TREVOR JONES LOVELACE SARUWAKA
versus
SPEAKER OF NATIONAL ASSEMBLY N.O
and
THE CLERK OF PARLIAMENT
and
THE CHIEF SECURITY OFFICER PARLIAMENT OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 22 June 2017 and 25 October 2017

Opposed Matter

T Zhuwarara, for the applicant
S J Chihambakwe, for the respondents

MAKONI J: The applicant approached this court seeking the following order:

"1. It is be and is hereby declared that, barring, ejectment and or interference of the Applicant's attendance in the pre-budget consultative meetings and National Assembly on account of Applicant's wearing of a colourful Rastafari jacket constitutes a violation of his right to freedom of conscience and religion as set out under Section 60 of the Constitution.
2. it is be and is hereby declared that Section 76(1)(a) as read with section 76(5) of the National Assembly Standing Rules and Orders permits the Applicant to wear his Rastafari colourful jacket in the House or during National Assembly business."

The background of the matter is that the applicant is the MDC-T member of the National Assembly for the Mutasa Central Constituency. On the 6th of October 2016, he was barred by the Parliamentary security personnel from entering the Parliament Chamber for a parliamentary session on the basis that he was wearing a jacket allegedly bearing the Zimbabwean national flag colours and was therefore improperly dressed. On 21 November 2016, the applicant wrote a letter to the Speaker of National Assembly N.O (the Speaker), advising him that he was going to attend the consultative meetings wearing his jacket. On 3 November 2016, the applicant attended the

meeting wearing his jacket. He was accosted by the security personnel who ejected him from the pre-budget consultative meeting on the basis that his jacket bore the national flag colours and was therefore improperly dressed.

The applicant wrote to the Speaker registering his displeasure with the alleged abuse of his constitutional rights as manifested in the ejectment from the said meeting. The letter did not solicit a response from the first respondent. The present applicant filed the application to this court on an urgent basis and the matter was removed from the roll of urgent matters.

The applicant avers that the Speakers' actions conflict with his rights enshrined in terms of section 60 of the Constitution of Zimbabwe of 2013 (Constitution).

The respondents opposed the application and raised a point *in limine* that the application is improperly before this court on the basis that it was once ruled not to be urgent and dismissed by TAGU J.

I will deal with the point in *limine* first.

The respondent contends that the matter was ruled not to be urgent and dismissed with costs. It was referred to the ordinary roll.

Mr *Zhuwarara,* for the applicant submitted that the matter is properly before this court. It's genesis was an urgent chamber application placed before TAGU J who removed it from the roll of urgent matters on the basis that it was not urgent. An application was then made to set the matter down on the ordinary roll.

The operative clause of TAGU J's judgement read as follows:

> "In the result the application to put the matter on the roll of urgent matters is dismissed with costs on a higher scale."

From the above it is clear that what was dismissed was the application to place the matter on the urgent roll. The court did not dismiss the application on the merits. What to do in such circumstances was settled in *Mazda & Ors* v *The Reformed Church in Zimbabwe Daisyfield Trust* ZIYAMBI J stated:

> "However, having concluded the matter was not urgent, the proper course would have been to remove the matter from the roll of urgent matter to allow the appellants, if so minded, to place the matter before the High Court on the ordinary roll for determination."

The matter was not finalised as alleged by the respondents. It was only removed from the urgent roll allowing the applicant to place the matter before this court on the ordinary roll. The confusion might have arisen from the wording of the operative clause in TAGU J's judgment. I am of the view that the operative clause should simply state:

1) "The matter is not urgent.
2) The matter is removed from the roll of urgent matters."

Having been satisfied that the matter is properly before this court, I dismiss the point in limine

On merits, Mr *Zhuwarara,* submitted that the ejectment and denial of access to Parliamentary sessions of the applicant by the respondents is a violation of the applicant's rights to freedom of conscience and religion as set in section 60 of the Constitution of Zimbabwe.

He further submitted that there is no provision, in the standing rules and orders of Parliament which bars wearing of a jacket bearing colours such as those the applicant has been wearing.

He further submitted that the colours for the Rastafarian religion are red, yellow, green and black. He submitted that in Rastafarian religion black stands for Africa, green for the fertile land, yellow for the Africa's wealth and red for the blood shed in defending the African continent from colonial domination. The Rastafarian people identify each other by their colours and such colours symbolise that they have the same love in their hearts for God and the same identity.

He further submitted that the jacket does not resemble the national flag in that it does not have a red star, and a triangle neither does it have the Zimbabwean bird hence the applicant's jacket cannot be said to resemble the Zimbabwean flag.

In support of his submissions, Mr. *Zhuwarara* referred to the case of *Dzvova* v *Minister of Education Sports and Culture and Others* 2007 (2) ZLR 196 (S), where the court declared that expulsion of a Rastafarian from school based on his religious belief through his hairstyle is a contravention of s 19 and 23 of the Constitution of Zimbabwe.

In opposing the application, Mr Chihambakwe submitted that the Speaker in his capacity as the Speaker of National Assembly has the discretion to decide on the attire to be worn in terms of the law as provided for in the National Assembly Standing Rules and Orders (Standing Orders). He further submitted that the decision made by the Speaker was of administrative nature in which he exercised his discretion given by the Standing Orders.

The applicant was supposed to challenge the decision under the administrative law

The issue before this court is whether the ejectment of the applicant from the Parliament, on the basis that his jacket resembles the national flag colours, is a violation of his right to freedom of conscience and religion.

The jacket in issue, from the front view has the colours yellow, red, black from the sides to the back and white on the lapels. From the back, it consists of mainly black at the centre and green on both sides. It has red sleeves. It does not have a red star, the triangle or the Zimbabwean bird as depicted on the National flag. The applicant contends that those colours are colours of the Rastafarian religion to which he subscribes to. Barring him from wearing his jacket infringes on his constitutional right as provided for in s 60 of the Constitution of Zimbabwe (Constitution).

The Constitution guarantees the freedom of religion to every citizen of Zimbabwe.

Section 60 of the Constitution provides that:

"1. Every person has the right to freedom of conscience, which includes-

a) Freedom of thought, opinion, religion or belief and
b) Freedom to practice and propagate and give expression to their thought, opinion, religion or belief, whether in public or in private and whether alone or together with others."

Rastafarian faith falls within the definition of religion. *In re Chikweshe* 1995 (1) ZLR 235 (S) at p 236 B GUBBAY CJ and EBRAHIM JA held that:

> "Rastafarianism is a religion, and the applicant is sincere in his belief in it and is entitled to express his belief through wearing of dreadlocks or other overt acts."

The meaning and importance of the fundamental right to freedom of religion has been laid out in a number of cases both inside and outside our jurisdiction. In the Canadian case of *R* v *Big M Drug Mart Ltd* 18 DLR (4th)321 at 353; [1985] 1 SCR 295 at 311 which was quoted in *In re Chikweshe* 1995 (1) ZLR 235 (S) the court held:

> "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination."

See also the English case of *The Queen On Application of SB* vs *Head Teacher and Governors of Denbigh High School*, the Supreme Court of Judicature, Court of Appeal (Civil Division) 2004 EWHC 1389 where it was stated:

> "Every shade of religious belief, if genuinely held, is entitled to due consideration under Article 9. What went wrong in this case was that the school failed to appreciate that by its action it was infringing the claimant's Article 9 right to manifest her religion."

In *Christian Education South Africa* v *Minister of Education* 2000 (4) SA 757 (CC) p.779 at F-G SACHS J stated:

> "There can be no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity."

However, it is trite that rights provided by the Constitution are not absolute. They are subject to limitations. Their enjoyment may be curtailed in specific circumstances. See *in re Munhumeso and Others* 1994(1) ZLR 49.

The limitation clause in section 86 of the Constitution provides that;

"86 Limitations of rights and freedoms

1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom…"

The learned authors, Iain Currie and Johan De Waal in *The Bill of Rights Handbook* 6th Ed at p151 state:

> "It must be emphasised that the existence of a general limitation section does not mean that the rights in the Bill of Rights can be limited for any reason. It is not simply a question of determining whether the benefits of a limitation to others or to the public interest will outweigh the cost to the right holder. If rights can be overridden simply on the basis that the general welfare is served by the restriction then there is little purpose in the constitutional entrenchment. The reasons for limiting a right need to be exceptionally strong."

In *Chimakure and Others* v *Attorney General* 2013 (2) ZLR 466 (S) p.495 at D – E it was held that:

> "The next matter which the Constitution controls is the origin and quality of the provision by which the restriction is imposed on the exercise of the right to freedom of expression. It requires that any interference with the freedom of expression must be "contained in law". The legislature alone may specify clearly and concretely in the law the actual limitations to the exercise of freedom of expression. If the restriction on the exercise of freedom of expression is imposed by a decision or action of the judiciary or the executive the decision or action must be under the authority of law."

The respondent has not put in issue the applicant's religion. His contention is that he was exercising his discretion in terms of the Standing Orders. On the other hand, the applicant argues that the Speakers' actions are not within the confines of the law. The question that comes to mind is whether the Speaker was authorised by law to act in the manner he did.

The respondents argued that the Speaker has powers to decide on what must be worn in the Parliament. In *Dzvova* v *Minister of Education, supra,* at p.204 E-G, the court stated:

> "In s 3 of the Interpretation Act [*Chapter 1:01*], "law" means any enactment and the common law of Zimbabwe. 'Regulation", "rule", "by-law", "order", or "notice" means respectively a regulation, rule, by-law, order or notice in force under the enactment under which it was made. There is nothing to link the school rules with any enactment. The rules were not made under any enactment."

Standing Orders are rules governing the proceedings of the Senate and the National Assembly, made in terms of s 139 of the Constitution. They are therefore authorised by an enactment, which is the Constitution in this case. EBRAHIM JA (as he then was) in *Biti & Anor* v *Min of Justice, Legal and Parliamentary Affairs & Anor* 2002 (1) ZRL 177 (S) 186 at B-F puts it this way:

> "By virtue of s 57 of the Constitution, it is clear Standing Orders have constitutional standing...There is, therefore, merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because standing orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with Standing Orders, they cannot be regarded merely as "rules of the club". Standing orders constitute legislation which must be obeyed and followed."

In the same matter MALABA JA (as he then was) in a dissenting judgement at 194 G-H made the following remarks:

> "Parliament has power under s 57(1)(a) of the Constitution to make Standing Orders with respect to the passing of Bills. Standing Orders have constitutional standing and are binding on Parliament until repealed."

The provisions under s 57 of the old Constitution of Zimbabwe are now provided in s 139 of the new Constitution of Zimbabwe 2013.

It is those rules that the Speaker used *in casu*. My view is that the Speaker's actions were constitutional as they were done in terms of the law. Unless the impugned provision is rendered unconstitutional by a court, the Speaker's actions remain lawful. The applicant should have sought to challenge the provision of the Standing Orders as being *ultra vires* the Constitution rather than seek a declarator that the Speaker acted unconstitutionally.

The Standing Orders give the Speaker the discretion on the attire to be worn in the House or during National Assembly business. S 76(2) of the National Assembly Standing Rules and Orders provides:

> "If the Speaker or the Chairperson, as the case may be, is of the opinion that the attire of a Member present in the Chamber during a sitting of the House is unsuitable or unbecoming to the dignity of the House he or she may order that Member to withdraw from the precincts of Parliament until such time is the Member concerned is suitably dressed."

The issue of what colours can be worn in the House is not provided for in the rules. This leaves the issue entirely in the discretion of the Speaker. What the applicant should have done is to challenge the provisions which give the Speaker such powers and discretion or challenging the manner in which the Speaker exercised his discretion. The decision made by the speaker was an administrative decision. If the applicant was aggrieved by the decision, he should have challenged it in terms of administrative law. He chose not to do so.

Mr Chihambakwe also urged the court to consider the doctrine of constitutional avoidance. The doctrine of constitutional avoidance was ably expounded by EBRAHIM JA in *Sports and Recreation Commission* v *Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) which was quoted in *Cuthbert Tapuwanashe Chawira and Ors* v *Minister of Jutice Legal and Parliamentary Affairs and Ors* CCZ 3/2017, where the learned judge stated:

> "There is also merit in Mr *Nherere'*s submission that this case should never have been considered as a constitutional one at all. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights."

BHUNU JA in *Cuthbert Tapuwanashe Chawira* supra, expanded on the principle on p.10 of the cyclostyled judgment by stating:

> "The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable subsidiary legislation together with other available legal remedies. Where there are alternative remedies the preferred route is to apply such remedies before resorting to the Constitution."

In *casu*, as already stated, the applicant had alternative remedies of approaching this court in terms of the administrative law before resorting to the Constitution.

From the above analysis, it is clear that the applicant has not made out a case for the relief that he seeks.

In the result, I will make the following order:

1) The application is dismissed.
2) The applicant to pay the respondent's costs.

Kadzere, Hungwe and Mandebele, applicant's legal practitioners
Chihambakwe, Mutizwa and Partners, respondents' legal practitioners