MOVEN KUFA
and
THE VOICE FOR DEMOCRACY TRUST
versus
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE N.O
and
THE PRIME MINISTER OF THE REPUBLIC OF ZIMBABWE N.O
and
SAVIOR KASUKUWERE
and
JOSEPH MADE
and
WALTER MZEMBI
and
FLORA BHUKA
and
SLYVESTER NGUNI
and
HENRY MADZORERA
and
GILES MUTSEKWA
and
SEKAI HOLLAND

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 22 March 2011, 5 and 6 April 2011

Mr *D. Ochieng*, for the applicants
Advocate *Uriri*, for the respondents

CHIWESHE JP: In this opposed application the applicants seek an order in the following terms:

"IT IS ORDERED THAT:

1. The purported appointments and entry into office as Ministers of:
   SAVIOUR KASUKUWERE
   JOSEPH MADE
   WALTER MUZEMBI
   FLORA BHUKA
   SYLVESTER NGUNI
   HENRY MADZORERA
   GILES MUTSEKWA

and
SEKAI HOLLAND
are hereby declared to be null and void.

ALTERNATIVELY

1. 1st respondent and 2nd respondent be and are hereby directed, within seven days of the date of service of this order upon them, to prevent more than 15 ZANU PF nominees, 13 MDC-T nominees and 3 MDC M nominees from purporting to act and carry out the functions of Ministers so that the Ministerial complement of Government does not exceed 31 persons.
2. The 1st and 2nd respondents are hereby ordered to publish in the Government Gazette a list of Government Ministers in the number and manner required under the constitution.
3. Only persons included in such list shall be entitled to receipt of any emoluments or entitlements as would accrue to a Minister from the Government or carry out the functions of a Government Minister.
4. It is hereby declared that there shall not be appointed any number of Ministers above those catered for in terms of the Constitution of Zimbabwe.
5. 1st respondent and 2nd respondent shall pay the costs of this application."

The facts giving rise to this application are common cause. The composition of the executive arm of Government is governed by Schedule 8 of the Constitution of Zimbabwe. The first paragraph of that Schedule provides that the provisions of Schedule 8 shall prevail notwithstanding any other provision to the contrary elsewhere in the Constitution. Art 20.1.6 (5) of Schedule 8 to the Constitution provides as follows:

> "There shall be thirty one (31) Ministers with fifteen (15) nominated by ZANU PF, thirteen (13) by MDC – T and three (3) by MDC M."

During the month of February 2009 the first respondent, acting in consultation with the second respondent, appointed a total of 41 Government Ministers. All the 41 appointees duly took and subscribed before the first respondent, the oaths of office and loyalty prescribed for Ministers. This number exceeds by 10 the 31 Ministers provided for in terms of Art 20.1. 6 (5) of Schedule 8 to the Constitution. The third to the tenth respondents were all appointed after the 31st appointee. Their appointments were thus made in excess of the 31 Ministers provided for in terms of Schedule 8 to the Constitution. For that reason, the applicants aver that their appointments were unconstitutional and therefore null and void.

At the hearing of this application Advocate *Uriri* (for the respondents) raised a point in *limine* as to the jurisdiction of the court to hear and determine what he referred to as a political question. He argued that Amendment Number 19 to the Constitution, which inserted Schedule 8 was driven by Parliament's intention to give effect to the Global Political Agreement (GPA) entered into by the three major political parties, namely, ZANU PF, MDC T, and MDC M. In doing so, Parliament was alive to the fact that the political settlement would not remain static – it could change from time to time. It was for this reason that the provisions of Schedule 8 were not inserted under s 31 of the Constitution which would ordinarily deal with the executive structures of Government. He further argued that Schedule 8 heralds itself as a "Framework for a New Government". Article 20 thereof introduces the provisions of the GPA in order to give that agreement the force of law. Schedule 8 is thus the product of a political settlement and susceptible to change through political conduct. Schedule 8, according to Advocate *Uriri*, raises political rather legal issues. For that reason any dispute arising there from is a matter for Parliament to resolve. The Courts have no jurisdiction to hear and determine such dispute.

Advocate *Ochieng* (for the applicants) argued to the contrary. While conceding that Schedule 8 came about as a result of the Global Political Agreement he contended, to my satisfaction, that once the terms of a political settlement are incorporated into the Constitution, they become part of our law. They can no longer be regarded as mere political issues – they become legal issues the import of which this court has jurisdiction to determine. This court has full original civil jurisdiction over all persons and over all civil matters in Zimbabwe (section 13 of the High Court Act [*Cap 7.06*]. I agree with the applicants when they state that the Constitution lies at the very foundation of the country's legal order. To suggest that any of its provisions are merely a political matter would undermine the rule of law and negate the very foundation of a democratic society. In support of this unusual proposition, Advocate *Uriri* cited the following cases: *King and Ors vs Attorneys Fidelity Fund Board of Control and Another* 2006 (1) SA 474; *Doctors for Life International vs Speaker of National Assembly* 2006 (6) SA 416; *United Democratic Movement vs President of South Africa* 2003 (1) SA 506.

However, these cases are distinguishable from the present application and in some respects, support the contention by the applicants that this court's jurisdiction is unassailable. In *King and Ors vs Attorneys Fidelity Fund Board of Control and Another*, *supra,* the issue was whether the South African National Assembly, had failed to fulfill its constitutional obligation to facilitate public participation in the legislative process. In the present application, the issue is not whether the first and second respondents have failed to fulfill their constitutional obligation; rather, the issue is whether in fulfilling that obligation, they have exceeded the mandate given to them in terms of Schedule 8 to the Constitution by appointing more than 31 Ministers.

In *United Democratic Movement vs President of the Republic of South Africa and Others* 2003 (1) SA 495 what the court dealt with at page 506 and identified as a "political question" was not the provisions of the disputed legislation themselves but the debate as to the merits of those provisions. That clearly would not be the concern of any court. The "merits and demerits" are matters for Parliament to deal with during the legislative process. In this application the merits or demerits of the provisions of Schedule 8 to the Constitution are not in issue. It is the interpretation of those provisions which is at stake. Clearly again the distinction is obvious. The respondents have not established any basis upon which the jurisdiction of this court is ousted. It was for this reason that I decided the point in *limine* in favour of the applicants.

On the merits the applicants appear to have established *a prima facie* case for the grant of the order they seek, assuming a literal construction of the relevant provision is adopted. I agree with the applicants that Schedule 8 is part of the Constitution by virtue of the Constitution of Zimbabwe Amendment (No 19) (Act 1 of 2009). I also agree that the dispute resolution mechanism in the political agreement (GPA) entered into by the three major political parties is not applicable in resolving disputes arising out of the provisions of Schedule 8 to the Constitution. The normal rules of statutory interpretation must apply.

The respondents have however argued that the provisions of Schedule 8 must be interpreted broadly and not restrictively. The respondents contend that the provisions of Art 20 .1. 6 (5) relating to the complement of Ministers are directory rather than

peremptory. It is argued that the preamble to Schedule 8 is instructive in the interpretation of the provisions of sub-paragraph 5. The Schedule is entitled "Framework for a new Government". The preamble acknowledges that the three parties have an obligation to establish a framework for working together in an inclusive government and that the formation of such a government will have to be approached with sensitivity, flexibility and willingness to compromise. The preamble also indicates the parties' commitment to carry the hopes and aspiration of "the millions of our people" and the parties' determination to work for conditions for "returning our country to stability and prosperity". It acknowledges the need for gender equality and the appointment of women to strategic Cabinet positions.

The respondents argue, and I agree, that the objectives and values set out in this preamble represent the objective for which Schedule 8 was inserted into the Constitution, and the reason why Schedule 8 was given primacy over the rest of the provisions of the Constitution. The Schedule therefore represents part of the broader political agreement among the three political parties. Schedule 8 therefore, it is argued, is an extra-ordinary provision in the Constitution placed there purely for political expediency. It therefore stands on an entirely different footing from the rest of the provisions of the constitution. It is then averred by the respondent that "a court of law having established that a particular issue before it is of a purely political nature, notwithstanding its inclusion in the Constitution, the court should refuse to involve itself by prescribing remedy for it". Reference is then made to the "political question" doctrine which admittedly, whilst recognized in the United States, has not been recognized in this jurisdiction. It is further argued that this principle of interpretation should be followed by our courts, particularly when any intervention on the usual grounds of unconstitutionality may lead to instability within the political establishment and the citizenry, thereby defeating the whole purpose for which the inclusive government was established. As already alluded to earlier, I do not agree with the respondents in this regard. I am of the view that once a political matter is inserted into the Constitution, it becomes justiciable. However, any remedy that the court may impose must take into account any adverse implications of such remedy on the political order of the day.

The respondents further propose that in interpreting the provisions of the Constitution, the principle of purposive interpretation of statutes should be taken into account. In terms of that principle, interpretation is not dependent entirely on the literal meaning of the words used in a statutory provision. One must look beyond the manifested intention in order to give full effect to the intention of the legislature. In this case the purpose of the provision in question was the establishment of a new Government on the basis of "flexibility, compromise and sensitivity" in line with the spirit underlying the GPA. At page 36 of the book "Interpretation of Statutes", the learned author, G.E. Devenish, is quoted thus:

> "An authentic purposive approach ----- endeavours to interpret a provision of a statute in accordance with the purpose or ratio under all circumstances regardless of whether there is ambiguity or not".

The contention of lack of ambiguity by the applicants, argue the respondents, is thus at variance with this approach and should therefore be rejected. The purpose of the enactment takes precedence over ambiguity or lack of it. For these reasons, taking into account the purpose for which Schedule 8 was inserted into the Constitution and the need for first respondent to appoint more than 31 Ministers as the practical means of achieving that purpose, the provision in question should be interpreted as directory rather than peremptory. For this proposition, the respondents have relied on the case of *R v National Insurance Commissioners* 1972 AC 944 where at 1005 D to E it was stated that there should be "…….a purposive approach to the Act as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them." The respondents also relied on the case of *Crawford and Ors v Borough of Eshowe and Anor* 956 (1) SA 147 wherein it was stated at p 157 H as follows:-

> "No universal rule can be laid down for the construction of statutes as to whether mandatory enactment should be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try to get to the real intention of the legislature by carefully attending to the whole scope of the statute concerned to be construed".

Further, in the same case, it is observed that "Provisions of a statute which relate to the performance of a public duty seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, that is to say directory

only, where the invalidation of actions done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and where invalidation would not promote the essential aims of the legislature". The respondents also relied on the Namibian case of *Government of the Republic of Namibia v Cultural 2000* 1994 (1) SA 487 wherein at p 418 F it was observed that:-

> "A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generic*. It must broadly, liberally and purposively be interpreted so as to avoid the austerity of tabulated legalism and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."

In *Capital Radio Pvt Ltd v Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (5) at p 247 B to D CHIDYAUSIKU CJ made similar pronouncements as follows:-

> "However, there is another different approach to constitutional interpretation. This approach is supported by a long line of cases both nationally and internationally. In this approach a Constitution is considered a document that is *sui generis* requiring special guidelines of interpretation. These guidelines or principles include:
>
> 1. the Constitution must be interpreted as a living instrument.
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> 2. the Constitution must be given a generous and purposive construction.
>
> 3. the Constitution must be construed as a whole.
>
> 4. the spirit of the Constitution, as reflected in the preamble and, national objective and directive principles of State policy, is to guide interpretation by the court.
>
> 5. ratified treaties should provide a legitimate guide in interpreting constitutional provisions".

In *Rattigan and Ors v Chief Immigration Officer and Ors* 1994 (2) ZLR 54 (5) at 57 F to H GUBBAY CJ (as he then was) said –

> "This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting as narrow, artificial, rigid and

pedantic interpretation; to be preferred is one which serves the interest of the Constitution, and best carries out its objects and promotes its purpose."

Traditionally our courts have been guided by the decision in *Sutter v Scheepers* 1932 AD 165, wherein the following rules of interpretation were suggested:-

"(1) The word "shall" when used in a statute is rather to be considered as peremptory, unless there are other circumstances which negative this construction.

(2) If a provision is couched in a negative form, it is to be regarded as a peremptory rather than a directory mandate.

(3) If a provision is couched in positive language and there is no sanction added in case the requisites are not carried out, then the presumption is in favour of an intention to make the provision only directory.

(4) If when we consider the scope and objects of a provision, we find that its terms would, if strictly carried out, lead to injustice and even fraud, and there is no explicit statement that the act is to be void if the conditions are not complied with, or if no sanction is added, then the presumption is rather in favour of the provision being directory.

(5) The history of the legislation also will afford a clue in some cases".

The applicants have argued that the provisions under consideration, being clear and unambiguous, be given their literal meaning. But it is clear to me that the trend in the construction of constitutional provisions is that the courts have increasingly moved away from the strict interpretation urged by the applicants in favour of a liberal approach. Indeed the Supreme Court in the *Capital Radio* case *supra* has confirmed that this is the preferred approach nationally and internationally. I agree with the respondents' analogy in applying the rules set out in *Sutter v Scheepers supra* to the present case. They state at p 29 of their heads of argument as follows:-

"……it is evident that article 20.1.6 (5) is not couched in the negative form, and the presumption, following the observations attributed to Maxwell above in relation to the performance of a public duty, should be that the provisions of the article should be construed as being merely directory rather than peremptory. Further argument in favour of the article being directory exists in that it is couched in positive language and there is no sanction added in case the requisites are not carried out. There is also no explicit statement that if the numbers mentioned therein are not adhered to or complied with then any contrary act is to be void".

In addition to the guidelines in the *Sutter* case *supra*, I have already indicated that our courts, nationally and internationally, have embraced a further doctrine in the construction of constitutional provisions – the doctrine of purposive interpretation. I am satisfied that it is primarily this doctrine, encompassing a liberal and broad approach to interpretation rather than the narrow and strict approach, that should guide the court in its determination of the present matter. There is nothing in the Interpretation Act [*Cap 1:01*] that precludes the court from proceeding accordingly.

If the order that the applicants seek were to be granted, it would destabilize the government of national unity and cause unnecessary confusion within the body politic and prejudice the public interest at large. That cannot be said to be consistent with the intention of the legislature in enacting Schedule 8 to the constitution. The stated intention of the legislature was to create a government of national unity in which the three major political parties would be represented proportionately. It was intended that this government achieves the objectives set out in the preamble to Schedule 8 and in the manner and spirit envisaged therein.

In the *Crawford and Ors supra* it was observed that "the provisions of a statute which relate to a public duty seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, that is to say as directory only……" The point is also made therein that where, as in the present case, it is sought to invalidate the actions of such public officers and the consequences of doing so would result in serious general inconvenience or injustice, and, where such invalidation would not promote the essential aims of the legislature, such an order as to invalidation should not be granted.

In any event the figures envisaged under Art 20.1.6 (5) have not been outrageously exceeded given the complexity of Government administration. Further, the proportion of representation as among the three parties remains largely the same. An anomaly has admittedly arisen but, in my view, that anomaly does not warrant the grant of the order sought. In any event this is not an anomaly that the legislature itself cannot address in one way or another, given its wide powers.

Finally, I agree with the respondents that because this application raises an important legal issue of great public interest, there should be no order made as to costs.

For these reasons I order as follows:

1. That the application be and is hereby dismissed in its entirety.
2. That there be no order as to costs.

Coghlan Welsh & Guest, applicants' legal practitioners
Attorney General's Office, respondents' legal practitioners