitted that since the court had granted the *declaratur* sought, it could be assumed that the court had found that the 1st

respondent's rights had been or were likely to be violated. It was also his submission that once the court found that the appellant had acted unlawfully then, it was incumbent upon the court to grant the *declaratur* as the court could not ignore a constitutional invalidity in terms of s 324 of the Constitution.

Mr *Biti* further argued that the argument by the appellants that the 2nd respondent came into effect after the promulgation of the Constitution in 2013 was devoid of merit as such argument meant that the life period of the Commission was curtailed by five (5) years.

ANALYSIS

14. It appears to me from the submissions made that the determination of a single issue will potentially have the effect of resolving the matter. The issue for determination by this Court is whether or not the court *a quo* erred in granting the declaratory order sought by the 1st respondent without first finding whether or not the 1st respondent's rights in terms of s 56 (1) of the Constitution had been violated.
15. It is quite apparent from the founding affidavit by the 1st respondent that she approached the court in terms of s 85 (1) of the Constitution seeking a declaratory order on the basis that her constitutional right enshrined in s 56 (1) had been violated. At paragraph 26 of the founding affidavit, the applicant stated thus:

“I therefore contend that my Constitutional right to equal protection of the law as protected by s 56 (1) of the Constitution has been breached by appellant's actions in failing to ensure that the Commission was in existence and would operate effectively for the ten (10) years envisaged in s 251 of the Constitution.”

At para 78 the applicant again reiterates that she is bringing the application in terms of s 85 (1) (a) of the Constitution on the basis that her rights under s 56 (1) of the Constitution have been violated. It is therefore necessary at the outset to establish

whether or not the applicant approached the court correctly in terms of s 85(1)(a) and thereafter assess whether or not the court found that her rights had been violated.

16. Section 85 (1) of the Constitution provides:

“Any of the following persons, namely:

- (a) any person acting in their own interests;
- (b)
- (c)
- (d)
- (e)

is entitled to approach a court, **alleging that a fundamental right or freedom enshrined in this Chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights** and an award of compensation.” (emphasis is my own)

17. A proper interpretation of the above provision is that once a person approaches a court on the basis of s 85 (1) (a) of the Constitution, the court must make a determination on the following issues:

- (i) That the person approaching the court has an interest in the matter, and
- (ii) That the person is alleging that a fundamental right in Chapter 4 has been, is being or is likely to be violated in respect to her.

See *Meda v Sibanda & Anor* 2016 (2) ZLR 232 (CC) at 263.

18. A reading of the judgment of the court *a quo* shows that the court did not make a determination on the above issues. The court *a quo* clearly did not consider that the case before it was a s 85 (1) application which required that the 1st respondent satisfies the court that she was properly before it and that she had the requisite interest. This point was emphasized in *Loveness Mudzuru & Anor v Minister of Justice, Legal & Parliamentary Affairs N.O. & 2 Ors* CCZ 12/2015 where MALABA DCJ (as he then was) stated at p 9 of the cyclostyled judgment that:

“The person claiming the right to approach the court must show on the facts that he or she seeks to vindicate his or her own interest adversely affected by an infringement of a fundamental right or freedom. The infringement must be in relation to himself or herself as the victim or there must be harm or injury to his or her own interests arising directly from the infringement of a fundamental right or freedom of another person.”

19. On the basis of the above, I find with respect, that the court *a quo* grossly misdirected itself in failing to consider the cause of action of the case that was before it. The full judgment of the court *a quo* makes no reference at all to the basis upon which the application was made. There is no reference to the application being a s 85 (1) application. Instead, the court *a quo* launched into the rules of statutory interpretation without applying its mind to the case before it or making any specific finding of whether or not the applicant before it had the requisite interest to launch the application.

20. It is of importance to note that in her founding affidavit the 1st respondent averred that her legal interest in bringing the application was founded on the basis of a violation of a fundamental right under s 56 (1) of the Constitution.

It is trite that the interest that an applicant must allege in s 85 of the Constitution is a legal interest in the matter not just that of a busy body who wants to poke their nose into any matter that does not concern them. I note in passing that the court made no finding whether or not the 1st respondent was properly before it.

21. Turning to the crux of the matter before me it is my view that the matter turns on a determination of whether or not the court made a finding that the 1st respondent's rights under s 56 (1) had been violated. It is trite that where a litigant approaches the court under s 85 (1) alleging that her rights have been violated it is incumbent upon the court *to make a* determination on this point. In other words, a s 85 (1) application requires the applicant to allege and prove an infringement of his or her fundamental right. The

making of such a determination is what triggers the remedy that the court will eventually make in order to grant relief to the applicant. In other words, a declaratory order made in terms of s 85 (1) of the Constitution cannot be made in the air. It must be based upon a finding that the applicant's rights had been or were likely to be breached.

Section 56 of the Constitution upon which the 1st respondent founded her claim reads as follows:

“56 Equality and non-discrimination

- (1) All persons are equal before the law and have the right to equal protection and benefit of the law.
- (2) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (3) Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.
- (4) A person is treated in a discriminatory manner for the purpose of subsection (3) if-
 - (a) they are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
 - (b) other people are accorded directly or indirectly a privilege or advantage which they are not accorded.
- (5) Discrimination on any of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.
- (6) The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and—
 - (a) such measures must be taken to redress circumstances of genuine need;

(b) no such measure is to be regarded as unfair for the purposes of subsection (3).”

22. Section 56 of the Constitution is a non-discriminatory provision. It guarantees equality before the law. In other words for a person to prove a violation under this provision he or she must not only prove unequal or different treatment but also that others in a similar position were afforded such protection. In the case of *Samuel Sipepa Moyo v Minister of Local Government, Rural & Urban Development & 2 Ors* CCZ 6/2016, the court had reason to interpret the meaning and application of this provision. At p 8 of the judgment, the court stated:

“In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same or similar position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons.”

23. Applying the above to the facts of this case, I take the view that it was incumbent upon the 1st respondent to satisfy the court *a quo* that her rights had been or were in danger of being violated and that others in a similar position had been treated differently. The court *a quo* was thus obliged to interrogate the evidence presented *a quo* and make a specific finding that her rights as enshrined in s 56(1) had been or were in danger of being violated. It was only after making such a finding, that the court could make the order sought by the applicant before it on the basis that it was granting relief in terms of s 85 of the Constitution. Firstly, the 1st respondent in her founding affidavit did not aver that she had suffered from unequal treatment or differentiation. She did not allege that she was denied protection whilst others in a similar position as her had been afforded such protection. Secondly, a reading of the judgment of the court *a quo* indicates that no finding of this important consideration was made. This point was conceded by Mr *Biti*. Indeed, he would have been hard pressed to argue otherwise as, nowhere in the judgment, does the court refer either to s 85 (1) or to s 56 (1) of the Constitution upon

which the application is founded. A finding on this point would have opened the door for the relief sought by the 1st respondent. The court *a quo* thus erred and misdirected itself in this respect.

24. I was not persuaded by the argument by Mr *Biti* that the court should find that in granting the declaratur it must have found that there was a violation of s 56 (1) of the Constitution as otherwise it would not have granted the relief sought. However, it is my view that the matter cannot be resolved in this way. A reading of the judgment shows that the Court was clearly not concerned with this issue. Its only concern was interpreting s 251 of the Constitution. It was also not apparent what law was applied to make the declaratory order. A declaratory order is generally made in terms of s 14 of the High Court Act [*Chapter 7:06*].

The court *a quo* did not interrogate the requirements for the grant of a declaratory order in this case. Whatever the basis of the relief granted, it remained embedded in the mind of the court and was not reduced to writing.

25. I was also not persuaded that the court *a quo* correctly applied s 324 of the Constitution on the facts of this case. The section provides as follows:

“All constitutional obligations must be performed diligently and without delay.”

I come to this conclusion because it was never the 1st respondent’s case before the court *a quo* that she was approaching the court on the basis of constitutional invalidity arising from the conduct of Parliament in failing to enact the NPCR Act with due speed. If that was the 1st respondent’s case she would not have approached the court in terms of s 85 of the Constitution. An application in terms of s 85(1) relates only to the vindication of an alleged infringement enshrined in Chapter 4 and not a violation of the Constitution under s 324.

26. It has been stated in a number of judgments that an application stands or falls on its founding affidavit (See *Yinus Ahmed v Docking Station Safaris Private t/a CC Sales* SC 70/18, *Fuyana v Moyo* SC 54-06, *Muchini v Adams & Ors* SC 47-13 and *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* SC 80-06.) The 1st respondent's founding affidavit bases her claim on s 85(1) of the Constitution alleging a breach of a fundamental right. Her claim was not based on a failure to comply with a Constitutional provision as enshrined in s 324. Thus she could not rely on s 324 to procure the relief that she obtained.
27. Having found that the court *a quo* erred and misdirected itself in failing to find whether or not s56 (1) of the Constitution had been breached it is not necessary for this court to determine whether or not the interpretation given to s 251 of the Constitution was correct. This issue would only have arisen if the court had found a breach of s 56(1) of the Constitution.

COSTS

The matter related to an infringement of fundamental rights. The point has been made *ad nauseam* in various decisions in this jurisdiction that access to the courts on allegations of a breach of fundamental rights should never be impeded in any way. In my view no order of costs on appeal should be awarded against the losing party. This will ensure that access to the court, in Constitutional matters, is not curtailed by issues of costs. In any event the issue upon which this matter turned was not raised by the appellants, but by the court itself.

DISPOSITION

28. With respect, I find that the court *a quo* erred in granting the declaratory order sought by the 1st respondent. The concession by Mr *Biti* that the court *a quo* did not make the

necessary determination on whether or not the 1st respondent's rights under s 56 (1) had been, or were in danger of being violated, was the determining factor in this appeal.

The decision of the court *a quo* cannot stand and must therefore be vacated.

In the result, it is accordingly ordered as follows:

1. The appeal is allowed with no order as to costs.
2. The judgment of the court *a quo* is hereby set aside and substituted as follows:-

“The application be and is hereby dismissed with no order as to costs.”

GWAUNZA DCJ : I agree

BHUNU JA : I agree

Civil Division of the Attorney General's Office, appellants' legal practitioners.

Tendai Biti Law, 1st respondent's legal practitioners