ALLAN NORMAN MARKHAM
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS
and
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 27 September 2021 & 12 October 2022

COURT APPLICATION

T Biti, for the applicant
C Chibidi, for the respondents

MANZUNZU J

INTRODUCTION:

In 2013 Zimbabwe celebrated the birth of a new Constitution. It is an epoch in the life of Zimbabweans. The new Constitution also brings with it certain obligations on institutions and other office bearers. It is such obligations that the applicant brings this application against the respondents seeking an order in the following terms:

"*IT IS ORDERED THAT:*

1. *The first respondent's failure to enact an Act of Parliament stipulated in section 198 (a) of the Constitution of Zimbabwe was a breach of section 324 of the Constitution.*
2. *The first respondent be and is hereby ordered to enact a bill covering the issues defined in section 198 (a) of the Constitution of Zimbabwe within 45 days from the date of this order.*
3. *The first respondent must pay costs of this suit."*

The application is opposed by the respondents as shall be seen from a summary of their notice of opposition later in this judgment.

ANALYSIS OF EVIDENCE

The applicant starts his case with what appears more like a lecture on how corruption has taken root within public and private institutions. He examined the inadequacy in legal tools of addressing corruption.

Whilst the applicant has somewhat unnecessarily overloaded his application with voluminous information, the simple point he is making is this; section 198 of the Constitution creates certain obligations for the respondents which obligations must, in terms of section 324 of the Constitution, be performed diligently and without delay. The applicant seeks a declaratory order that the respondents breached their Constitutional obligation created by section 198 and must be ordered to abide with the same within a given time frame.

Section 198 falls within Chapter 9 of the Constitution. There are five sections which fall in this Chapter under the main heading; "Principles of Public Administration and Leadership." It is a governance issue which calls for accountability and transparency for those who hold public office within a democratic system.

Section 198 of the Constitution provides that; "*An Act of Parliament must provide measures to enforce the provisions of this Chapter, including measures*
(a) requiring public officers to make regular disclosures of their assets;
(b) establishing codes of conduct to be observed by public officers;
(c) specifying the standards of good corporate governance to be observed by government-controlled entities and other commercial entities owned or wholly controlled by the State;
(d) providing for the disciplining of persons who contravene the provisions of this Chapter or of any code of conduct or standard referred to in paragraph (b).

It cannot be disputed that section 198 creates a Constitutional obligation to enact a law to operationalize the dictates of Chapter 9. I did not hear the respondents say otherwise. In other words, the parties are in agreement on the interpretation of sections 198 and 324. Section 324 provides that; "*All constitutional obligations must be performed diligently and without delay."*

This application was filed seven years after the Constitution came into existence. It is also not in dispute that the obligation under section 198 has not been fulfilled. The question which emerges as a real issue is, **who has the responsibility to carry out the obligation created by section 198; that is, to enact an Act of Parliament that must provide**

measures to enforce the provisions of Chapter 9 which must include measures laid out in paragraphs (a) to (d) of section 198? The applicant says in paragraph 5 of the founding affidavit it is the respondents who should *"actualize and formulate a legislative text that provides measures of good governance….."* In the relief sought in paragraph two of the draft order the applicant says, "*The first respondent be and is hereby ordered to enact a bill covering the issues defined in section 198 (a) …."* During oral submissions Mr Biti for the applicant, on realizing the wide meaning of the word "enact," sought to amend the draft order so that the first respondent is ordered to gazette a Bill within 45 days of the date of the court order.

The position taken by the respondents in opposing this application is that while they do not out rightly deny that they do contribute to the legislative process, but such process is a collective responsibility with other players like Parliament, the President and Cabinet which ought to have been joined. Sections 116, 117 and 110 (3) (c) were relied upon.

Section 116 states that: *"The Legislature of Zimbabwe consists of Parliament and the President acting in accordance with this Chapter."*

Section 117 reads; *"(1) The legislative authority of Zimbabwe is derived from the people and is vested in and exercised in accordance with this Constitution by the Legislature.*
(2) The legislative authority confers on the Legislature the power—
(a) to amend this Constitution in accordance with section 328;
(b) to make laws for the peace, order and good governance of Zimbabwe; and
(c) to confer subordinate legislative powers upon another body or authority in accordance with section 134."

Section 110 (3) (c) provides that; *"(3) Subject to this Constitution, the Cabinet is responsible for—*
(c) preparing, initiating and implementing national legislation;"

The respondents' argument is that constitutional obligations are not selective of persons and institutions. In fact, they concede that indeed the Constitution has created

obligations. They however say there is no basis to hold them "*at ransom when there are so many other functionaries involved in the law-making process."* This they have said without defining their role in the law-making process for the court to see for itself that which they can do and that which is done by other functionaries.

Mr Chibidi for the respondents argued that section 198 does not create or impose any obligation on the respondents per ser. I disagree with that. Here we are talking of a Minister responsible for the Ministry of Justice and Parliamentary Affairs and the Attorney-General who is legal advisor to Government. Dube J as she then was, had occasion to comment on these two important offices in a similar case of *Haruzivishe and Another v Minister of Justice and Others HH 76/20.* The court had this to say; *"In terms of s88 (2) of the Constitution, the executive authority of Zimbabwe vests in the President who exercises such power through members of his cabinet… In terms of s 110 (3) (c) of the Constitution, members of cabinet have the responsibility of preparing, initiating and implementing national legislation. Cabinet ministers are the functionaries of the executive and are responsible for preparing, initiating and implementing national legislation.*

> *The first to the fourth respondents are part of the executive authority of Zimbabwe. The Minister of Justice is the minister responsible for the administration of constitutional issues and … They (Ministers) hold portfolios in the areas which are the subject of these proceedings They are vested with the authority in terms of s110 (3) (c) of the Constitution to initiate legislation .This being the case, they are obliged to actualize the requirements of s210 of the Constitution and initiate the legislation which is required to be tabled by the Minister of Justice. .. The assertion by the applicants that legislation is initiated by the Cabinet Minister concerned who takes the principles of the legislation sought to be introduced to the Attorney General who prepares a draft to be tabled in Parliament was not refuted… If the relevant Cabinet Ministers are not responsible for initiating legislation, then who is? The respondents are abrogating their duty. The Attorney General is the principal legal adviser to government. It is his responsibility to draft legislation on behalf of government, to protect and uphold the law and defend public interest." (emphasis is mine).*

While the respondents have shown that they are not the only players in the legislative process, they have not shown that they ought not be cited as respondents at all. The first

respondent admits that he was assigned the administration of the Constitution by the President. The respondents want this application dismissed on the basis of non-joinder. That cannot be a cause to defeat the application unless wrong respondents were cited altogether. Rule 32 (11) of the High Court Rules, 2021 states that; *"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."*

The respondents in an effort to exonerate themselves from the alleged breach of section 324, apart from reiterating that the obligation created by section 198 lies with Parliament and Cabinet, outlined Government efforts in giving effect to legislative requirements of the Constitution. While the efforts are commendable, the fact remains that Constitutional obligations must be performed diligently and without delay. A delay of seven years is by no means classified as reasonable. The respondents gave no indication, in terms of time frame, as to when the obligation will be performed apart from the fact that research has started and was meant to be completed by 30 April 2021.

In *Chironga and Another v Minister of Justice and Others CCZ* 14/20 the Constitutional Court underscored the obligation upon public office bearers. Commenting on the rule of law and supremacy of the Constitution the court warned; *"… public office bearers ignore their constitutional obligations at their own peril… the State, its organs and functionaries cannot, without consequence, be allowed to adopt a lackadaisical attitude, at the expense of the public interest, in bringing into operation institutions and mechanisms commanded by the supreme law."*

It is clear from the set of facts before the court that the respondents failed to act within a reasonable time and therefore are in breach of the constitutional obligation. The fact also justify the granting of a *mandamus*. It is the period (as suggested by the applicant) within which the respondents are to act which I find to be too short. Courts should make orders which are realistic of performance.

DISPOSITION

1. The first respondent's failure to formulate within a reasonable time a Bill to give effect to the Act envisaged in section 198 (a) of the Constitution of Zimbabwe is in breach of section 324 of the Constitution.
2. The first respondent is ordered to gazette the Bill envisaged by section 198 (a) of the Constitution of Zimbabwe within three months from the date of this order.
3. The first respondent shall pay costs of suit.

Tendayi Biti Law, applicant's legal practitioners
Civil Division of the Attorney General, 1st and 2nd respondents' legal practitioners