GIVEN MUSHORE
versus
SPEAKER OF NATIONAL ASSEMBLY
and
THE CLERK OF PARLIAMENT
and
THE CHAIRPERSON, PARLIAMENTARY COMMITTEE ON JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS
and
PARLIAMENT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 17 March 2023 & 28 March 2023

Opposed Application – Constitutional *Mandamus*

T Maanda, for the applicant
A Demo, for the respondents

MUSITHU J:

This application was placed before the court as an urgent court application in terms of the proviso to r 59(6), as read with r 65(8) of the High Court Rules, 2021. The timelines within which further pleadings were to be filed were truncated in terms of the proviso to r 59(6). The applicant seeks the following relief:

"IT IS ORDERED AS FOLLOWS:

(1) The first to Fourth Respondents are hereby directed to facilitate for the consultation of the Applicant and all other prisoners who might be interested either at Chikurubi Maximum Prison or at other prisons in Zimbabwe regarding the Prisons and Correctional Services Bill in the National Assembly.
(2) The First and Fourth Respondents are hereby ordered to direct the Third Respondent to consult the Applicant and all other prisoners who might be interested either at Chikurubi Maximum Prison or at other prisons in Zimbabwe regarding the Prisons and Correctional Services Bill in the National Assembly and present its report to the National Assembly.
(3) There is no order as to costs."

The brief background facts are as follows. The applicant is an adult Zimbabwean male currently serving a lengthy prison term at Chikurubi Maximum Prison. The applicant complains about the manner in which the Portfolio Committee on Justice, Legal and Parliamentary Affairs (the Committee), led by the third respondent went about collating the public's views on the Prisons and Correctional Service Bill [H.B. 6, 2022] (the Bill). The applicant averred that on 19 February 2023, the respondents published a schedule for conducting public hearings in respect of the said Bill. He only became aware of the consultations on 21 February 2023, after the meetings had commenced on 20 February 2023.

The applicant is concerned that the consultation process could be completed or taken to the next level, before his views and those of other prisoners were considered. The applicant further averred that s 141 of the Constitution obliged the fourth respondent to ensure that all interested parties were consulted on the bill, unless such consultations were inappropriate or impracticable. The published schedule omitted consultations on the prison community, yet the proposed law was intended to regulate the affairs of that constituency. Consulting the prison community could not be held to be inappropriate or impracticable. Prisoners were always consulted by judicial officers whenever they carried out routine inspections at prisons.

Sometime around 21 February 2023, the applicant wrote to the first respondent through his legal practitioners requesting that he be consulted on the Bill. That letter was copied to the second and third respondents. No response came.

It was in view of the foregoing that the applicant approached the court for a constitutional *mandamus* to compel the respondents to perform their constitutional obligations.

The application was fervently opposed. The first and fourth respondents' opposing affidavit was deposed to by the first respondent. The second and third respondents associated themselves with the deposition made by the first respondent in their opposing affidavits. The first respondent's opposing affidavit raised the following preliminary points: that the applicant was asking the court to interfere with uncompleted Parliamentary processes; that this court had no jurisdiction to grant the relief sought; lack of urgency; infringement of the principle of separation of powers; failure to exhaust internal remedies at the applicant's disposal; absence of *locus standi* and that the relief sought was incompetent.

As regards the merits, the respondents denied that the applicant was not given an opportunity to express his views on the Bill. They averred that the applicant could have expressed his views through written submissions or correspondence if he was unable to attend the physical hearings. The notice alluded to by the applicant made it clear that written submissions and correspondence were welcome. The applicant had not explained why he did not utilize this avenue. The respondents further averred that in carrying out its consultations, the Committee was not necessarily required to visit each prisoner or reach out to all persons in every corner of the country. The respondents submitted that they had received loads of written submissions from interested parties, and there was no reason why the applicant could not have done the same.

The respondents denied that the applicant had mandate to speak on behalf of other prisoners. They also denied that the applicant had satisfied the requirements for a *mandamus.* They urged the court to dismiss the application with costs.

THE SUBMISSIONS AND THE ANALYSIS

Whether the High Court has jurisdiction to grant the relief sought by the applicant

Before delving into the merits of the application, the court must determine the issue of jurisdiction first. Mr *Demo* for the applicant submitted that the alleged failure by Parliament to fulfill its obligation under s 141 of the Constitution was a matter within the exclusive jurisdiction of the Constitutional Court in terms of s 167(2)(d) of the Constitution. Counsel referred to the judgment of the Constitutional Court in *Gonese & Another v President of Zimbabwe and Two Others*[1], which authority entrenches that position of the law.

Mr *Demo* further submitted that this court was being called upon to give an order which intrudes into the domain of Parliament. An investigation into whether or not Parliament complied with its obligation under s 141 of the Constitution essentially required the court to intrude into the domain of Parliament. Judicial intrusion into the domain of Parliament was a preserve of the Constitutional Court.

In reply, Mr *Maanda* for the applicant submitted that the respondents had clearly misunderstood the applicant's complaint. What was before the court was not a constitutional matter. The applicant was not seeking a *declaratur* pursuant to a failure to fulfill a constitutional obligation. What was being sought was an order to compel the respondents to facilitate for the

[1] CCZ 10/2018

consultation of the applicant or other prisoners who may have an interest in the Bill. A relief for compliance and an enquiry into whether Parliament had fulfilled its constitutional obligation were different matters.

Mr *Maanda* further submitted that the fourth respondent was not beyond the reach of the court at any stages of its proceedings. The applicant merely sought to ensure that any omissions in the course of conducting those proceedings were corrected by the court.

The applicant's application was accompanied by a notice to the Registrar in terms of r 10(1) of the High Court rules. The relevant part of r 10 states as follows:

> "***10. Friend of court***
> (1) Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the application or pleading.
> (2) Such notice shall contain a clear and succinct description of the constitutional issue concerned."

The constitutional issue is described in the notice as follows:

> "Whether or not the Respondents can be compelled to consult prisoners on the Prisons and Correctional Services Bill in terms of section 141(b) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013"

In paragraph 8 of the founding affidavit, the applicant states that the application is made in terms of r 59(6) as read together with r 65(8) of the High Court rules, with a view *"to compel the Respondents to consult me and possibly other prisoners on the Prisons and Correctional Services Bill in terms of section 141(b) of the Constitution."* Section 171(1)(c) of the Constitution bestows on this court jurisdiction to decide on constitutional matters except those that only the Constitutional Court may decide upon. The jurisdiction of the Constitutional Court in constitutional matters is set out in s 167 of the Constitution. The material part of that section that is relevant to this application reads as follows:

> "**167 Jurisdiction of Constitutional Court**
> (1) …….
> (2) Subject to this Constitution, only the Constitutional Court may—
> (*a*) ……;
> (*b*) ……;
> (*c*) ……..; or
> (*d*) <u>determine whether Parliament or the President has failed to fulfil a constitutional obligation</u>.
> (3) The Constitutional Court makes the final decision whether an Act of Parliament or <u>conduct of the President or Parliament is constitutional</u>, and must confirm any order of constitutional invalidity made by another court before that order has any force." (Underlining for emphasis)

It is clear from a reading of s 167(2)(d) and s 167(3), that it is within the exclusive domain of the Constitutional Court to determine whether Parliament has failed to fulfill a constitutional obligation. It is also the exclusive domain of the Constitutional Court to determine whether or not the conduct of Parliament is constitutional. Section 332 of the Constitution defines a constitutional matter to mean *"a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution" (Underlining for emphasis).*

As already noted, the applicant seeks a *mandamus* to compel the respondents to consult him and other prisoners on the Bill. The Committee conducting the consultative processes is a creature of the fourth respondent. In conducting those public hearings it would actually be carrying out a Parliamentary process. That process must be carried out with the provisions of s 141 of the Constitution in mind. Section 141(a) and (b) of the Constitution states as follows:

> "**141 Public access to and involvement in Parliament**
> Parliament must—
> (*a*) facilitate public involvement in its legislative and other processes and in the processes of its committees;
> (*b*) ensure that interested parties are consulted about Bills being considered by Parliament, unless such consultation is inappropriate or impracticable;"

In order for this court to grant the relief sought, it must in the first instance determine whether or not the fourth respondent infringed s 141 (b) of the Constitution in the manner in which the public hearings were conducted to the exclusion of the applicant. If the order sought by the applicant were to be granted by this court, it would compel the respondents to comply with s 141 (a) and (b) of the Constitution. This court cannot grant the *mandamus* without satisfying itself that there was an infringement of that law. This court must therefore first make a finding that the applicant and the constituency he seeks to represent were not consulted by the respondents as required by s 141(b). There is no doubt that the process involves the interpretation and the enforcement of the Constitution. It firmly places the applicant's complaint within the ambit of a constitutional matter as defined by s 332 of the Constitution.

Section 141(b) imposes an obligation on the fourth respondent to ensure that interested parties such as the applicant are consulted in connection with any Bill that affects their rights. In determining whether the law was complied with, the court must scrutinize the conduct of the fourth respondent, especially the manner in which the public hearings were rolled out. In doing so, the court is essentially determining whether the fourth respondent fulfilled its constitutional obligation

as required by the law. That enquiry falls squarely within the scope of s 167(2)(d) the Constitution. Further, in so doing, the court inevitably has to make a pronouncement on the constitutionality of the conduct of the fourth respondent. As I have already highlighted that sort of determination falls within the exclusive jurisdiction of the Constitutional Court.

In the case of *Gonese & Another* v *President of Zimbabwe and Two Others*[2], PATEL JCC cited with approval the dictum in the South African Constitutional Case of *Doctors for Life International* v *Speaker of the National Assembly & Ors*[3]. In that case the Constitutional Court was called upon to interpret s 167(4)(e) of the South African Constitution, which is the equivalent of s 167(2)(d) of the Zimbabwean Constitution. The court made the following pertinent remarks:

> "The principle underlying the exclusive jurisdiction of this Court under section 167(4) is that disputes that involve important questions that relate to the sensitive areas of separation of powers must be decided by this Court only. Therefore, the closer the issues to be decided are to the sensitive area of separation of powers, the more likely it is that the issues will fall within section 167(4)……." [at para 24]
>
> "A review by a court of whether Parliament has complied with its obligation under section 72(1)(a) calls upon a court to intrude into the domain of a principal legislative organ of the state. Under our Constitution, this intrusion is reserved for this Court only." [at para 26]
>
> "A construction of section 167(4)(e) which gives this Court exclusive jurisdiction to decide whether Parliament has complied with its constitutional obligation to facilitate public involvement in its legislative processes is therefore consistent with the principles underlying the exclusive jurisdiction of this Court. An order declaring that Parliament has failed to fulfil its constitutional obligation to facilitate public involvement in its legislative process and directing Parliament to comply with that obligation constitutes judicial intrusion into the domain of the principle [*sic*] legislative organ of the state. Such an order will inevitably have important political consequences. Only this Court has this power." [at para 27]
>
> "The question whether Parliament has fulfilled its obligation under section 72(1)(a) therefore requires this Court to decide a crucial separation of powers question and is manifestly within the exclusive jurisdiction of this Court under section 167(4)(e) of the Constitution." [at para 28]"

I fully associate myself with the views of the learned Judge. This court does not have jurisdiction to determine the constitutional issue raised in this application as it is falls within the domain of the Constitutional Court. The court agrees with the respondents' contention that the application must fall on that basis. There is merit in the preliminary point. In view of this finding, it is needless for the court to traverse the remaining preliminary points and the merits of the matter.

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[2] *Supra* at p 9
[3] 2006 (6) SA 416 (CC)

COSTS

Mr *Maanda* submitted that the considering the nature of the application and the important issue it raises, the applicant must not be saddled with an order of costs in the event that he is unsuccessful. Mr *Demo* on the other hand urged the court to dismiss the application with costs for lack of merit. This matter falls within the realm of public interest litigation. The courts are always slow to award costs in these types of litigation except in exceptional circumstances where the conduct of a party deserves censure. In the exercise of its discretion, the court finds it befitting to order that each party bears its own costs of suit.

DISPOSITION

Resultantly, the following order is made:

1. The court declines jurisdiction.
2. Each party shall bear its own costs of suit.

Zimbabwe Human Rights NGO Forum, applicant's legal practitioners
Chihambake Mutizwa & Partners, respondents' legal practitioners