

JUDICIAL SERVICE COMMISSION

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THE EFFECTS OF MEASURES TAKEN TO COMBAT THE SPREAD OF COVID-19 ON ACCESS TO JUSTICE

BY THE

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INTRODUCTION

The COVID-19 outbreak evolved rapidly and before the world understood what was really happening it assumed the status of a universal crisis. On 30 January 2020 the World Health Organisation Director-General declared that the outbreak constituted a public health emergency of international concern and subsequently, on 11 March 2020, COVID-19 was declared a pandemic.¹ This infectious disease, for which there is no known vaccine or antidote yet, posed extraordinary challenges to national and international governance systems. It forced nations to quickly adapt in order to respond to inevitably challenging circumstances and manage the crisis in order to save lives. The indication was that unless measures were put in place to break the chain of transmission, there would be a sharp increase in the

¹ WHO Director-General's opening remarks at the Mission briefing on COVID-19 (12 March 2020) . Geneva: World Health Organization; 2020 (<https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-mission-briefing-on-COVID-19---12-march-2020>).

number of affected cases and ultimately a high infection and mortality rate in the populace of Zimbabwe. Comprehensive measures were needed to limit devastating human and economic loss.

MEASURES PUT IN PLACE BY THE GOVERNMENT OF ZIMBABWE

As the contagion enveloped the globe disregarding borders, its rapid progression became an agenda of top national priority. This led the Government to adopt measures aimed at saving lives and, as much as possible, containing its spread. On 27 March 2020 the Government introduced public health regulations intended to curb the spread of COVID-19. Acting in terms of section 64(1)(a) of the **Public Health Act** [*Chapter 15:17*], COVID-19 was declared to be a formidable epidemic disease by section 3 of the **Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020** (“the Regulations”), published in Statutory

Instrument 77 of 2020. The declaration had effect until 20 May 2020, unless the period would be earlier extended.

The object of the Regulations was to enable the implementation of measures aimed at preventing, containing and treating “the incidence of COVID-19”. Realising that human contact encouraged the spread of the disease, the Government took the initiative to prohibit public gatherings for any purpose whatsoever. The Regulations gave enforcement officers, defined as police officers, peace officers, municipal police officers, health officers and identified area civil protection officers, powers to disperse persons gathered and if those people refused to disperse to take appropriate action, including arrest and detention.

The Regulations permitted compulsory testing, detention, isolation, quarantine, treatment, disinfection and evacuation

where infection was suspected in order to contain the virus². To show the seriousness with which the Government was taking these interventions, the penalty for failure to comply with these requirements and prohibitions was set at a level twelve fine³ and/or imprisonment for a period of up to one year⁴.

The Regulations allowed the Minister of Health to identify and approve places of quarantine and isolation and directed him to specify these by general notice in the *Government Gazette*⁵. The Minister was also given powers to make orders to restrict and regulate certain specified activities to fulfil the objects of the Regulations.

This provision set the tone for the penning of the **Public Health (COVID-19 Prevention, Containment and Treatment)**

² Section 6

³ Currently set at ZW\$36 000 by SI 57/2020

⁴ Section 5 (2) and section 6 of SI 77 of 2020

⁵ Section 7

(National Lockdown) Order, 2020 (“the Order”), published in Statutory Instrument 83 of 2020, subsequently amended by various Statutory Instruments,⁶ and recently amended and consolidated by Statutory Instrument 200 of 2020⁷. The Order introduced a national lockdown, initially for a period of twenty-one (21) days from 30 March 2020 to 19 April 2020. This period was to be extended and relaxed with time as the epidemiological situation on the ground changed.

In terms of the Order, every individual was confined to his or her home, save for a few circumstances when he or she was allowed to temporarily leave his or her place of residence to buy basic necessities, fuel, gas or medicine; or to seek medical attention; or, if he or she was employed in an essential service, to attend work or go about the business of the essential service⁸.

⁶ Namely Statutory Instruments 84, 86, 93, 94, 99, 101, 102, 110, 115, 136, 144, 153, 160, 174 and 186 of 2020.

⁷ Published on 20 August 2020

⁸ Section 4 of SI 83 of 2020

What is critical to note is that through Statutory Instrument 84 of 2020 courts were declared an essential service. While declaring all criminal courts as an essential service, the Statutory Instrument gave the Chief Justice powers to further declare any other courts and support staff as essential services through Practice Directions⁹. Initially, the Sheriff and the Messenger of Court were specifically excluded from the list of essential services. Subsequently, both the criminal and civil courts were declared essential services, with the Sheriff and the Messenger of Court's offices being allowed to provide all services other than carrying out evictions or executions or conducting sales in execution.¹⁰ Eventually, through Statutory Instrument 153 of 2020, the Sheriff and the Messenger of Court were allowed to conduct their normal business with the proviso that no action for eviction should "be

⁹ Section 2 of SI 84 of 2020

¹⁰ Definition substituted by Statutory Instrument 101 of 2020

entertained against any person for exercising any right conferred by the **Presidential Powers (Temporary Measures) (Deferral of Rent and Mortgage Payments During National Lockdown) Regulations, 2020**”.¹¹

The declaration of courts as an essential service was borne out of the realisation that access to justice is a fundamental aspect of the rule of law. Access to justice is critical to the effective functioning of any society. This is the fundamental reason why the Government categorised the courts as an “essential service”. The Judiciary has a special responsibility to ensure that even if the country is under the grip of COVID-19 there is access to justice. Courts have a residual constitutional responsibility to ensure that access to justice remains available. Section 165(1)(c) of the **Constitution of Zimbabwe** emphasises that the role of the courts

¹¹ Published in Statutory Instrument 96 of 2020

is paramount in safeguarding human rights and freedoms and the rule of law. Maintaining the stability of law in times of disasters is a critical component of the rule of law. The importance of the role of the courts is not diminished in the midst of pandemics. People still rely on the courts for resolution of disputes and the courts are still expected to do justice between litigants. This curbs resort to self-help. Against this background, despite the fact that these were uncharted waters, the courts still had to operate and adapt to the fast-paced dynamism of the pandemic.

MEASURES TAKEN BY THE JUDICIAL SERVICE COMMISSION

March 2020 marked a period of heightened public concern and anxiety in Zimbabwe, spurred on by the recording of the first ever confirmed case of COVID-19 in Zimbabwe. The fact that the virus had finally knocked on Zimbabwe's doors was proof of the

harsh reality that its spread indeed transcends boundaries. The Judiciary was confronted with the need to strike the very delicate balance between the safety of those using and working in the courts, and ensuring that access to the courts was still enjoyed through the implementation of measures that promoted access to justice and maintained the effective administration of justice. I am glad that before that case was confirmed the Judicial Service Commission took the initiative to come up with a cocktail of measures meant to prevent infection. Perhaps our proactive stance then contributed to the very few number of cases recorded in the courts as we were better prepared for the virus before it hit the country.

On 23 March 2020 I issued a Directive to scale down operations in our courts. In terms of the Directive, trials and non-urgent hearings were to be postponed for a period of not less than two

months. Hearings were confined to urgent matters, bail applications and initial remands. All weddings were cancelled. No hearings were to be conducted in chambers. If it was necessary to have hearings, it was encouraged that only the parties and their legal representatives would attend, while those not involved in the case were discouraged from attending.

Disinfection and regular cleaning of surfaces was to be more rigorous. Strict enforcement of the preventive measures was done. Members of the Judicial Service at courts, legal practitioners and litigants attending court sessions were required to sanitise and maintain social distancing of at least two metres apart. Frequent hand washing was also encouraged. Members of staff using public transport were excused from attending work unless they were requested to report for duty. In that case, the Secretariat was required to make arrangements for JSC vehicles to provide

transport for them. Court managers were exhorted to ensure that the skeletal staff would cover all essential areas so as not to disenfranchise litigants. This included identifying judicial officers and staff members who would report to work and those who would “work from home”.

The tempo was rising. It became necessary on 25 March 2020 to give a message of hope to members of the Judicial Service, urging them to observe the safety requirements and to take the opportunity to finalise all outstanding work. To guide internal operations, Circulars 3 to 6 of 2020 were also issued.

PRACTICE DIRECTIONS

As earlier mentioned, limitations were put in place but our focus was on the fact that the courts were declared an essential service and specific matters were allowed to be heard as directed by myself. This led to the creation of Practice Directions 1 to 6

between 29 March 2020 and 29 June 2020. These were informed by the Government directives and developments in the country on the pandemic.

1. Practice Direction 1

This provided that the filing of new cases, processes and pleadings were suspended for the duration of the national lockdown and that, subject to limitations, only initial remands, urgent applications and bail applications would be entertained.

The *dies induciae* for filing pleadings was suspended. All pending criminal cases on remand were automatically rolled over for a period of at least twenty-one (21) calendar days. Civil cases were postponed to the first business day after the lockdown period in the Magistrates' Courts and to the first day of the second term for matters pending in the Superior Courts. Sales in execution were stayed for the duration of the lockdown period.

2. Practice Direction 2

Following the extension of the lockdown period by the President, conditions under Practice Direction 1 remained in force and all pending criminal cases on remand were further automatically rolled over. Sales in execution remained stayed for the duration of the extension.

3. Practice Direction 3

The stringent lockdown regulations were relaxed by the President on 1 May 2020 with effect from 4 May 2020. All courts became fully functional on 11 May 2020, upon which date the remand dates of accused persons were rescheduled. All cases were to be heard and determined expeditiously. The Sheriff would now carry out his duties apart from evictions, executions and sales. Entry into courtrooms was limited to litigants, their legal practitioners, witnesses and members of the Press. Everyone was required to

wear face masks and be subjected to temperature checks and sanitisation of hands. Filing of court process was limited to the hours between 0800hrs and 1500hrs. Solemnisation of marriages remained suspended.

4. Practice Direction 4

This followed a further relaxation of the lockdown Regulations. Operational hours of all court registries reverted to the provisions in the applicable rules of court. The other provisions of Practice Direction 3 of 2020 remained operational.

5. Practice Direction 5

Practice Direction 5 of 2020 lifted the moratorium on the solemnisation of marriages but limited participants to the wedding couple and their witnesses.

6. Practice Direction 6

This followed the amendment of Statutory Instrument 83 of 2020 by Statutory Instrument 153 of 2020 allowing the Sheriff and the Messenger of Court to operate as alluded to above. The Practice Direction provided that the Sheriff and the Messenger of Court would conduct service and execution of process and orders in compliance with the Public Health Order.

Currently, courts are still an essential service but, through Statutory Instruments 176 and 200 of 2020, they are subject to the limitations imposed by the curfew limitations on business hours.¹²

THE IMPACT OF THE MEASURES ON ACCESS TO JUSTICE

The facts narrated show that a host of limitations have been imposed on the operations of the courts since March 2020. These anti-COVID-19 measures have affected the normal operations of the justice system, as our activities were either adjusted or

¹² Section 25 of SI 200 of 2020

suspended to accommodate the new state of affairs. While such restrictive measures may have been necessary to effectively tackle the pandemic, the limited operation of the courts, as well as restrictions on access to courts, has had adverse implications on access to justice.

Although these measures were put in place to address the pandemic, we still have a duty to protect and respect the rule of law by ensuring the right of access to justice. After weighing the two essentials, access to justice and public health, the courts had to postpone the hearing of cases, with the exception of specified categories of matters particularly those that affected personal safety, liberty and those that were time-sensitive. The courts gradually resumed activities on 11 May 2020 observing strict regulations, with the general public not being allowed to enter a courtroom unless they were essential to the hearing.

The nature of judicial processes involves in-person participation in proceedings and our court system, as it is currently, was not designed to function in the context of a “lockdown”. However, this has presented an opportunity to identify procedures to modernise our justice system in light of this new development.

The physical accessibility of access to justice, namely the ability to approach the courts and attend hearings, was hindered by COVID-19 as these facilities were inaccessible. This physical impairment constituted a disruption in the normal flow of justice and a direct threat to the rule of law.

Amidst the national constraints, we have tried our level best to maintain access to justice. The measures referred to above have been put in place to open up the courts. As a general rule, all court hearings should be open to the general public as a means of ensuring transparency except in exceptional circumstances where

the public or media may be excluded to protect the interests of justice. Opening proceedings to public scrutiny pays homage to the old adage – “justice must not only be done but must be seen to be done”. The work of the courts done in public allows an assessment of the quality of justice that is being administered. Exclusion of the public from such hearings for public health reasons is unfamiliar territory, which has an impact on access to justice. Nonetheless, it has since become vital in our day-to-day activities. Attendance at court is limited to those who are involved in the proceedings. The measure is to protect our staff members and the attendees themselves. This maintains a delicate balance between the open court concept and compliance with the restrictions imposed by the Government.

COVID-19 has negatively affected progress on the 2030 Agenda for Sustainable Development. The focus has since shifted from

sprinting towards achievement of **UN SDG Goal 16**, which seeks to promote the rule of law, to trying to maintain the minimum standard of access to justice during this time. Every sector bears the responsibility of ensuring that its level of preparedness and its response to manage the spread of the virus are adequate.

During the lockdown period, the Judiciary embarked on establishing the aforementioned guidelines to help courts build their capacity for the return to full operations. The Judiciary is continually assessing methods of managing and reducing the backlog to ensure that access to justice is not compromised. We have in the past couple of years given attention and dedicated ourselves to better coordination, strengthening the Judiciary, enhancement of access to justice, and the effectiveness and efficiency of the courts. Judicial accountability has been embraced in the context of a general trend to render members of

the Judiciary answerable to the people in ways that are transparent, accessible and effective in the spirit of good governance. It was therefore necessary to continuously look for ways to ensure that those who needed to access the courts could access them. Admittedly, the cases that could be heard were restricted due to the lockdown. I am proud to state that the courts did not remain closed in their entirety during the lockdown period. This was a necessity to prevent the temptation of people resorting to self-help mechanisms as a result of the courts being inaccessible.

Reduced court operations resulted in the prolonged detention of accused persons. The restrictions adversely affected the right of access to a court and the right of persons deprived of liberty to be promptly brought before a Judge. The right to be tried by a

competent, independent and impartial tribunal is a fundamental right.

These are not normal times and we need to play our part in responding to the pandemic and reduce the risk of the spread of infection, hence the limitation on the nature of people who can visit our courts. It is mandatory that every person who enters the courts is wearing a face mask and sanitises their hands. At the Rotten Row Magistrates' Court in particular, we set up a sanitisation booth, the first of its kind, not only to ensure that people comply with the Regulations but also that access to justice is not hindered. These measures are a necessity in the protection and preservation of life.

The procedures that are in place guarantee that justice is still served albeit in a limited context. Participants in courtrooms are required to observe social distancing. All visitors at court

premises keep a distance from others when queuing to get assistance. We have introduced extra and thorough cleaning and disinfection measures to make our buildings safer.

As the pandemic evolved over the past few months and a spike in cases recorded, the courts have not been spared from people directly affected by the virus. We have had instances where some of our members have contracted the virus. The Secretary has assembled Provincial Covid-19 Inspectorate Teams and designated certain members to be part of the JSC COVID-19 Enforcement Team. These measures have ensured compliance with the Regulations and Practice Directions in place. Reaction to actual and possible COVID-19 scares has been expeditious, with the necessary protocols of immediate testing, self-isolation and disinfection of premises being faithfully and diligently observed. Coupled with the other protocols of wearing face masks,

sanitisation and strict observance of social distancing rules, these measures have ensured that we have a negligible number of members infected by COVID-19.

WAY FORWARD

It appears that the disruption to the justice system will continue for the unforeseeable future. I would like to point out that COVID-19 is not the “new normal”. Eventually life will revert to what it was before the COVID-19 pandemic. As long as we ensure that adequate protection is put in place in line with the restrictions, in-person court hearings will still proceed.

It is hoped that, funds permitting, we will expand the scope of our courts to include video conferencing and virtual hearings. The virus has been a harsh reminder that in order to keep in line with emerging trends, we need to speed up the process of electronic and virtual case management. The process is in motion but we are

yet to fully operationalise the system. In this COVID-19 crisis, such operationalisation of electronic case management will go a long way in minimising human contact, thereby reducing possibilities of infections and the spread of the virus while justice remains accessible. It is heartening to note that the UNDP has expressed a firm commitment to supporting the establishment of virtual courts in Zimbabwe. This will eliminate the presence of litigants or lawyers in courts, make it possible for adjudication of some cases online, and set the tone for the introduction of the Integrated Electronic Case Management System.

If anything, the COVID-19 context has provided us with a unique opportunity to examine ways in which the justice system can become more agile, with a long-term impact that can last beyond a crisis period such as this one. This includes strengthening and improving ICT infrastructures that support the digitisation of

cases. This will prove vital, for instance, to persons who may want to pay a fine which can be paid online to obviate the necessity for a person to come into the building to swipe or pay cash.

Prior to COVID-19, our Judiciary was overwhelmed with a backlog of cases. With cases put on hold because of the crisis, the backlog is greater. You will notice that the number of cases filed during the lockdown period significantly reduced, not because there were no issues requiring court intervention arising, but because of the travel restrictions in place. There will be need to develop surge capacities to be able to handle this backlog in an effective, fair and timely manner.

CONCLUSION

As the world responds to the unfolding COVID-19 induced health crisis, Judges, and indeed all stakeholders in the justice delivery sector, are contemplating what may lie ahead for them in terms of

their safety and access to justice. The justice sector remains open to the public, as it is an essential service that cannot be dispensed with. Even in the difficult and unprecedented times we find ourselves in, we should remain determined to ensure that the wheels of justice remain in motion.

Remarkably, hearings are taking place with the observance of the strict protective measures. Although a state of uncertainty looms in the air, our justice system must remain responsive otherwise the rule of law itself may well be included amongst the victims of COVID-19. We should be able to continue to adopt measures that ensure that access to justice is enjoyed by the public. The pandemic threw a curveball at our justice system. While efforts are being made by medical experts around the world to find a vaccine for the disease, we continue striving to provide quality justice to the public. As the events unfold, we will take the

necessary steps to implement effective and efficient ways of doing business so that our courts can remain accessible to the general public.

I would like to remind us all that, if we want to avoid the loss of life and prevent our health system being overwhelmed, we should continue practising good hygiene and respect the restrictions that are in place for our well-being. In our courts, the health and safety of all participants, as well as staff, has always been of paramount importance. As the Judiciary, we should play our part and provide service delivery in as safe an environment as possible. It is our assurance that we are doing our best to ensure the safety of everyone inside the court buildings whilst ensuring that access to justice is achieved. I affirm our capacity to maintain the rule of law during this pandemic and protect the rights of all citizens whilst ensuring that everyone is safe.