

IN THE CONSTITUTIONAL COURT OF ZIMBABWE

CASE NO. CZ 50/15

HELD AT HARARE

In the matter between:

FARAI LAWRENCE NDLOVU

1st Applicant

WISDOM GOCHERA

2nd Applicant

And

MINISTER OF JUSTICE, LEGAL AND

PARLIAMENTARY AFFAIRS

1st Respondent

THE ATTORNEY-GENERAL

2nd Respondent

RESPONDENTS' HEADS OF ARGUMENT

BRIEF BACKGROUND

1. Both applicants are convicted murderers whose automatic appeals against the death sentence were dismissed by the Supreme Court under Supreme Court Judgments SC 33/05 and SC 36/14.
2. The applicants have been awaiting the execution of their death sentences since the dismissal of their automatic appeals. The first applicant has been awaiting execution of his sentence since the 24th of May 2012, whilst the second applicant has also been awaiting execution of sentence since the 6th of September 2005.
3. On the 22nd of May 2013 a new Constitution of Zimbabwe was promulgated with certain of its provisions coming into effect on that date of promulgation.



4. Section 48(1) of the new Constitution provides as follows:

"Every person has the right to life"

5. Applicants now contend that the new Constitution of Zimbabwe guarantees them the right to life. As a result they argue that they cannot be executed for to execute them now amounts to an infringement of the right to life contrary to the provisions of section 48(1) of the Constitution.

6. **COMMENCEMENT OF THE CONSTITUTION**

6.1 The starting point in interpreting the Constitution must be found in the words used in the Constitution itself.

6.2 Section 329 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013, provides for **commencement of the Constitution, transitional provisions and savings** and provides as follows:

"The sixth schedule applies to the commencement of this Constitution the repeal of the former Constitution and the transition to the new constitutional order established by this Constitution."

6.3 The Constitution, in the second part of Schedule 6, paragraph 3(1), states that when the Constitution comes into commencement the rights guaranteed in the Constitution under Chapter 4, being the Declaration of Rights under which the right to life is sanctioned, come into commencement on the publication day.

- 6.4 The right to life as guaranteed under s48 (1) of the Constitution was therefore effective from the date of publication of the current Constitution which was 22nd May, 2013. Nowhere is it stated in the text that the Constitution shall have any retrospective effect.
- 6.5 The Constitution is clear. The rights and freedoms enshrined in Chapter 4 came into operation on the publication date, and therefore do not apply in retrospect.
- 6.6 Applicants cannot hence argue that the provisions of the new Constitution cover them as they were both convicted and sentenced before the publication date. In other words, section 48(1) of the Constitution does not render unconstitutional or unlawful the imposition of the death penalty upon both applicants at the relevant times.

7. SANCTITY OF THE RIGHT TO LIFE

- 7.1 It has been argued in favour of the applicants that a democratic society based on openness, justice, human dignity, equality and freedom, **would have a great aversion to the death penalty in general.**
- 7.2 Human life is God given. Noone has the right to take away another person's life. Democracy and the right to human dignity does not mean being one sided and turning a blind eye to the rights of others.

7.3 Applicants need not lose sight of the fact that by committing murder they also violated an equally important right, the right to life.

7.4 The applicants failed to recognise and respect the rights to life and to human dignity in so far as they applied to other persons. Democracy, in an open and democratic society based on human rights, dignity, equality and freedom demands that they face the consequences of their actions.

7.5 The right to life is the most sacred of all rights, hence the applicants need not lose sight of the fact that they deprived their victims of such a right.

8. **PRESUMPTION AGAINST RETROSPECTIVITY**

8.1 There is a general presumption against retrospectivity from a reading of the provisions of section 17(1)(b)(c) and (d) of the **Interpretation Act** [Chapter 1:01]. Section 17 of the **Interpretation Act** provides as follows:

8.2 **“Effect of repeal of enactment**

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(1) Where an enactment repeals another enactment, the repeal shall

Not –

(a)

(b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or

(c) affect any right privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or

(d) affect any offence committed against the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect thereof;"

8.3 Clearly therefore from the provisions of section 17, persons who were convicted of murder under the old Constitution cannot have the provisions of the new Constitution apply to them in retrospect as there exists a presumption against retrospectivity in section 17 of the **Interpretation Act**.

8.4 The Supreme Court had an opportunity to determine whether a repealed enactment can apply in retrospect and clearly stated that unless the repealed enactment expressly says so, an enactment that has been repealed cannot have retrospective effect.

See the cases of

- 1) **Zimbabwe Phosphate Industries Ltd v Mafora and Others** SC 44/05
- 2) **Barclays Bank v Nyahuma** SC 86/04.

8.5 Further authorities to augment the argument that repealed statutes are not retrospective in effect unless the words of the Act itself clearly state so are listed below.

8.6 In the case of **Nkomo and Another v Attorney General and Others** 1993 (2) ZLR 422 SC Gubbay CJ, speaking for the majority of the court had this to say at 428H – 429C,

*It is a cardinal rule in our law dating probably from codex 1:14:7, that there is a strong presumption against retrospective construction. See **Agere v Nyambuya** 1982 (2) ZLR 336(S) at 338G – 339G. Even where a*

statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in any way affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided unless such a construction appears clearly from the language used or arises by necessary implication. See **Bell v Voorsitter van die Rasklassificasie raad en Andere** 1968 (2) SA 678(A) at 684 E ' F, **Bellairs v Hodnett and Anor** 1978(1) SA 1109 at 1148 F – G; **Pretorisu v Minister of Defence** 1980 ZLR 395A at 401 F – G;**Adampol (Pty) Ltd v Administrator Transvaal** 1989 (3) SA 800A at 805F – 806D. Care must always be taken to ensure that the retrospectivity is confined to the exact extent which the section of the Act provides. See **Attwood v Minister of Justice and Anor** 1960 (4) SA 911 (T) at 914F; **Lentell v Registrar General and Anor** 1979(2) RLR 465 (A) at 470 F – G".

8.7 The cases referred to above strongly emphasise the existence of the presumption against retrospectivity of statutes.

8.8 In **Curtis v Johannesburg Municipality** 1906 TS 308 at 311, INNES CJ also pointed out the existence of the presumption against retrospectivity.

8.9 The learned Chief Justice pointed out that;

*"The general rule is that, in the absence of express provision to the contrary, **statutes should be considered as affecting future matters only** and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation"*

8.10 Similarly it is argued that neither can the promulgation of a new statute give rise to rights which were non-existent prior to its promulgation.

8.11 It is therefore humbly submitted that in view of the provisions of the **Interpretation Act** and the cases cited above, the provisions of the new Constitution cannot apply in retrospect in favour of the applicants. The provisions of section 48 of the new Constitution therefore clearly apply to persons who were convicted after the publication date as explicitly provided for under Part II, section 3(1) (b) of the sixth schedule.

8.12 Section 48 does not provide for retrospectivity consequently, the correctness of what was done in connection with the imposition and execution of the death penalty is not impugned.

8.13 The issue is the imposition of the death penalty itself at the relevant time. It is not affected by the current Constitution. Section 48 does not affect the issue of execution where the death penalty was lawfully imposed.

9. **IS THERE A LAW THAT PROVIDES FOR THE DEATH PENALTY UNDER THE PROVISIONS OF SECTION 48(2) OF THE CONSTITUTION**

9.1 It has been argued that to the extent that we do not have the law envisaged under s48(2) no one can therefore be executed in Zimbabwe at the present moment.

9.2 Under paragraph 58 of the Applicants heads, it has been argued that "the Constitution may permit a law, not itself to provide for the death penalty under the constrained provision of section 48(2). That law is not there."

9.3 It is submitted however that that law is in existence by virtue of the Constitution itself.

Reference to "a law" in section 48(2) is to be distinguished from reference to "an Act of Parliament" in section 48(3).

Section 48(2) provides that;

"A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances"

Section 48(3) provides that

"An Act of Parliament must protect the lives of unborn children and that Act must provide that pregnancy may be terminated only in accordance with that law"

9.4 Law must therefore be taken as defined in section 332 of the Constitution to include any provision of the Constitution, unwritten law, which includes existing Acts, common law and precedent. So the law envisaged under section 48(2) already exists. Section 332 of the new Constitution which deals with definitions provides that;

"In this Constitution

"law" means

(a) any provision of this Constitution or of an Act of Parliament;

(b) any provision of a Statutory Instrument; or

(c) any written law in force in Zimbabwe including customary law"

- 9.5 Clearly therefore, a law cannot be restricted to mean an Act of Parliament only. Any provision of the Constitution is a law. In this regard therefore section 48(2) of the New Constitution is in itself a law which provide for the imposition of the death penalty. Accordingly the law envisaged by section 48(2) is in place.

10. CONSTITUTIONALITY OF CURRENT DEATH PENALTY LAWS IN ZIMBABWE

- 10.1 It is not in dispute that sections 47 of the Criminal Code and Section 337 and 338 of the **Criminal Procedure and Evidence Act** (Chapter 9:07) are clearly no longer in conformity with the new Constitution.
- 10.2 Paragraph 10 of Part 4 of the 6th Schedule provides that:

"..... all existing laws continue in force but must be construed in conformity with this Constitution".

This means that existing laws remain in force. Only those that do not comply with the new Constitution will be affected

- 10.3 While the current provisions of death penalty Laws in Zimbabwe are no longer in conformity with the new Constitution, the unconstitutionality of these laws is being addressed by Parliament under the **General Laws Amendment Bill No. HB2, 2015** in a manner which seeks to address the shortcomings of the relevant provisions of the Criminal Code and the C.P and E Act (Chapter 9:07).
- 10.4 The amendments seek to align provisions of the Acts in question with the new Constitution. It is worth noting that the alignment of all our legislation to the Constitution is a mammoth task which cannot be completed overnight.

10.5 It cannot, however, be argued that because of this inconformity with the new Constitution, all persons under sentence of death should now have their sentences commuted to life sentences.

11. COMMUTATION OF DEATH SENTENCE

11.1 The Constitution itself is clear on what should be done by persons on the death row to qualify to have their sentences to capital punishment commuted to life sentences.

11.2 The new Constitution provides in section 48(2)(e) that such persons need to apply for such commutation to the President of the Republic of Zimbabwe.

11.3 Section 48(2)(e) specifically provides as follows:

48(2) "A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and-

(e) the person sentenced must have a right to seek pardon or commutation of the penalty from the President"

11.4 Applicants are therefore not before the proper forum. If they want to seek for commutation of their sentences, then they should direct their applications to the President as clearly provided for by the law.

11.5 Accordingly it is respectfully submitted that the application is without merit and should be dismissed with costs.

DATED at HARARE this day of SEPTEMBER, 2015.

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