

Re MUGISHA

[Rwanda SUPREME COURT – RS/INCONST/SPEC 00002/2018/SC (Rugege, P.J., Kayitesi Z, Mutashya, Kayitesi R, Cyanzayire, J.) 18 January 2019]

Constitution – Unconstitutionality of laws – The role of the State in the petition seeking to declare a law unconstitutional – The State does not participate in the petition seeking to declare a law unconstitutional as a party but rather it appears to express its opinion on the law which is sought to be repealed. Consequently, it cannot raise a preliminary objection concerning the admissibility of the petition.

Constitution – Unconstitutionality of laws – Interest in petitioning against a law for being unconstitutional – A person lodging a petition seeking to declare a law unconstitutional does not need to demonstrate the personal interests he/she has in the petition as long as the purpose is to protect the public interest.

Facts: After the publication of the Law N°68/2018 of 30/08/2018 determining offences and penalties in general in the Official Gazette, Advocate Mugisha petitioned the Supreme Court seeking a declaration that articles 233, 236, 136, 138, 154 and 139 of that law infringe articles 15, 18 and 38 of the Constitution. He further stated that the articles which he seeks to have repealed are in two categories the first one contains three articles: 154, 233 and 236 and the second has three articles; 136, 138 and 139.

During the hearing, the State Attorney raises a preliminary objection of inadmissibility of the petition on the ground that Advocate Mugisha does not demonstrate a personal interest he has in petitioning the court and in particular that he does not demonstrate how those provisions were detrimental to him. She further elaborates that pursuant to article 3 of the Law relating to the civil, commercial, labour and administrative procedure which provides that a claim cannot be admissible in court if the claimant does not have the interest and capacity to sue, that is the reason why the petitioner should establish the interest he has in the petition such as demonstrating how those provisions are detrimental to him, for instance if he has ever been punished based on those provisions. He should not just state that they prejudice the press or the married couples, without even demonstrating that he is representing those prejudiced by those provisions. She further argues that pursuant to article 72 of the Law determining the jurisdiction of courts which provides that the Supreme Court may be petitioned by any person institution or association with legal personality seeking to have a law declared unconstitutional if they have any interest. She claimed that the interest must be real and obvious not speculation and that alleging that he petitioned the court for the general interest is misleading because the law provides for those with the interest.

In his defence on the raised objection, the petitioner states that the Law determining the jurisdiction of courts provides that the Supreme Court is petitioned by any person or company or associations with legal personality seeking to have a law declared unconstitutional. Thus basing on the fact that he is on the roll of advocates, he feels that he has a part to play in the establishment of fair laws which are consistent with the Constitution, and moreover as any Rwandan who has the interest in protecting the Constitution and also to ensure that the enacted laws guarantee fair justice, especially as issues he seeks to be examined are in the general interests, since they concern every Rwandan.

Before examining the issue of the interest of the petitioner, the Court first examined whether the State has the standing to raise the objection of inadmissibility in the hearings of the petition seeking to declare a law unconstitutional.

Held: 1. The State does not participate of the State in the petition seeking to declare a law unconstitutional as a party but rather it appears to express its opinion on the law which is sought to be repealed. Consequently, it cannot raise a preliminary objection concerning the admissibility of the petition.

2. A person lodging a petition seeking to declare a law unconstitutional does not need to demonstrate the personal interests he/she has in the petition as long as the purpose is to protect the public interest.

**The petitioner has the interest in petitioning the court seeking to declare a Law unconstitutional.
The hearing will proceed on the merits.**

Statutes and Statutory instruments referred to:

Law N°30/2018 of 02/06/2018 determining the jurisdiction of Courts, articles 72 and 80.

Law N°22/2018 of 29/04/2018 Law relating to the civil, commercial, labour and administrative procedure, article 3.

Case referred to:

Zantsi v Council of State, Ciskei and Others (CCT24/94) [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC).

European Court of Human Rights, Klass and others v Federal Republic of Germany, (Series A, NO 28) (1979-80) 2 EHRR 214.

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR (6 December 1995).

Minister of Home Affairs v Eisenberg & Associates, (CCT15/03) [2003] ZACC 10; 2003 (8) BCLR 838; 2003 (5) SA 281 rendered on 27 June 2003 by the Constitutional Court of South Africa

Kruger v President of the Republic of South Africa and Others (CCT 57/07) [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) rendered on 2 October 2008 by the by the Constitutional Court of South Africa.

Doctrines:

Serge Guinchard et Thierry Debard, Lexique des termes juridiques 2015-2016, 23e éd, Dalloz, 2015

Judgment

I. BACKGROUND OF THE CASE

[1] Advocate Mugisha Richard petitioned the Supreme Court arguing that after the publication in the Official Gazette, the Law N°68/2018 of 30/08/2018 determining offences and penalties in general, he found article 136, 138, 139, 154, 233 and 236 of that law inconsistent with the Constitution of the Republic of Rwanda of 2003 revised in 2015.

[2] The articles sought to be repealed because they are inconsistent with the Constitution are six (6) grouped into two categories: the first category consists of three (3) provisions: article 154, 233 and 236. Article 154 provides that any person who publicly defames religious rituals, symbols and religious cult objects by use of actions, words, signs, writings, gestures or threats, whether carried out at the place where rituals are intended to be performed or where they are normally performed, commits an offence. Article 233 provides any person who, verbally, by gestures or threats, in writings or cartoons, humiliates a member of Parliament when exercising his/her mandate, a member of the Cabinet, security officers or any other person in charge of a public service in the performance or in connection with the performance of his/her duties, commits an offence. Lastly article 236 provides that any person who insults or defames the President of the Republic, commits an offence. Those articles also provide penalties for each offence.

[3] Advocate Mugisha Richard argues that those provisions contradict article 15 of the Constitution of the Republic of Rwanda because they protect those in particular classes depending on their positions

whilst all persons are equal before the law.¹ He also argues that those provisions infringe on the freedom of press, of the print media, that of images (cartoons) pictures and even those of broadcasting which are guaranteed by article 38 of the Constitution,² because pursuant to those provisions, the press is not allowed to publish anything criticising those classes of public officials or religion while that article of the Constitution provides that the freedom of expression and that of access to information are recognised and respected by the State.

[4] The second category is made up of three provisions (3): article 136 which provides that any spouse who has sexual intercourse with a person other than his/her spouse, commits an offence. Article 138 provides that a person who lives as a husband and wife with a person other than his/her spouse while one or both of them are married, commits an offence, while article 139 provides that a spouse who, without serious reasons, deserts his/her marital home for more than two (2) months and evades his/her obligations, commits an offence. Advocate Mugisha Richard finds that those articles infringe article 18 of the Constitution of the Republic of Rwanda which provides that the State puts in place appropriate legislation and organs for the protection of the family, yet articles 136, 138 and 139 provide for a prison sentence for one of the spouse which makes it impossible for the family to be protected or to flourish when one of them is in prison.

[5] The hearing of the case took place on 4/12/2018, Advocate Mugisha Richard assisted by Advocate Nkundabarashi Moïse and Advocate Kabasinga Florida, while the State of Rwanda was represented by the State Attorney, Advocate Kabibi Speciose.

[6] State Attorney Kabibi Speciose raised a preliminary objection of the inadmissibility of the petition lodged by Advocate Mugisha Richard on the ground that he does not demonstrate his personal interest in that petition especially that he did not demonstrate how those provisions were prejudicial to him.

II. ANALYSIS OF THE LEGAL ISSUES

Whether the petition lodged by Advocate Mugisha Richard is inadmissible on the ground that he lacks interest.

[7] State Attorney Kabibi Speciose requests that the petition should be rejected on the ground that Advocate Mugisha Richard lacks interest and failed to prove how those provisions he seeks to be repealed prejudiced him. She explains that article 3 of the Law relating to the civil, commercial, labour and administrative procedure, provides that a claim is inadmissible in court if the claimant has no interest and capacity to sue, that is the reason why Advocate Mugisha Richard has to demonstrate the interest he has in the petition, such as indicating how those provisions prejudiced him, whether he was penalized basing on those provisions instead of arguing that they prejudiced the press or are detrimental to the married couple and he does not demonstrate that he is representing those prejudiced by those provisions.

[8] She argues that pursuant to article 72 of the Law determining the jurisdiction of courts which provides that the Supreme Court can be petitioned by a person seeking to have a law declared unconstitutional if he/she has any interest. The fact that Mugisha Richard is an advocate who assists in the administration of justice, should not be considered as according him the interest to lodge the petition especially given that the interest must be apparent to everyone but not merely presuming or claiming that it is in the general interest. She adds that the nature of the petition demonstrates that it was not lodged in

¹ Article 15 provides that all persons are equal before the law. They are entitled to equal protection of the law.

² Freedom of press, of expression and of access to information are recognized and guaranteed by the State. Freedom of expression and freedom of access to information shall not prejudice public order, good morals, the protection of the youth and children, the right of every citizen to honour and dignity and protection of personal and family privacy. Conditions for exercising and respect for these freedoms are determined by law

the public interest but rather in his own personal interest, that is why he must demonstrate the interest he has in lodging that petition.

[9] She concludes arguing that if Advocate Mugisha Richard as an advocate lodged a petition in the name of his colleagues he should demonstrate that he is representing them and also demonstrate how those provisions prejudiced them and how their execution was detrimental to them.

[10] In his defense, Advocate Mugisha Richard states that basing on article 72 of the Law N° 30/2018 of 02/06/2018, determining the jurisdiction of courts which provides that the Supreme Court is petitioned by any person or company and associations with legal personality over petitions seeking to declare a law unconstitutional if they have any interest, and basing on the fact that he is on the roll of advocates, assisting justice, he believes that he has a role in the establishment of fair laws which are consistent with the Constitution, that is where he bases his interest to petition the Court requesting it to declare the stated provisions inconsistent with the Constitution. He also states that as a Rwandan he has an interest in upholding the Constitution either in its text or purpose.

[11] He argues that it is not necessary to wait for offences to be committed and before a petition can be lodged, that he cannot sit aside and just watch, when there are issues which are detrimental to the family and which will have negative consequences to the general public including him. He states that the same applies to the press. He has the interest of petitioning the court in case there are things detrimental to the proper functioning of the press.

[12] Counsel Nkundabarashi Moïse states that every Rwandan has a right to petition the Court on the matters concerning the Constitution and upholding it and even to make sure that the laws which are passed provide fair justice. He further argues that Mugisha Richard, being an advocate in particular, has the interest to show that there are laws which were passed that are inconsistent with the Constitution, and that what he petitioned for is in the public interest because it concerns every Rwandan, that is why he finds the statements of the State Attorney that an advocate does not have an interest to be groundless because the interest should not only be demonstrated when there is a problem, instead it would be better to act in order to protect and uphold the Constitution.

[13] Counsel Kabasinga Florida argues that Mugisha Richard has both personal and public interest to lodge a petition because the impugned provisions concern everybody including Mugisha Richard, since any person can be prosecuted for the offences prescribed by those provisions and that therefore Mugisha Richard has interest in lodging that petition so that he can defend his personal interest and the those of others who can be victimized by those provisions.

VIEW OF THE COURT

Whether the State has the capacity to raise a preliminary objection of inadmissibility of the petition

[14] Before deciding whether the petitioner has the required interest, the Court finds it necessary to first establish whether the State can raise an objection of inadmissibility in cases relating to the petitions seeking to declare a law unconstitutional.

[15] Article 72 paragraph three of the Law N° 30/2018 of 02/06/2018, determining the jurisdiction of courts provides that the hearing of petitions seeking to declare a law unconstitutional is conducted in public and **in the presence of a Government representative**. It's not provided that the State is the respondent in the petitions seeking to declare a law unconstitutional, instead the State appears in order to give its opinion on the understanding of the law which it is sought to have it repealed as the State represents the public interest and its institutions participate in drafting and passing of laws.

[16] Since the appearance of the State in the case is to give its opinion on the law which the petitioner seeks to have repealed as motivated above, it also has the right to express its opinion on the issues of admissibility of the petition seeking to declare a law unconstitutional. The Court therefore finds the arguments of the State Attorney should be considered as an opinion instead of being an objection raised by a party to the case

Regarding the interest to lodge a petition

[17] This Court is yet to be seized with many petitions seeking to declare a law unconstitutional. In particular, it's the first time the State Attorney has argued that the petitioner has no interest. That is the reason why in motivating its decision, the Court interprets the laws that apply in Rwanda which relate to this issue and also refer to case law of other countries where such petitions have been decided over a time.

[18] Article 3 paragraph one Law No22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that unless otherwise provided by law, a claim is admissible in court only if the claimant has standing, **interest** and capacity to sue. The law does not explain whether its personal or public interest.

[19] Usually, as explained by the legal, scholars for a claim to be admissible, the claimant has to have interest manifested by the advantages that would be obtained based on his claim, which is legitimate, personal and direct.³ The interest in a case is aimed at demonstrating that there is a right which the claimant wants to be granted by a court decision or he wants the court to decide on the issues which are of importance to him. The claimant is required to have interest in the claim so that it prevents those who may file claims with an agenda to get fame or advertise their services or those who may want to get the rights intended for others.

[20] The interest is again put into consideration so that the meagre resources allocated to courts be utilized to resolve real issues other than using them on abstract issues. On this matter, the Constitutional Court of the Republic of South Africa in the case of *Zantsi v Council of State*,⁴ Ciskei and Other held that it is not ordinarily desirable for a court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest [...]. Pursuant to the motivations given above, the Court finds that the arguments of the State Attorney regarding interest in the case are more appropriate in ordinary cases.

[21] The Court is of the view that there is a difference with the constitutional petitions whereby the interest should be perceived in broad way, especially in a developing country like Rwanda where the citizens are not yet aware of their constitutional rights, and there is a need to assist them to realize them through courts. Article 72 paragraph of the Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts provides that the Supreme Court is petitioned by any person or company and associations with legal personality seeking to declare unconstitutional a law **if they have any interest**. The nature of the cases seeking to declare a law unconstitutional indicate that **the interest lies in the seeking to declare a law unconstitutional** because it is detrimental to the rights of the claimants or it renders it impossible to realize the objectives of the Constitution which must be achieved.

[22] In this petition, the interest is to have article 233 relating to the offence of humiliation of national authorities and persons in charge of public service, article 236 relating to the offence of insults or

³ Serge Guinchard et Thierry Debard, *Lexique des termes juridiques 2015-2016*, 23e éd, Dalloz, 2015 p 58. Intérêt pour agir: condition de recevabilité de l'action consistant dans l'avantage que procurerait au demandeur la reconnaissance par le juge de sa prétention. L'intérêt doit être personnel, direct, né, et actuel

⁴ *Zantsi v Council of State, Ciskei and Others* (CCT24/94) [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) (22 September 1995)

defamation against the President of the Republic, article 136 relating to the offence of adultery, article 138 relating to the offence of concubinage, article 154 relating to the offence of public defamation of religious rituals and article 139 relating to the offence of desertion of the marital home of the Law N° 68/2018 of 30/08/2018 determining offences and penalties in general declared inconsistent with the Constitution of the Republic of Rwanda because they may be detrimental to some rights including equality before the law, freedom of press, freedom of expression and that of access to information and even the flourishing of the family which has to be protected by the State.

[23] The Law N°68/2018 of 30/08/2018 determining offences and penalties in general is a law which applies to all who may be subjected to prosecution for the offences provided in that law and have to be respected by all including Advocate Mugisha Richard. The law which provides for the offences and penalties does not apply only to the offenders or those who may commit crimes, it applies to everyone in its jurisdiction because it determines how people are to behave in certain circumstances and failure to comply becomes an offence. This implies that in one way or another, that law applies to the petitioner, Mugisha Richard. Therefore, the Court finds that as a person who is subjected to that law, who can be prosecuted for the offences mentioned above, he has an interest to request that some of its provisions be declared unconstitutional.

[24] If the petitioner believes that a certain law is unconstitutional he does not need to wait until he is prosecuted of the offences provided by that law. He has the right to request for it to be repealed. The probability of a law being unconstitutional should be considered as an important issue which needs to be addressed rather than considering it as an abstract issue.

[25] the Court finds that the fact that the petitioner was never prosecuted or convicted based on the provisions he claims to be unconstitutional, it should not be interpreted as lack of interest in the petition because the mere existence of those provisions he claims that are unconstitutional is enough for him to petition the court seeking that those provisions be repealed without necessarily proving that they were used to prosecute him. This was also the position of some courts of other jurisdictions like in the case of *Klass and others v. Germany*, whereby the European Court of Human Rights was petitioned seeking the repeal of article 10 of Act of 13 August 1968 on Restrictions on the Secrecy of the Mail, Post and Telecommunications (*Gesetz zur Beschränkung*). The Court held that a person can seek the repeal of the law without first proving that it was applied on him. The Court motivated its decision in these words: “[...] The Court therefore accepts that an individual may, under certain conditions, **claim to be the victim of a violation occasioned by the mere existence of secret measures or of legislation permitting secret measures, without having to allege that such measures were in fact applied to him**”.⁵ When these findings are considered together with the petition lodged by Mugisha Richard, it is found the fact that he has never been prosecuted based on provisions he seeks to have repealed, does not mean those provisions do not apply to him too because in case he violates them, they will be based on to prosecute him. Interest can be current or prospective.

[26] Interest in the petition seeking to declare a law unconstitutional must be perceived in a broader sense because it reaches all those who are subject to that Law rather than the petitioner only as it is the case in ordinary cases. This is evident especially when the Court decides to repeal a law that is inconsistent with the Constitution as that decision concerns every one, the petitioner or anyone else to the extent that nobody can again request for the repeal of that law or article on the ground that it is unconstitutional. That is the reason article 72, the last paragraph of the Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts provides that when the Supreme Court holds that such a law is unconstitutional, that declaration is published in the Official Gazette of the Republic of Rwanda. This is done in order to inform all the concerned people (petitioner or anyone else) to know that the law is no longer in force.

⁵ European Court of Human Rights, *Klass and others v Federal Republic of Germany*, (Series A, NO 28) (1979-80) 2 EHRR 214, 6 September 1978 available on <http://hudoc.echr.coe.int>

[27] The issue regarding the broad interpretation of interest in petitions seeking to declare a law unconstitutional was also emphasized by the Constitutional Court of South Africa in the case of *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*, whereby it held that “ As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honored in our society. This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, **it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact**⁶.

[28] The petition seeking to declare a law or some of its provisions unconstitutional can be lodged in the interest of the petitioner or in the public interest. Even though another article⁷ of the Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts, provides for the right of filing a petition in the general interest, it does not bar a petitioner seeking to declare a law unconstitutional from filing the petition with the aim of protecting the public interest .This was the position of the Supreme Court of Canada in the case of *Minister of Justice (Can.) v. Borowski*,⁸ whereby the judge stated that “I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has **a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court**. In my opinion, the respondent has met this test and should be permitted to proceed with his action”.

[29] Besides the fact that the provisions sought to be repealed concern him as a person who may write documents about the public officials which can be considered as defamatory and subsequently cause him to be prosecuted, Advocate Mugisha Richard as a citizen who is committed to ensuring respect for the rights to give and access information including the freedom of press and even the protection of the family as provided for by the Constitution, has the interest to petition the court seeking to repeal of the provisions which infringe on those rights.

[30] The interest of an Advocate who petitioned the court seeking to declare a law unconstitutional should be viewed in the perspective of his legal profession and his role in the development of laws which makes him eligible to lodge a petition even if he does not have a particular interest. In the case of *Minister of Home Affairs v Eisenberg & Associates*, the Constitutional Court of South Africa held that Advocates have a particular interest to seek for the repeal of laws that are inconsistent with the Constitution of that Country, and also have an interest as members of the public to lodge that petition. That Court held as follows : “Respondent,[Eisenberg & Associates] ***had an interest as a member of the public in asserting the right that it claimed to have and had standing to raise that issue in its own interests***⁹“. This is similar to the arguments of Advocate Mugisha Richard whereby he argued that as an advocate and as one of the citizens, he has an interest to petition the Court seeking to invalidate the provisions of a law which is detrimental to him, to the general public and to ensure that the Constitution is upheld. He does not need to prove that he is representing other advocates or a particular group of the public as the State Attorney claims.

⁶ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995). Paragraph 230

⁷ Article 80 of the Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts.

⁸ *Minister of Justice (Can) v Borowski* [1981] 2 SCR 575 at 598, per MARTLAND.J. for the majority.

⁹ Constitutional Court of South Africa, *Minister of Home Affairs v Eisenberg & Associates*, (CCT15/03) [2003] ZACC 10; 2003 (8) BCLR 838 ; 2003 (5) SA 281

[31] The Advocate as a professional in law who assists in the administration of justice, who is responsible for representing, assisting and pleading for people before the executive, before the courts and in other institutions can petition against laws that are inconsistent with the Constitution not in his personal interest but in the interest of the administration of justice. The legal knowledge an advocate is expected to have is more than that of the ordinary citizen or those who did not study the law and moreover the duties bestowed to him by that profession, places him in a better position to lodge a petition seeking to declare unconstitutional some provisions of the law, because he is more conversant with the laws and the procedure of repealing them, in case they are inconsistent with the Constitution.

[32] This approach is similar to that in the case of *Kruger v President of the Republic of South Africa and Others*. The Constitutional Court of South Africa held that a practitioner can base his claim on both direct and professional interest, whereby it held that : “Where the practitioner can establish both that a proclamation is of direct and central importance to the field in which he or she operates, and that it is in the interest of the administration of justice that the validity of that proclamation be determined by a court, that practitioner may approach a court to challenge the validity of such a proclamation. Legal practitioners must not assume that they will be allowed to bring applications to this Court for a declaration of invalidity based purely on financial self- interest or in circumstances where they cannot show that it will be in the interest of the administration of justice that they do so.¹⁰ For Mugisha Richard, as a legal practitioner, with experience in law, to petition the Supreme Court seeking the repeal of the mentioned articles because they infringe on the Constitution, the Court finds that it is in the interest of administration of justice because he can give explanations which can guide the Court and the decision taken be of importance to the justice in general.

[33] In light of the foregoing, the Court holds that Advocate Mugisha Richard has interest in different ways as explained to petition the court seeking to declare certain provisions of the law unconstitutional.

[34] Due to the significance of the issues to be examined in the hearing of this case on the merits and considering that there are no precedents on similar cases tried by the courts of Rwanda, the Court invites persons, institutions and non-government organizations with expertise who wish to act as *Amicus Curiae*, to submit requests to that effect through the Court registry of the Supreme Court not later than 8/02/2019, and submit written documents they wish to produce before the court not later than 28/02/2019.

III. DECISION OF THE COURT

[35] Holds that Advocate Mugisha Richard has an interest to lodge a petition seeking to declare unconstitutional certain provisions of the law;

[36] Declares that the hearing will proceed on the merits on 18/03/2019.

¹⁰ *Kruger v President of the Republic of South Africa and Others* (CCT 57/07) [2008] ZACC 17; 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) (2 October 2008)