Reportable (13)

Judgement No. S.C. 20\03
Civil Application no 7\03

Associated Newspapers of Zimbabwe (Private) Limited v (1) The Minister of State for Information and Publicity in the Presidents Office (2) Media and Information Commission (3) The Attorney-General of Zimbabwe

Supreme Court of Zimbabwe
Chidyausiku CJ. Cheda JA, Ziyambi JA, Malaba JA & Gwaunza JA
Harare June 3 & September 11, 2003

A.P. de Bourbon S.C., for the applicant
J. Tomana, for the first and second respondents
C. Mudenda, with him *C Muchenga,* for the third respondent

CHIDYAUSIKU CJ: The applicant in this matter is a corporate company that owns and publishes the Daily News. The principal object of the applicant is to acquire, publish and circulate or otherwise deal with any newspapers or other publications. The applicant contends that it is entitled to enjoy the freedom of expression set out in section 20 of the Constitution of Zimbabwe. It is the view of the applicant that the Access to Information and Protection of Privacy Act, Chapter [10:27] (hereinafter referred to as the Act) in general terms interferes with and unduly restricts the enjoyment by the citizens of Zimbabwe of their freedom of expression.

In particular the applicants impugns sections 39, 40, 41, 65, 70, 71, 79, 80, 83 and 89 of the Act, and S.I 169C of 2002, made thereunder. It is contended that the above provisions are unconstitutional.

The first and second respondents have realised the point in *limine* that the applicant has dirty hands and is not entitled to approach this Court for relief. This allegation of dirty hands arises from the fact that the applicant is in open defiance of the law which it is seeking to impugn. The first respondent's contention is set out in paragraph 3 of the opposing affidavit which reads as follows:-

"3. I have read and understood the Applicant's founding papers and respond thereto in opposition as follows:-

3.1 Firstly might I be permitted to state that the Act in question was law in this country at the date of the instant application.

3.1.1 I am advised that unless and until a piece of legislation is either repealed by an Act of Parliament or declared unconstitutional and therefore nullified by this Honourable Court, such piece of legislation retains the force of law obliging all citizens to obey and respect it.

3.1.2 The Applicant and its journalists are required by the Act to register and be accredited after due compliance with the regulations promulgated as SI 169C/02

3.1.3 The Applicant has taken the choice not to apply for the registration and the Applicant's journalists have not applied for accreditation. Applicant is therefore by choice operating a media business in contravention of the Act.

3.1.4 In other words the Applicant has taken the place of Parliament and this Honourable Court, adjudged the Act unconstitutional and proceeded to ignore the same completely.

3.1.5 I know of no country where a citizen has the option to respect a law if it suits such citizen or ignore the same with impunity of the piece of legislation fails to meet the expectations of such citizen.

3.1.6 This in fact, is what the Applicant has done.

3.1.7 I am however advised that this too is not acceptable in this country and in particular that the Honourable Court will not tolerate such an attitude from any of the subjects of the laws of Zimbabwe.

3.1.8 Applicant approaches this Honourable Court with dirty hands. Applicant is simply approaching this Honourable Court for a rubber-stamp of its prior decision to disrespect the Act which is an existing Zimbabwean piece of law.

3.1.9 I accordingly urge this Honourable Court to register and restate the Zimbabwean position on this lawless attitude by refusing to entertain this application.

3.1.10 However in the event, that this Honourable Court chooses to condone the deliberate decision by the Applicant to disobey the Act, I respond, in opposition, to the merits of the application as follows."

The second respondent associates itself with the attitude of the first respondent. The Chairman of the Commission makes the following averment in paragraph 2 of his affidavit: -

"2. I confirm that I have read and understood the Applicant's papers. I have also read the 1st respondent's opposing affidavit the contents of which I fully associate myself with."

The applicant's response to the above averments are to be found in paragraph 3 of the answering affidavit, part of which reads as follows:

"3.3.1 I do not accept as correct the view that the First Respondent expresses regarding the laws whose validity is being lawfully challenged. <u>If the Applicant's view that the provisions of the Act which it is sought to have declared unconstitutional are indeed unconstitutional then Applicant and any other persons affected by those provisions are not obliged to comply with them.</u> In any event First Respondent very significantly and blatantly exempted the mass media services controlled by him from these provisions of the Act. (underlining is mine)

Section 66 of the Act, in terms of which the applicant is required to register provides as follows: -

"Registration of mass media services

(1) A mass media owner shall carry on the activities of a mass media service only after registering and receiving a certificate of registration in terms of this Act:

Provided that this section shall not apply to –

(a) the activities of a person holding a licence issued in terms of the Broadcasting Service Act [Chapter 12:06] to the extent that such activities are permitted by such licence; or

(b) a representative office of a foreign mass media service permitted to operate in Zimbabwe in terms of section ninety; or

(c) in-house publications of an organisation which is not a mass media service.

(2) An application for the registration of a mass media service whose products are intended for dissemination in Zimbabwe shall be submitted by its owner to the Commission in the form and manner prescribed and accompanied by the prescribed fee.

(3) The Commission shall, upon receiving an application for registration, send a notification of receipt to the owner or the person authorised by him indicating the date when the application was received, and the Commission shall consider such application within a month of receiving it.

(4) A mass media service shall be registered when it is issued with a certificate of registration by the Commission.

(5) A certificate issued in terms of subsection (4) shall be valid for a period of two years and may be renewed thereafter.

(6) The registered owner shall start circulating his mass media's products six months from the date of issue of the registration certificate, failing which the registration shall be deemed to be cancelled."

The applicant has not compelled with section 66 of the Act because it contends that is cannot do so in good conscience. The applicant contends that it or any other persons affected by the above provisions are not obliged to comply with the above provisions if they should be found to be unconstitutional.

It is not disputed, therefore, that as of now the applicant is operating contrary to the provisions of section 66 of the Act. The applicant now approaches this Court seeking the relief that section 66 and other sections of the Act be declared unconstitutional.

Mr *Tomana* for the first and second respondents made a number of submissions in support of the first and second respondents' point in *limine.* He submitted that the applicant is approaching the Court with dirty hands and is not entitled to relief from this Court. He submitted that the applicant admits that it chose not to apply for registration because, in its view, the provisions requiring registration of Mass Media Services are not constitutional. It was Mr *Tomana's* further contention that among all the Mass Media service providers in Zimbabwe only the applicant chose to disrespect the law by deliberately refraining from applying for registration as prescribed because it unilaterally resolved that it cannot, in its alleged conscience, obey such a law. Mr *Tomana* argued that it was not for the applicant to judge any law of this land as unconstitutional. That function was for the Constitutional Court. He also argued that every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. Even in those cases where the constitutionality of the Acts are in doubt all such doubts are resolved in favour of the validity of the Acts. When an Act is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution in order to avoid the consequence of unconstitutionality. For the above proposition Mr *Tomana* cited the learned author Black, *The Construction and Interpretation of Laws.*[1] The cases of *Growell v Benson*[2] and *the Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd*[3] were also cited in support of the above proposition. In the case of *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd, supra* GEORGES CJ (as he then was) at 383A-E had this to say:-

> "Many neo-Nigerian constitutions permit derogation from the declared rights provided that these derogations are, to use the phrase in the Zimbabwean Constitution, 'reasonably justifiable in a democratic society'. Even where the Constitution does not make it clear where the onus lies as the Zimbabwe Constitution does, the onus lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic society and not on the State to show that it is. In that sense there is a presumption of constitutionality. As LORD FRASER OF TULLYBELTON states in *Attorney-General & Anor v Antigua Times Ltd* [1975] 3 All ER 81 at 90:-
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> > 'In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required in other cases the Act will not provide the answer to that question. In such cases evidence has to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.'
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> In that sense the presumption represents no more than the Court adopting the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonable justifiable in a democratic society. But situations can arise even in such societies in which the majorities oppress minorities and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the court will interfere."

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[1] 1911 p 110 paragraph 41H)

[2] (1931) 285 US 22 at 62

[3] 1983 (2) ZLR 376

Mr *de Bourbon,* for the applicant, on the other hand, submitted that the respondents' contention that the applicant has come to court with dirty hands, and therefore, should not be heard is without legal foundation. He submitted that the applicant had not sought to be registered in terms of the Act because the applicant considers that the registration provisions of the Act are unconstitutional. The essence of Mr *de Bourbon's* submission is crisply set out in paragraph 4 of his heads of argument wherein he submits:-

> "It is correct that the Applicant has not sought to be registered in terms of AIPPA. The Applicant considered that the registration provisions of AIPPA are unconstitutional. It considers that, despite the presumption of constitutionality, see *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC); 1984 (2) SA 778 (ZS), that it cannot in conscience obey such a law."

In the same paragraph Mr *de Bourbon* also refers to the remarks of the Late Martin Luther King which, in my view, have no legal significance in *casu.*

Mr *de Bourbon* has also argued that even if the applicant had sought to be registered it might not have been possible for it to do so because certain administrative mechanisms were not ion place to enable it to register in terms of the Act. There might have been substance in this argument had the applicant's case been that it was unable to register because of administrative difficulties. That is not its case. He also argued that the applicant's conduct is not tainted with any moral turpitude such as fraud or dishonesty and is, therefore, entitled to approach this Court for relief.

In paragraph 10 of his heads, Mr *de Bourbon* makes the following submission: -

"But at the end of the day the fact of the matter is that the Applicant has made no secret of its attitude towards AIPPA; it has made full disclosure to this Honourable Court. It considers the legislation to unconstitutional, and was not prepared to make an application in terms of section 656 of AIPPA for registration. It has continued operating, and the question that has to be determined by this Honourable Court is whether its attitude in that regard was correct. It is respectfully submitted that it cannot be denied a hearting because two of the three respondents seek to enforce what might well be unconstitutional legislation." (the underlining is mine)

Mr *de Bourbon* made the further submission that the applicant has *locus standi* in terms of section 24 of the Constitution and should, therefore, be heard by this Court.

I agree with Mr *de Bourbon's* contention that the applicant has *locus standi* in terms of section 24 of the Constitution. The issue to be determined as Mr *de Bourbon* himself has submitted is whether the applicant's attitude in refusing to obey a law pending the determination of the constitutionality of such law is correct. Is such an applicant entitled to be heard on the merits of the challenge while in defiance of the law?

The issue of whether a citizen should comply with a law whose validity it challenges pending the determination of the validity of such a law was considered in the case of *F. Hoffman-La Roche & Co A.G and Others v Secretary of State for Trade and Industry.*[4]

The facts of the case were briefly as follows. The F Hoffman-La Roche, a pharmaceutical company thereafter referred to as the company) was selling some drugs at a certain price. The Secretary for Trade, ("The Secretary") issued statutory orders reducing the selling price of the drugs sold by the company. The company contended that the statutory ordered were *ultra vires* an, therefore, invalid. The company indicated that it was not going to obey the orders. The company was going to raise the prices so as to restore them to the level obtaining before the orders were made. But it would pay the difference into a bank account to await a decision on the validity of the orders. The Secretary applied for an injunction to restrain the company from charging in excess of the prices specified in the order. The Secretary sough an interim injunction pending the determination of the matter. The company was prepared to

[4] [1975] AC 295

submit to the interim injunction, keeping the low price provided that the Secretary gave an undertaking in damage so as to recompense the company is the orders were afterwards held to be invalid. The Secretary was no willing to give that undertaking. ALON J, in the court of first instance, dismissed the Secretary's application for interim injunction mainly on the basis of his refusal to give an undertaking and that in any event the company was paying the money in a trust account to be refunded to purchasers in the event of the decision going against the company and the orders being held valid. The Secretary appealed against the judgement of WALON J. The appeal was upheld.

Lord DENNING M. R in allowing the appeal had this to say at pp 321H-322A: -

> "The Secretary of State has made, under the authority of Parliament, an order which compels the plaintiffs to reduce their prices greatly. That order has been approved, after full debate, by both Houses of Parliament. So long as that order stands, it is the law of the land. When the courts are asked to enforce it, they must do so."

Lord DENNING M. R further observed at p 322B-C:-

> "They argue that the law is valid; but unless and until these courts declare it to be so, they must obey it. They cannot stipulate for and undertaking as the price of their obedience. They musty obey first and then argue afterwards.
>
> I would allow the appeal and grant the injunction as asked without requiring any undertaking from the Crown in damages."

The Company appealed to the House of Lords but the appeal was dismissed. Thus the principle that a citizen who disputes the validity of a law must obey it first and argue afterwards is founded on sound authority and practical common sense. The applicant's contention that it is not bound by a law it considers unconstitutional is simply a recipe for chaos and a total breakdown of the rule of law.

I am not persuaded by Mr *de Bourbon's* submission that the principle of dirty hands only applies to those litigants whose conduct lacks probity or honesty and those litigants whose conduct is tainted with moral obliquity such as fraud or other forms of dishonesty.

For the above submission Mr *de Bourbon* sought to rely on the case of *Deputy Sheriff, Harare v Mahleza & Anor* 1997 (2) ZLR 425 (HC). In that case Mrs Mahleza had purchased goods inn the name of her husband's company in order to avoid payment of sales tax. The goods were subsequently attached at the instance of the company's creditors. Interpleader proceedings were launched. The court, *mero motu,* refused her relief until such time as she would have paid the tax. Mrs Mahleza had been candid with the court as to why she purchased the goods in the name of the company. *Mahleza's* case, *supra,* is certainly an authority for the proposition that a litigant with dirty hands will be denied relief. That case does not seek to define the extent of that principle. It certainly is not an authority for the proposition that denial of relief will be confined only to those litigants whose conduct lacks probity or honesty or is tainted with moral obliquity. In the cases of *S v Niell*[5] and *S v Nkosi*[6] the court refused to hear appeals of appellants who had absconded or failed to comply with bail conditions. Such conduct does not, in any way, involve moral obliquity yet litigants in defiance of court orders more often than not are denied relief by the court until they have purged their contempt. In my view there is no difference in principle between a litigant who is in defiance of a court order and a litigant who is in defiance of the law. The Court will not grant relief to a litigant with dirty hands in absence of good cause being shown or until such defiance or contempt has been purged.[7] In the present case Mr *de Bourbon* has advanced two reasons why the court should exempt the applicant from the application of the dirty hands principle, namely: -

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[5] 1982 (1) ZLR 142

[6] 1963 (4) SA 87

[7] Hoffman - La Roche v Trade Secretary, supra

1. that the applicant has made an open and candid disclosure of its conduct;
2. that the applicant is acting in response to its conscience

I am not satisfied that these two reasons are sufficient to justify this court to grant relief to the applicant who approaches it while in open defiance of the law for a number of reasons. The mere fact that the applicant has disclosed to the court its defiance of the law is totally inadequate to purge the applicant's contempt of the law. In many cases where relief was refused and, indeed, in the present case, the facts are patent and the litigant has no choice but to make such a disclosure. In the present case the applicant did not apply for registration in terms of the Act. Its failure to do so is a matter of public record and easily ascertainable. Disclosure of what is patent and obvious is not something for which the applicant can claim credit. Indeed, in Mahleza's case, *supra,* the litigant disclosed in her affidavit that she had used another person's name to purchase her goods in order to avoid payment of tax. This disclosure did not help her. If anything it was as a result of such disclosure that the court *mero motu* raised the principle of dirty hands. In my view, it would not have helped the litigant either if she had alleged that the law imposing the tax was unconstitutional, which brings me to the next reason advanced by Mr *de Bourbon* as to why this Court should grant the applicant the relief it seeks.

The applicant argues that it could not, in good conscience, apply to register in terms of the Act because in it view certain provisions of the Act and, in particular, section 66, requiring such registration was unconstitutional. I am not impressed by the good conscience argument for a number of reasons. Firstly, section 66 of the Act is not blatantly unconstitutional. At worst its constitutionality is debateable. If the impugned section was patently unconstitutional the court might be persuaded. Indeed the licensing of the media, particularly, the electronic media has been adjudged constitutional in some jurisdictions.[8] A perusal of the other impugned sections reveals that they are not totally repugnant and would need careful consideration to determine their constitutionality. Secondly, it would appear that of all the publishing companies the applicant was the only conscientious objector. If the Act was as morally repugnant as the applicant would have the court believe one would have expected more than one conscientious objector.

The Court is a court of law, and as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects pending a determination by this Court. In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this Court with clean hands on the same papers.

Compliance with the law does not necessarily mean submission of an application for registration to carry on the activities of a mass media service. It certainly means desisting from carrying on the activities of a mass media service illegally.

In the result the point taken in *limine* succeeds. The applicant is operating outside the law and this Court will only hear the applicant on merits once the applicant has submitted itself to the law.

No order as to costs has been requested and none will be made.

CHEDA JA: I agree
ZIYAMBI JA: I agree
MALABA JA: I agree
GWAUNZA JA: I agree

Gill Godlonton and Gerrans, applicant's legal practitioners

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[8] Athukorale Ors v Attorney-General of Sri Lanka (1997) 2 BHRC 610

Muzangaza Mandaza & Tomana, first and second respondent's legal practitioners
Civil Division of the Attorney-General's Office, third respondent's legal practitioners.