NATIONAL ELECTORAL REFORM AGENDA
versus
OFFICER COMMANDING POLICE HARARE N.O.
and
COMMISSIONER GENERAL OF POLICE N.O.
and
THE MINISTER OF HOME AFFAIRS

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 26 August 2016

Urgent chamber application

K.E. Kadzere, assisted by Mr Nyandoro,
Mr Mandevere and Mr Chamisa, for the applicant
H Magadure assisted by Mr Chimombe, for the respondents

MWAYERA J: On 26th August 2016 the following consent order was granted:

"It is ordered that

1. The applicant's members be and are hereby allowed to exercise their constitutional right to demonstrate and present a petition to ZEC Zimbabwe Electoral Commission Head Office by engaging in a peaceful street march on the 26th of August 2016 starting from 12 noon to 400pm, in fulfilment of the notification dated 12 August 2016.
2. The applicants are to march from freedom square at an open space at Rainbow Towers and proceed to Robert Mugabe way up to 4th Street into Jason Moyo Avenue and turn to Harare Street to ZEC Headquarters for purposes of presenting a petition.
3. The respondents be and are hereby ordered not to interfere, obstruct or stop the march enroute referred to in paragraph 1 and 2 which is to facilitate the applicant's constitutional right and freedom to petition in a peaceful manner.
4. The respondents are further ordered to facilitate the peaceful holding of demonstration and keep peace while the demonstration is taking place.
5. There shall be no order as to costs."

The reasons for the disposition and order by consent were pronounced to the parties at the hearing. Based on submissions made they touched on the following:

(1) Consensus on urgency

(2) Lack of opposition

(3) Failure to substantiate on the point *in limine*

(4) The Constitutional provisions that impact on the right to demonstrate.

I indicated to the parties that a written judgment capturing the above reasons for the order would be availed. These are they.

The applicant approached the court through the urgent chamber book on 25 August 2016 after 6:00pm. I directed that the respondents be served and the matter set down for 8:00am on 26 August 2016. At 8:30am it was brought to my attention that the applicants had only served the respondents with the application and that no notice of set down had been served. The Registrar proceeded to issue and serve the notice of set down for 10:00am and the parties duly attended in chambers. The applicants' sought an interim order that they be allowed to exercise their constitutional right to demonstrate and present a petition at (ZEC) Zimbabwe Electoral Commission. They further sought that the respondents be interdicted from interfering, obstructing or stopping the demonstration. Also the respondents were to keep peace while the demonstration was taking place.

The respondents, despite being served with the application at 19:40 hours on 25 August 2016 per the certificate of service filed of record, did not file any opposing papers. At the time of hearing the matter at 10:00am on 26 August 2016, the respondents did not file opposing papers neither did they seek for time to file opposing papers but proceeded to address the court orally. The respondents did not dispute that the matter was urgent but raised a point *in limine* that that the applicant had no cause of action. The respondents scantly replied to the applicant's written and oral assertions.

The application was, strictly speaking, not opposed as it was apparent from Mr *Magadure* for the respondents that other than merely saying "the application is opposed" the submissions were in support of the applicant's right to peaceful demonstration as provided for in the Constitution. I will revisit the respondent's counsel's submissions in due course.

The applicant, as could be discerned from papers and oral submissions, consists of an association of thirteen political parties comprising of Zimbabwe People First, Free Zimbabwe Congress, Zanu Ndonga, ZUNDE African Democratic Party, Progressive Democrats of Zimbabwe, Transform Zimbabwe, Zimbabwe First, DARE, PPDZ, MDC and MDC-T. The applicant, in pursuit of lobbying electoral reforms, approached the first respondent seeking clearance to hold a peaceful demonstration on 26 August 2016. By a letter dated 12 August 2016, the applicant dispatched a notification of intention to have a peaceful demonstration and procession in Harare on 26 August 2016. The letter was attached to the application as Annexure 'A' p 13. The notification letter outlined the purpose of the march, the date, time, expected number of participants and that each political party participating would provide its

marshals to control the people and monitor their members for purposes of peace. The notification letter further outlined the route to be followed as being:

> "from the open area behind Rainbow Towers along Robert Mugabe way to Fourth Street then we turn along Jason Moyo then straight to Harare Street and ZEC HQ".

In response to the notification letter from the applicant, the first respondent issued a letter dated 15 August 2016 Annexure 'B'. Page 14 of the letter acknowledged receipt of the notification to hold a march in Harare CBD. The response in para 3 and 4 reads as follows.

> "3. This office is discouraging the issue of marching in the Central Business District considering the number of participants i.e. 150 000 to be involved in your street demonstration. The crowd cannot be accommodated in the CBD as it interrupts the smooth flow of both human and vehicular traffic.
>
> 1. We however encourage you to send representatives to submit your petition to ZEC headquarters rather than engaging in street demonstration"

According to the applicant, this response to their letter of notification was only delivered on the applicants on 25 August 2016 in the afternoon thus prompting an urgent chamber application in the evening of the 25th of August 2016. The applicant presented that when the need to act arose they were propelled into action and filed the present application. The respondents' counsel, Mr *Magadure,* conceded that the issue of urgency was not in contention. The application was thus properly before the court through the urgent chamber book. It was evident when the need to act arose the applicant sprang to action. The application falls within the four corners of urgency as contemplated by the rules of this court. This is more so when one looks at the circumstances of this matter and the requirements of urgency therein which can be summarised as follows.

1. That the applicant roused into action when the need to act arose.
2. That the urgency is not self-created since the applicant in principle compiled with the requirements outlined in s 25 and 26 of the Public Order and Security Act (POSA) [*Chapter 11:17*].
3. That the applicant will suffer irreparable harm if the relief sought were not to be entertained on an urgent basis given logistical arrangements made in preparation for the march since the applicant constantly checked with the first respondent and got no response, positive or negative till last minute on 25 August in the afternoon when the peaceful demonstration was scheduled for 26 August at 8:00am.

See *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 and *Document Support Centre (Pvt)* v *Mapuvire* 2006 (2) ZLR where the requirements of urgency were ably pronounced.

The applicant, from the papers and oral submissions, was seeking an interdict to stop the respondents from barring a peaceful demonstration to deliver a petition. This type of relief has requirements which go with it for the court to exercise its discretion to accede or not accede to it. The applicant must show

(a) that there is a right even though open to doubt which is the subject matter of the main action which he seeks to protect.
(b) There is an injury actually committed or reasonably apprehended.
(c) that there is absence of a similar or adequate protection by any other ordinary remedy.
(d) that the balance of convenience favours the granting of the interim relief. See *Airfield Investments Pvt Ltd* v *Minister of Lands and Ors* 2004 511 and see also *Boadi* v *Boadi and Another* 1992 (2) ZLR 22 CB Prest: The *Law of Practice of Interdicts SA*: Juta Law 2014 p34-80.

Our law on requirements for temporary or final interdict and urgent applications is settled. In this case given the concession by the parties on urgency it is not viewed as necessary to discuss further on the issue of urgency. The respondent did not present any argument in respect of the application falling under consideration on an urgent basis as respondent's counsel submitted the issue of urgency was not in contention.

The address in "opposition" was under the umbrella of a purported point *in limine* that there is no cause of action. I proposed to come back to the "opposition" which I call a half-hearted opposition for lack of merit. The nature of relief sought when viewed in conjunction with the submissions by Mr *Magadure*, exposed the respondents as having no basis for opposing the application. Mr *Magadure* who conceded that the application is urgent pointed out that the applicants had no cause of action because the respondents did not bar them from carrying out a peaceful demonstration. He highlighted that Annexure 'B', the reply to the notification of an intended peaceful march of 26 August 2016, was simply an opinion of the regulatory authority to discourage and not bar the demonstration. Mr *Magadure* emphasised that, the fact that the first respondent expressed an opinion that his office discouraged the issue of marching did not mean the second respondent barred the demonstration. On being asked to clarify what was meant by not barring but discouraging the demonstration, Mr

Magadure expressly stated that the respondents did not bar the applicants from demonstrating but that what the respondents wanted was a peaceful demonstration. This is what the applicant sought in the notification letter Annexure 'A' and also in the interim relief prayed for in the application. The respondent, clearly in the face of the citizen right to demonstrate peacefully and petition as enshrined in s 59 of the Constitution, could not present arguments for barring the applicants from demonstrating peacefully. Section 59 of the Constitution reads:

> "Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully" my emphasis

The respondent's counsel, in a clandestine unprofessional manner for fear of presenting a contrary view to his interpretation of the reply (Annexure 'B') which did not sanction or authorise the demonstration persisted that the applicants were not barred from peaceful demonstration. The question that loomed large then was what was the basis of opposition. The applicants were seeking to demonstrate peacefully and the respondents did not bar them from demonstrating peacefully. Mr *Magadure* agonised to reconcile the opposition and his submission that all that the respondents wanted was a peaceful demonstration. The cause of action was clear and merely clothing opposition by raising no cause of action as a point *in limine* in the face of the relief sought and evidence outlined in the founding affidavit by Joelson Mugari and supporting affidavit lucidly speaking to the cause of action, did not change the complexion of the baseless opposition. The point *in limine* cannot be sustained given both the applicant and the respondents agreed that the urgent chamber application was properly before the court. Further it was agreed that the application was urgent and both parties had a common interest of peaceful demonstration. Given these concessions when viewed holistically the balance of convenience favoured the application being granted.

Citizens have a right to demonstrate peacefully. The respondents conceded to this point and clamoured that what they wanted was a peaceful demonstration and not that they were barring the applicants when they issued out a letter discouraging the demonstration. For the regulatory authority to end on discouraging and not suggesting an alternative to the exercise of the constitutional right to demonstrate and petition, and to just argue that the applicants were not barred from exercising their constitutional right is ambiguous and displays a clear misapprehension of the function and role of the police in so far as they have a duty to uphold the Constitution. The regulatory authority is not mandated to leave the

applicants who approach it with notification, in terms of the law for purposes of exercising their right to speculate that they have either been authorised or not authorised or that the notification is in order. The import of Annexure 2 as presented by counsel for the respondents was not to bar a peaceful demonstration but discourage it. If one is to accept that, then the Respondents are in support of the relief sought for a peaceful demonstration. There is no opposition filed or orally submitted such that one wonders what Mr *Magadure* sought to achieve by mere utterance that the application is opposed without any substantiation. He in fact submitted for and on behalf of the applicants when he sought to interpret the first respondent's response to the notification to mean the respondents were not opposed to a peaceful demonstration but discouraged the applicants from exercising their constitutionally given right to demonstrate and petition peacefully. If there was room for negotiation then one questions the logic of delay in delivery of the response from the 15th to 25th August 2016 when the demonstration was for the 26th of August. The assertion by the applicants that they made several follow ups after delivering their notification on 12 August was not challenged. This would have facilitated dialogue and any logistical arrangements but then to deliver what was termed discouragement and not barring letter would bring into question the procedural regularity of the respondent's conduct in so far as upholding the Constitution is concerned.

Mr *Magadure* was at pains to reconcile that the respondents did not bar a peaceful demonstration and that he had to maintain an unsupported stance that the application was opposed. One cannot help but lament the legal profession diverting from a noble stance on account of slavitude to instruction at the expense of ethical conduct and justice. A legal practitioner has to endeavour to strike a balance between his client's interests, fellow legal practitioners and at the same time be sincere with the court as an officer of the court. To rise and say an application is opposed and then submit nothing to substantiate the opposition but buttress the applicant's case smacks of abuse of the court process and the justice delivery system. Why should the respondents blow hot and cold? In one breadth they agree the application is urgent and that they did not bar the applicants from peacefully demonstrating and in another breadth say they discouraged the demonstration but did not bar it and as such they are opposed to the application. The court was of the view that it was disingenuous for the respondents to purport to stand in the way of the application when in reality they had no ground on which to do so as the submissions were clear the respondents did not bar and were not against a peaceful demonstration.

The conduct of the respondents as an administrative or regulating authority charged with overseeing upholding of the constitution in the circumstances of this case leaves a lot to be desired. The delay in handing over the response to the notification is unexplained. There is lack of transparency which would lead to infringement of the rights of the applicant. The same conduct persisted during the hearing where in double barrelled submissions the counsel for the respondent sought to portray that they were appreciative of the applicant's constitutional right and as such did not bar but discouraged the demonstration and petition. All they wanted was a peaceful demonstration. This is what the applicants sought so was this an opposed application? The answer is definitely NO. I subscribe to the sentiments of the court in *Afretair Pvt Ltd and Another* v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) at p 21 where it was remarked:

> "It seems to me, to put it in simple terms, that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency. …… Transparency is a more modern but equally valuable word which, venture to suggest, could usefully be used in such decisions to connote openness frankness, honesty and absence of bias, collusions favouritism, bribery and corruption and underhand dealings and considerations of any sort…….
>
> The duty of the court is not to dismiss the authority and take over its functions, but ensure, as far as humanly possible, that it carries out its functions fairly and transparently……"

See also *Silver Trucks (Pvt) Ltd and Anor* v *Director Customs and Exercise* 1999(1) ZLR 490. Although in these cases it was not the police institution handling the matter the same principles are applicable. There has to be clarity and transparency. The applicants, in conformity and compliance with the law on 12 August 2016 notified the police of an intended demonstration on 26 August 2016. They made follow ups but got no reply guidance or directions as provided for by the law for any modification but only got the reply on 25 August not sanctioning the demonstration but barring or discouraging to use the respondent's counsel's words. This sequence of events does not resonate with transparency and or fairness given the applicants were seeking to exercise a clear constitutional right which for all practical terms falls under the respondent's purview of facilitation because of their obvious constitutional mandate to maintain law and order. The respondent's functions were not carried out fairly and it is that which gave rise to the application which for all intents and purpose was not opposed as utterances of the words the matter is opposed turned out to be window dressing.

The applicants sprang to action when the need to act arose on 25 August when they got the reply. The respondents' counsel conceded the application was urgent and that

respondents did not bar a peaceful demonstration but discouraged the same. Outrightly the applicants have a constitutional right to demonstrate and petition peacefully. Having complied with all the necessary requirements, in the absence of forthcoming dialogue for adjustment given the clear right for which in the circumstances the remedy was in getting a court order, and in the absence of any meaningful opposition there is no basis for depriving the applicants of their constitutional right. This is moreso, given the peaceful demonstration and petition ought to be facilitated by the police who have a constitutional mandate to uphold the constitution and enforce the law without fear or favour. This was an urgent application in which applicants sought an interim relief that the respondents be interdicted from barring the applicants from carrying out a peaceful demonstration and petition as provided for by the constitution. The applicants further sought that the respondents facilitate the peaceful demonstration. The final order sought is a declaratur that the applicants have a constitutional right to demonstrate and petition.

From the foregoing in the absence of meaningful opposition I found no reason militating against grant of the order sought. Our constitutional provisions on the right to demonstrate and petition peacefully are in sync with international and regional instruments to which we are a State party. Section 326 of our constitution further buttresses the position by highlighting that customary international law is part of the law of Zimbabwe for as long as it is consistent with the Constitution or an Act of Parliament. Article 20 of the Universal Declaration of Rights and Article 21 of the Covenant on Civil Political Rights speak to the right to peaceful assembly and demonstration and permissible restrictions respectively. Zimbabwe being a constitutional democracy like all other countries who are State parties to these treaties and international conventions, has a duty to respect, promote and fulfil these rights. Clearly a reading of our constitution reveals that the fundamental rights such as the right to demonstration and petition peacefully may only be limited 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. *In casu* no submissions were made in opposition of the exercise of the fundamental right to peacefully demonstrate and petition. In principle the parties were in agreement in so far as the right to peacefully demonstrate is provided for by the supreme law of the country, the Constitution. In the absence of a law and compelling grounds for limitation of the right it would be inappropriate for the court to stand in the way of the parties in the face of clear constitutional provisions sanctioning the fundamental rights.

I must however, mention that the fundamental right to demonstrate peacefully as provided for in the Constitution is not absolute. The right has to be exercised responsibly so as to ensure that it does not infringe on other citizens' rights. Section 86 of the Constitution is illustrative. There is need for the applicant to take responsibility to ensure peace as outlined in their notification letter and equally there is need for the respondents to facilitate the demonstration so as to ensure that the right to peaceful demonstration and petition is exercised. It is incumbent upon the parties to comply with the Constitution and follow international best practise so as to maintain peace during the procession which of necessity has to be facilitated by the police who are duty bound in terms of the Constitution to maintain law and order, detect, investigate and prevent crime, preserving the internal security of Zimbabwe, protecting and securing the lives and property of people and upholding the Constitution enforcing law without fear or favour. Section 219 of the Constitution is instructive.

Under the backdrop of the above reasons the consent order was granted, with the participation in formulation of the terms of the order and consent of both Mr *Kadzere*, for the applicant and Mr *Magadure,* for the respondents.

Kadzere, Hungwe & Mandevere, applicant's legal practitioners
Civil Division, respondents' legal practitioners