REPORTABLE Z.L.R. (6)

Judgment No S.C. 9\2002
Civil Application No 34\2002

(1) TENDAI LAXTON BITI (2) MOVEMENT FOR DEMOCRATIC CHANGE v (1) MINISTER OF HOME AFFAIRS (2) THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA, CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE FEBRUARY 15 & 28, 2002

A.P. de Bourbon SC, for the applicants

Y. Dondo, for the respondents

SANDURA JA: This application was brought directly to this Court in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution"). In it the applicants sought a declaration that s 24 of the Public Order and Security Act [Chapter 11:17] ("the Act") contravened sections 20 and 21 of the Constitution.

The background facts are as follows. The first applicant ("Biti") is a Member of Parliament for the constituency of Harare East. He is a member of the National Executive of the Movement for Democratic Change ("the MDC"), the main opposition party in Zimbabwe.

On 28 January 2002 Biti, acting in terms of s 24(1) of the Act, wrote to the Officer Commanding the Police, Harare Suburban District, Chief Superintendent Kupara ("Kupara"), notifying her that the MDC would be holding twelve public meetings in the Harare East constituency from 2 to 23 February 2002. The date and venue of each meeting, as well as the time at which each meeting was to commence, were given.

In reply, Kupara informed Biti that only four of the twelve meetings could be held. The rest were prohibited for various reasons. Aggrieved by that decision the applicants approached this Court and filed this application, alleging that s 24 of the Act infringed their rights of freedom of expression and freedom of assembly.

Section 24 of the Act reads as follows:-

"(1) Subject to subsection (5), the organiser of a public gathering shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the gathering is to be held:

Provided that the regulating authority may, in his discretion, permit shorter notice to be given.

(2) For the avoidance of doubt, it is declared that the purpose of the notice required by subsection (1) is -

(a) to afford the regulating authority a reasonable opportunity of anticipating or preventing any public disorder or a breach of the peace; and

(b) to facilitate co-operation between the Police Force and the organiser of the gathering concerned; and

(c) to ensure that the gathering concerned does not unduly interfere with the rights of others or lead to an obstruction of traffic, a breach of the peace or public disorder.

(3) Any Saturday, Sunday or public holiday falling within the four-day period of notice referred to in subsection (1) shall be counted as part of the period.

(4) Where there are two or more organisers of a public gathering, the giving of notice by any one of them in terms of subsection (1) shall be a discharge of the duty imposed upon the other or others by that subsection.

(5) This section shall not apply to public gatherings of a class described in the Schedule.

(6) Any organiser of a public gathering who fails to notify the regulating authority for the area of the gathering in accordance with subsection (1) shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

I now wish to set out the relevant provisions of sections 20 and 21 of the Constitution.

The relevant part of s 20 reads:-

"(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, the economic interests of the state, public morality or public health;

(b) …; or

(c) …;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The relevant part of s 21 reads:-

"(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

(2) …

(3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) - (d) …;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles."

It is well established that in a democratic society the freedom of expression and the freedom of assembly and association are of great importance. As this Court stated in the case of *In re Munhumeso & Ors* 1994 (1)ZLR 49(S) at 56G-H:-

"The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the

> foundation of a democratic society and are 'one of the basic conditions for its progress and for the development of every man', per European Court of Human Rights in *Handyside v United Kingdom* (1976) 1 EHRR 737 at para 49. See also *Whitney v California* 274 US 357 (1926) at 375; *Cox v Louisiana(2)* 379 US 559 (1965) at 574; *S v Turrell & Ors* 1973 (1) SA 248 (C) at 256G-H.
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> Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve: (i) it helps an individual obtain self fulfilment; (ii) it assists in the discovery of the truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See *Pandey Constitutional Law of India* 24 ed at p 118. In sum, what is at stake is the basic principle of the 'people's right to know'. See *Indian Express Newspapers (Bombay) v Union of India* (1985) 2 SCR 287."

However, this Court has recognised the need to reconcile the rights of freedom of expression and assembly with governmental responsibility to ensure the sound maintenance of public order. There must be a compromise which will accommodate the exercise of the protected rights within a framework of public order which enables ordinary people to go about their business without obstruction. See: *In re Munhumeso & Ors, supra,* at p 58D-H.

Having said that, I now proceed to consider whether s 24 of the Act infringes the rights of freedom of expression and freedom of assembly. If it does, a further issue to consider is whether a derogation from these protected rights is reasonably justifiable in a democratic society.

S 24 of the Act provides that the organiser of a public gathering shall give at least four clear days' written notice of the holding of the gathering to the regulating authority for the area in which the meeting is to be held, and that if he fails to do that he commits an offence which renders him liable to a fine not exceeding ten

thousand dollars or to imprisonment for a period not exceeding six months, or to both such fine and such imprisonment. I have no doubt in my mind that the section infringes the rights of freedom of expression and freedom of assembly. The right to assemble and the right to express one's views publicly are fundamental in a democratic society. The need to give notice of the intention to exercise that democratic right is an infringement of that right.

However, that is not the end of the matter because s 20(2)(a) of the Constitution permits the enactment of a law, or anything done under the authority thereof, which derogates from the right to freedom of expression in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society.

Similarly, s 21(3)(a) of the Constitution permits the enactment of a law, or anything done under the authority thereof, which derogates from the right to freedom of assembly and association, in the interests of public safety and public order to an extent which is reasonably justifiable in a democratic society.

In order to succeed, therefore, the applicants had to show that this Court should not accept that s 24 of the Act is reasonably justifiable in a democratic society on the grounds of public safety or public order. I am not convinced that they have succeeded in doing so.

As can be seen from the provisions of s 24(2) of the Act, the notice required in terms of s 24(1) serves two main purposes. The first is to afford the

regulating authority a reasonable opportunity of anticipating or preventing any public disorder or any breach of the peace, and the second is to ensure that the gathering concerned does not unduly interfere with the rights of other people or lead to an obstruction of traffic, a breach of the peace or public disorder.

In my view, the above objectives are covered by the provisions of s 20(2)(a) and s 21(3)(a) of the Constitution.

What is reasonably justifiable in a democratic society is a concept which cannot be defined with precision. As this Court said in the *Munhumeso* case, *supra*, at p 64B:-

> "What is reasonably justifiable in a democratic society is an illusive concept - one which cannot be precisely defined by the courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it arbitrarily invades the enjoyment of a constitutionally guaranteed right. See, generally, *Commissioner of Taxes v CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 370F-372C, 1990 (2) SA 260 (ZS) at 265B-266D."

In my view, s 24 of the Act does not arbitrarily or excessively invade the enjoyment of the freedom of expression and the freedom of assembly and association. It merely requires the organiser of the public gathering to give the written notice to the regulating authority. Most importantly, it does not give the regulating authority the power to prohibit the gathering or to order the persons taking part in the gathering to disperse. These powers are given to the regulating authority in terms of other sections of the Act which are not under consideration in the present application.

Incidentally, there is legislation in the United Kingdom which requires the organisers of a procession to give written notice to the police. S 11 of the Public Order Act 1986, in relevant part, reads:-

> "(1) Written notice shall be given in accordance with this section of any proposal to hold a public procession intended -
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> (a) to demonstrate support for or opposition to the views or actions of any person or body of persons;
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> (b) to publicise a cause or campaign; or
>
> (c) to mark or commemorate an event …
>
> (2) – (6) …
>
> (7) Where a public procession is held, each of the persons organising it is guilty of an offence if -
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> (a) the requirements of this section as to notice have not been satisfied; or
>
> (b) the date when it is held, the time when it starts, or its route, differs from the date, time or route specified in the notice."

In addition, s 2(1) of the same Act has the following provision:-

> "Where three or more persons who are present together use or threaten unlawful violence and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety, each of the persons using or threatening unlawful violence is guilty of violent disorder."

In my view, the application cannot succeed.

As far as costs are concerned, in line with previous decisions of this Court such as *Hewlett v Minister of Finance & Anor* 1981 ZLR 571 (SC), and *Bull v*

Minister of Home Affairs 1986 (1) ZLR 202 (SC), I think that there should be no order as to costs.

In the circumstances, the application is dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree

CHEDA JA: I agree

ZIYAMBI JA: I agree

MALABA JA: I agree

Atherstone & Cook, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners