National Constitutional Assembly
Versus
The President N.O.
And
The Minister Of Justice Legal And Parliamentary Affairs N.O.
And
The Attorney General N.O.

IN THE HIGH COURT OF ZIMBABWE
GUVAVA J
HELD AT HARARE, 11 March 2004 and 2 November 2005

Mr *Muchadehama*, for the Applicant
Mr *Mutsonziwa,* for the Respondents

GUVAVA J: The National Constitutional Assembly (NCA) is a civic organization which was formed in May 1997 with the objective of advocating for a new constitution in Zimbabwe. The NCA has two categories of members that is individuals and civic organizations in Zimbabwe. Institutional members of the NCA include among others a broad based membership of organizations such as the Zimbabwe Congress of Trade Unions (ZCTU), the Zimbabwe National Students Union (ZINASU), and various opposition political parties. Individual members are natural persons who are either citizens or permanent residents of Zimbabwe.

The 1st respondent is the President of the Republic of Zimbabwe. He is the head of State and Government. The 2nd respondent is the Minister of Justice, Legal and Parliamentary Affairs. The 3rd respondent is the Attorney General, who is the Government's chief legal advisor. The respondents are cited in their official capacities in this application.

The applicant approached this court seeking the following order:

"1. That within fourteen days of the service of this order upon them the respondents be and are hereby directed to meet and receive from applicant, a document entitled " Proposed Draft Constitution of Zimbabwe"

2. That within thirty days (30) days of receiving the " Proposed Draft Constitution of Zimbabwe" the respondents be and are hereby directed to communicate to the applicant, the response of the Government of Zimbabwe to the said document.

3. That there will be no order as to costs.

4. That in the event of opposition the 2nd respondent pays the costs"

The application was based on four main grounds. Firstly, that the applicant had been discriminated against in terms of section 23 of the Constitution. Secondly

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that its rights to receive and impart ideas had been curtailed in contravention of section 20 of the Constitution. Thirdly that its freedom of association had been infringed in contravention of section 21 of the Constitution and finally that it was being denied its lawful right of access to Government.

The facts upon which the applicants brought this application may be summarized thus. On 6 November 2000 the NCA wrote to the Minister of Justice, Legal and Parliamentary Affairs calling upon Government to convene a stakeholders conference to decide on the way forward following the outcome of the referendum which was held in February 2000. During the referendum the people in Zimbabwe voted against Constitutional reform, a government initiative, at the instigation of the applicant. It *was* the position of the NCA that constitutional reform should not come about as it was against the manner of establishment and the modus operandi of the Constitutional Review Commission which had drafted the draft constitution. The Minister rejected the suggestion by the NCA in his letter dated 14 November 2000. In that letter the Minister stated that following the rejection of the draft Constitution the governments priority was now centered on economic recovery and land redistribution and no longer focused on constitutional reform.

The applicant thereafter embarked on a process of drafting a new Constitution for Zimbabwe. A Stakeholders Conference was convened and following that meeting, a draft Constitution was launched on 28 September 2001. In December 2001 the applicant held a second Stakeholders Conference which made substantial amendments to the initial draft. On 17 December 2001 the applicant wrote another letter to the 2nd respondent seeking the assistance of the Minister in facilitating a meeting with the President the 1st respondent, for purpose of the formally handing over of the draft Constitution. There was no response to the letter. This letter was followed by another letter by the applicants' legal practitioners demanding that the 2nd respondent facilitates a meeting between the applicant and the President of Zimbabwe failing which they would file the application which is now before me. No response was received from the 2nd respondent.

The applicant stated in its affidavit that it believed that the Governments refusal to receive the NCA's draft Constitution was grossly unreasonable and offends various provisions of the Constitution.

The application was opposed by the respondents on the basis that it was frivolous and vexatious. The respondents prayed for the dismissal of the application

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with costs on a legal practitioner and client scale.

Before dealing with the merits of the matter it is important to point out that in terms of our law the President of Zimbabwe cannot be sued without the leave of this court. Rule 18 of the High Court Rules 1979 provides as follows:

> "No summons or other process of this court may be sued out against the President or against any of the judges of the High Court without the leave of the court granted on court application for that purpose."

No court application was made for such leave in this matter as required by this rule. In my view the 1st respondent has thus been improperly cited as no leave from this court was granted for the President to be sued. Accordingly the application against 1st respondent is dismissed on that basis.

I will now proceed to deal with each of the issues raised by the applicant in seratium, as against the 2nd and 3rd respondents.

SECTION 23 OF THE CONSTITUTION

The argument by the applicant was that the 2nd respondent had contravened s23 (1) of the Constitution as it was being discriminated against on political grounds. This assertion was based on the fact that the 2nd respondent had refused to meet with the applicant and discuss issues pertaining to the proposed draft constitution, which had been drafted by the applicant. In order to determine whether or not there has been such discrimination it is necessary to examine the relevant provision.

S23 of the Constitution provides as follows:

> "23 (1) Subject to the provisions of this section -
> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
> (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority."

S 23 (2) of the Constitution however qualifies the discrimination. It provides thus:

> "(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced -
>
> (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or
> (b) by the according to persons of another such description of a privilege

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> or advantage which is not accorded to persons of the first-mentioned description;
>
> and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour and creed of the persons concerned."

It seems to me therefore that a proper interpretation of s23 of the Constitution is that actions may only be discriminatory if other persons are accorded the same privileges which are being denied to the applicants. The applicants must also be denied on the basis of race, tribe place of origin, political opinions, colour and creed. In his book "The Constitution of India" P.M. Bakshi explains the meaning of discrimination as set out in Article 15 of the Constitution of India which is similar to s23 of the Zimbabwe Constitution. At page 22 he states that the crucial word in this article is "discrimination" which means "making an adverse distinction with regard to or distinguishing unfavourably from others. (see *Kathii Raning Rawat v State of Sarashra* (1952) SCR 435 at 442) In other words the discrimination cannot be abstract but must be in relation to other persons or groups.

The applicant has not alleged in its papers that the Minister has been meeting other groups in order to discuss constitutional amendments but has refused to meet with the applicant. To the contrary, it was conceded by the applicant that, at the time that the respondents were considering constitutional reform they were actually invited to take part in the Constitutional Commission but they decided not to take part in the process. In its papers the applicant explained that it refused to take part in the process and was instrumental in members of the public rejecting the draft Constitution during the Referendum in 2000. Whilst the applicants were perfectly entitled to decline the invitation to take part in this process it illustrates clearly that the respondents were in actual fact not discriminatory at all as they gave applicant an opportunity to make submissions if it so wished. After the rejection of the Constitutional reform the 1st and 2nd respondent abandoned the process and have not been consulting with any person or group of persons in this respect. This position was made very clearly in the letters in response to the applicant's request for consultations.

On the facts before me I can come to no other conclusion than that the applicant has failed to establish a basis upon which they can assert that they have been discriminated against by the respondents within the ambit of s23 of the

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Constitution.

SECTION 20 OF THE CONSTITUTION

The applicants also alleged that the 2nd respondent had contravened s 20 of the Constitution as he had refused to share ideas with the applicant. S 20 of the Constitution protects the fundamental freedoms of expression i.e. freedom to hold opinions and to receive and impart ideas without interference. From the facts before me there has been no allegation made that the 2nd respondent in any way interfered with the applicants rights as set out in s 20 of the Constitution. To the contrary the background information which was provided by the applicant covering how their process began and the various meetings they have held proves beyond doubt that its rights have not been curtailed at all. The crux of the right under s20 is the curtailment of the freedom of expression. (See *In re Munhumeso + Ors* 1994(1) ZLR 49(s). It does not in my view envisage a situation where persons, such as the respondent, are forced to receive information and ideas that they do not wish to receive.

In any event it was conceded during argument that the applicant had other methods by which they could impart their ideas to the 2nd respondent without necessarily holding meetings. It was conceded by Mr *Muchadehama* that the applicant could publish its draft constitution in the public media or could post the document to the 2nd respondent. These were both acceptable and long practised methods of disseminating information to members of the public or targetted groups.

I therefore find that the applicant has not proved a contravention of s 20 of the Constitution.

SECTION 21 OF THE CONSTITUTION

The third point which was raised by the applicant was that the 2nd respondent had contravened s21 of the Constitution as he had refused to associate with the applicant for the purpose of discussing the draft constitution. This provision in the Constitution guarantees the right to every person to freely associate as long as the association is lawful. The only restrictions to that right are the derogations which have been given by the Constitution in subsection (3). It is not clear to me why the applicant would seek to compel the respondents to associate with it as forced association is expressly prohibited by subsection (2) of s21. This provision states as follows:

> "(2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association."

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In my view the right which is being protected by the Constitution is the restriction of a persons right to associate with persons of their own choice. There has not been an allegation, on the papers before me that the applicant's rights have been restricted in any way. I know of no right in the Constitution which forces persons to associate against their will. Indeed it would be a total negation of that very freedom which s 21 of the Constitution thrives to uphold particularly the freedom of association.

RIGHT OF ACCESS TO PUBLIC OFFICIALS

The applicant also raised the point that citizens have a legal right to meet Government officials and raise their concerns and that public officials have a duty to meet with their citizens. The applicant did not provide any authority for this proposition and I was unable to find any in terms of our law. In my view whilst it is a worthwhile exercise for government to engage in dialogue with its citizens, and has in fact done so on a number of occasions, I know of no law which gives citizens a justicable right to force government to meet with them.

In respect to costs the applicant submitted that there should be no order made as the issues raised were important constitutional ones. I am however not persuaded by this argument on the facts of this particular case. This application was in my view clearly misguided, as there was no legal basis for bringing such an application. The respondents have successfully defended the application and are thus entitled to their costs.

Accordingly the application is dismissed with costs.

Mbizo, Muchadehama & Makoni, Legal Practitioners for the Applicant.

Civil Division of the Attorney Generals Office, Legal Practitioners for the respondents.

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