

VENDORS INITIATIVE FOR SOCIAL AND
ECONOMIC TRANSFORMATION (VISET)
and
OLIVIA NHAU
versus
CITY OF HARARE
and
MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS AND NATIONAL HOUSING
and
COMMISSIONER GENERAL OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 19 January and 7 February, 2017

Urgent Chamber Application

T Bhatasara, for the applicant
D Kanokanga, for the 1st respondent
Ms R Chanduru, for the 2nd & 3rd respondents

MANGOTA J: The applicant is a trust. It was registered on 20 August, 2015. It has, as its main objective, the enhancement of the lives and welfare of vendors and informal traders who operate in Zimbabwe. The second applicant is a member of the first applicant. She is a career vendor.

The applicants filed the present application on an urgent basis. They did so in response to a press statement which the first respondent issued on 12 January, 2017. They complained that the respondents acted in a high handed manner against vendors and informal traders who operate within the Central Business District of Harare. They, therefore, moved the court to interdict the respondents from continuing to act as they alleged against them.

The statement which the first respondent's Acting Town Clerk issued reads:

“PRESS STATEMENT ON STREET VENDING BY HARARE TOWN CLERK MRS
JOSEPHINE NCUBE

In light of the current outbreak of typhoid in the city circumstances on the ground have forced us to take drastic measures to contain the spread of the disease. Preliminary investigations have shown that the key drivers of typhoid and any other water borne diseases are issues related to personal hygiene, unregulated vending of food stuffs such as vegetables, meat, fish [cooked and uncooked] and inadequate water supplies. There are issues that we can immediately control/regulate to ensure that we contain the spread of typhoid. One of these is street vending. We are therefore, issuing a 48 hour ultimatum to all food vendors operating within the Harare Metropolitan area to cease operations temporarily forthwith.

The ban will be reviewed depending on improvements on the ground. The ban also covers general vending at illegal sites. Pushcarts used in the Central Business District will be impounded during the exercise. Impounded fruits, meat, maize, fish and vegetables will be destroyed. The action is being taken with the interests of the majority at heart. We are invoking the Public Health Act for the public good.

We are aware of the fierce backlash that we will receive from the vending public but our operations are in the public interest. From today we will carry out publicity campaigns to educate the public on the action we are taking and encourage the vending public to go to designated sites” [emphasis added]

It is the above cited statement and the respondents’ alleged subsequent conduct which irked the applicants. They submitted that the respondents’ conduct violated the rights of vendors and informal traders. They averred that, four days after the statement was issued, officers who fell under the command of the first and third respondents descended on the vendors. These, they said, demolished some vending stalls, merchandise, wares, and property which belonged to the first applicant’s members who operate within the city of Harare. The officers’ conduct, they submitted, violated ss 52, 53, 64, 68 and 74 of the Constitution of Zimbabwe.

The respondents spoke in unison. They denied having ever demolished the vendors’ stalls and/or goods. They gave commendation to the statement which the first respondent issued. They submitted that the statement was commensurate with the desire to protect members of the public from contracting such dangerously communicable diseases as typhoid and cholera. These, they said, thrived in unhygienic conditions which obtained in the areas where vendors and informal traders operate from. They stated that the vendors whom the statement targeted were illegally selling food from undesignated areas in contravention of ss 5, 6, 7 and 8 of the Harare (Vendors) By-Laws. The first respondent, they averred, confiscated food items which had the risk of causing the spread of infectious diseases. It confiscated such from illegal vendors and destroyed them in terms of s 11 (1) of the aforesaid By – Laws as read with ss 83, 84 and 101 of the Public

Health Act [*Chapter 15:09*]. They denied the allegations that the vendors and informal traders were subjected to violence, torture or inhuman treatment.

The applicants correctly identified the mandate of the first respondent. They said it is mandated to carry out its duties and responsibilities in the interest of the welfare of the residents who are within its geographical jurisdiction. It is in the stated interest that the first respondent's Town Clerk issued the statement which triggered the present application.

The statement did not contain any material which was sinister or offensive to anyone let alone to the first applicant's beneficiaries. It, in the main, notified the vendors of the outbreak of a highly contagious disease – typhoid – which resulted from incessant rains which pounded the City of Harare and the surrounding areas over a considerable period of time. It advised the first applicant's beneficiaries of the need on its part to contain the spread of the disease. It called upon all vendors and informal traders who operate within the city centre to cease their operations temporarily, but forthwith.

The first respondent accorded vendors and traders four full days within which they had to comply with the order. It emphasized the point that the ban which it had imposed covered general vending which took place at illegal sites. It made everyone aware that impounded foodstuffs which was on sale would be destroyed. It invited vendors and informal traders who were lawfully registered with it to leave undesignated points from where they were selling their wares and go to designated sites.

The first respondent could not be said to have violated s 68 of the Constitution of Zimbabwe. Its conduct was lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair (subsection 1 of s 68). It would have violated s 68 of the Constitution if it proceeded to act arbitrarily without issuing the statement through which it informed the first applicant's beneficiaries of the threat which had visited them as well as the need on its part to safeguard the lives of all those who fell within its jurisdiction. All vendors and informal traders were given, promptly and in writing, the reasons of the first respondent's conduct (subsection 2 of s 68). The four-day grace period which was extended to the first applicant's beneficiaries to cease operations and, if they were operating lawfully, to go to designated areas, was not unreasonable.

The applicant's assertion which was to the effect that the respondents violated s 74 of the Constitution of Zimbabwe was misplaced. Section 74 reads:

“74. Freedom from arbitrary eviction

No person may be evicted from their home, or have their home demolished , without a court order made after considering all the relevant circumstances” [emphasis added]

The application never stated that the vendors and informal traders were evicted from their homes. The court takes judicial notice of the fact that no vendor or informal trader has his or her home in the central business district of Harare. The applicant's reference to s 74 of the Constitution as having been violated, therefore, served no purpose at all in the application.

The constitution provides, and correctly so, that every person has the right to choose and carry on any profession, trade or occupation [s 64]. The same section, however, qualifies the right. It says the practice of a profession, trade or occupation may be regulated by law.

Vendors and informal traders should disabuse themselves of the notion that they operate in a vacuum. They should, at all material times, abide by the city By-Laws in particular Statutory Instrument 159/2014 and the Public Health Act [*Chapter 15:09*]. These pieces of legislation regulate their work as is stated in s 64 of the constitution.

It was in the letter and spirit of the abovementioned legislation that the first respondent's statement was issued. The first respondent has a duty to protect the public good of all those who fall under its jurisdiction. It stated as much in the statement as well as in its submissions. Its conduct was not unlawful as it rested on the law and the need on its part to arrest and control the contagious disease which had emerged. It measured the rights of the vendors and informal traders against some two million or so persons who are under its administration and moved, properly so, to save the lives of the many *vis-à-vis* that of the few. It, in the mentioned regard, placed reliance on s 86 of the Constitution of Zimbabwe.

Section 86 falls under the general head which relates to limitation of Fundamental Human Rights and Freedoms. The section reads, in part, as follows:

“86 Limitation of rights and freedoms

- (1) The fundamental rights and freedoms might be exercised reasonably and with due regard to the rights and freedoms of other persons.
- (2) The fundamental rights and freedoms ...may be limited only in terms of a 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 taking into account all relevant factors including –
- (a)
 - (b) the purpose of the limitation, in particular whether it is necessary in the interests of, public safety public health or the general public interest;
 - (c)
 - (d) The need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others.
 - (e)
 - (f) [emphasis added]”

It was in the interest of public safety and public health that the statement was issued. It was in pursuance of the mentioned two public good that the respondents conducted themselves in the manner which the applicants alleged against them, if they did. The ban which the first respondent imposed was fair, reasonable, necessary and justifiable in such a democratic society as the country enjoys under the dispensation of the new constitution. The ban was not only open and just but it also took into account the dignity of vendors and informal traders. It, in short, complied with the relevant portions of s 86 of the Constitution.

The applicants appeared to have had a desire to make some sweeping and unsubstantiated statements. They stated that, on Monday 16 January 2017, truckloads full of police officers who were under the employment of the first respondent descended on the first applicant’s beneficiaries who were in down town Harare. These, they said, destroyed the vending stalls and wares, assaulted some vendors and arrested others. They, in the mentioned regard, attached annexures, SW 3 and SW 4 to their application. The annexures, they submitted, supported the allegations of destruction of vending stalls and wares as well as the assault and arrest of vendors.

The annexures which the applicants made reference to show police officers in trucks and nothing more. They do not show any stalls or wares which were destroyed. They do not show the police assaulting or arresting anyone let alone the vendors and/or informal traders.

Apart from the two annexures which were produced to support the allegations of assault, torture, cruel, inhuman and degrading treatment of vendors and informal traders the applicants did not have any tangible evidence which supported their claims. They produced no evidence of assault. They produced no papers which showed that some of the first applicant’s beneficiaries were arrested. They made bare allegations which were devoid of proof.

In the absence of evidence which supported the applicants’ claims, the respondents could not be said to have violated sections 52 and 53 of the Constitution of Zimbabwe. The

respondents, on their part, denied the applicants' claims. Their denial is, in the court's view, not without merit.

The difficulty which the first applicant had to contend with was its assertion which was to the effect that all vendors who operate within Zimbabwe were or are its beneficiaries. Clause 4 of its Trust Deed stated as much. It reads:

“4. BENEFICIARIES

The beneficiaries are vendors and informal traders operating within Zimbabwe as a whole”.

Vendors and informal traders who operate within the City of Harare are, in its own words, a species of the genus which is under clause 4 of the Trust Deed. In stating as it did, the first applicant took more than it could chew, swallow and digest. Its statement contradicted that of Queen of Grace Zim Asset Trust which also claimed to represent all vendors and informal traders who are in Zimbabwe. The second trust also filed an urgent chamber application following the first respondent's statement of 12 January, 2017. It filed it under case number HC 283/17.

It is when such matters as are stated in the foregoing paragraph are taken account of that one is left to wonder if the first applicant's assertion is true or false. For a start, the first applicant submitted, through counsel, that it did not have the exact number of vendors and informal traders who are its beneficiaries. It attached to its supplementary affidavit Annexure SWII. The annexure, it said, was a record of its beneficiaries who operate within the central business district of Harare. The list has only four hundred and forty (440) persons.

The court made every effort to ascertain from it if the persons who are in the annexure were operating within or outside the law. Its response was that it did not know which of them were lawfully operating as vendors or informal traders and which were not. It said the number was a mixed bag.

The second difficulty which the first applicant ran into related to the question of whether or not it was moving the court to protect law – abiding and non – law abiding vendors and informal traders. The application suggested that to have been its position. During the hearing of the application, however, counsel submitted, and properly so, that only those vendors and

informal traders whom the first respondent issued with permits should be protected. The number and identity of such vendors remained unknown. That fact alone made it difficult, if not impossible, for the court to make an order which favored an unknown and unidentified group of vendors and informal traders.

An uneffortless walk in the direction of down town Harare shows a sorry state of affairs. The number of vendors and informal traders-legal and illegal – who occupy the spaces in down town Harare leaves a lot to be desired. The sight of the activities taking place in the affected portions of the city centre remains a real eye sore. The dirt which accompanies the multitude of vendors in the affected spaces of the city is not only very conspicuous but is also totally undesirable. That the affected spaces are fertile grounds for the birth and growth of such contagious diseases as typhoid and cholera requires little, if any, debate. The places are totally unhygienic. They do require urgent attention and a lasting solution.

It was in the spirit of what is taking place in the affected spaces of the city centre that the first respondent issued the ban. The ban was, at any rate, temporary. It was imposed to enable the first respondent to effectively deal with a real threat which had emerged. Vendors and informal traders, as law abiding citizens, should have assisted the first respondent to deal an effective blow to a menace which reared its ugly head in the Harare Metropolitan area. They are, after all, part of the rate payers who would not want to see the rates which they pay to the first respondent being ploughed into the treatment of persons who would have been adversely affected by the disease instead of having such channelled into their welfare as well as the development of the city which they should be proud of.

The respondents, in the court's view, did not violate the constitutional rights of anyone. They did not act in a vindictive manner at all. Their aim and object were and are to safeguard the public good as against the private good. The latter good must give way to the former. The old English adage which goes 'prevention is better than cure' is more relevant to the circumstances of this case than otherwise. There is no doubt that 'a stich in times saves nine'. The first respondent must be given a chance to arrest a threatening situation which arose out of the vendors' and informal traders' making. These must give way to a better and more responsive planning of the city. They cannot be allowed to sacrifice the greater good at the expense of their own private good.

The applicants did not establish, on a balance of probabilities, the requirements of an interdict. Those of them who are operating within the law – in the sense that permits were issued to them by the first respondent – should take advantage of the sites which were created and proceed to operate from those. Illegal vendors and traders cannot get any protection at all. They approached the court with dirty hands and the court frowns upon their conduct.

The court has considered all the circumstances of this application. It is satisfied that the application cannot stand.

It is, accordingly, dismissed with costs.

Mupanga Bhatasara Attorneys, applicant's legal practitioners

Kanokanga & Partners, 1st respondent's legal practitioners

Civil Division of the Attorney General's Office, 2nd and 3rd respondent's legal practitioners