REPORTABLE (71)

Judgment No. SC. 79/05
Civil Appeal No. 71/05

THOKOZANI KHUPHE v

(1) THE OFFICER IN CHARGE, LAW AND ORDER SECTION, ZRP BULAWAYO CENTRAL STATION
(2) THE COMMISSIONER OF POLICE, ZRP HARARE
(3) THE ATTORNEY-GENERAL OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & BERE AJA
BULAWAYO, NOVEMBER 28, 2005.

J Sibanda, for the appellant

B Ndove, for the respondents

CHEDA JA: After hearing the appellant's counsel, we dismissed this appeal with costs and indicated that the reasons would follow. These are they.

The appellant was a duly elected Member of Parliament for the Makokoba Constituency in Bulawayo at the time of the incident that led to this appeal. She represented the Movement for Democratic Change, an opposition political party in Zimbabwe.

In January 2005 new constituency boundaries were announced in preparation for the general elections that were to take place in March 2005.

On 23 January 2005 the appellant called for a meeting of her constituents at her restaurant, which is along Leopold Takawira Avenue in Bulawayo. More than eighty people from various wards of her constituency attended the meeting. Members of the Zimbabwe Republic Police arrived, broke up the meeting and arrested the appellant.

The appellant was charged with contravening s 24(6) of the Public Order and Security Act [*Chapter 11:17*] ("the Act") (also known as "POSA") - holding a public meeting without notifying the authority concerned. She was then placed on remand by the magistrate's court and at the time of the hearing of this appeal she was still on remand in respect of that charge.

The appellant, being of the view that the meeting she had called was a private one and did not fall under the type of meetings or gatherings prohibited by s 24 of the Act, approached the High Court seeking a declaration in the following terms:

> "1. That it is hereby declared that section 24 of the Public Order and Security Act [*Chapter 11:17*], as read with section 2 thereof, does not oblige the organiser or convenor of a meeting to notify the regulating authority concerned, if such meeting or gathering be a private meeting or gathering.
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> 2. For the avoidance of doubt, the organiser of such meeting as is referred to in (a), above, shall not be held to have contravened section 24 of POSA, as read with section 2 thereof, where the meeting or gathering concerned is not a public meeting or gathering.
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> 3. The respondents pay the costs of this application jointly and severally, the one paying to absolve the others."

The appellant also sought the following interim relief:

"Pending confirmation or the discharge of the order, that this order shall operate as a temporary order –

1. Restraining the second respondent, through his officers, from disrupting, breaking up or in any way interfering with the holding of any private meeting held by the applicant, whether such meeting be held in a private place or other place.

2. Restraining the second respondent, through his officers, from causing the arrest of the applicant for holding such meetings."

The High Court declined to grant the *declarator* and ordered the appellant to pay the costs.

The appellant appealed against this refusal by the High Court to grant the *declarator* sought.

I find the appellant's position to be difficult and confused, unless there is an error in the typed judgment of the High Court. In his judgment the Judge of the High Court stated:

"Mr Sibanda urged me not to dismiss the application but instead to decline to make the *declarator*."

At the end of his judgment the High Court Judge stated:

"Accordingly I decline to grant the *declarator* sought, with the applicant paying the costs of the application."

It is not clear why the appellant, having asked the court to decline to grant the *declarator* and the court having done exactly that, now appeals to this Court against that order.

Turning now to the merits, s 24 of the Act reads as follows:

> "24. (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 …
>
> 2 –6 …."

The main issue raised by the appellant is whether the meeting that she called was a public or a private meeting.

The appellant is currently on remand. The main issue to be determined at her trial is clearly whether her gathering was a public one or a private one. If it was not a public meeting, as she submits, she will be acquitted. If the gathering was a private one as opposed to a public one, that is a defence that is still available to her, which could lead to an acquittal if proved. If it was not, the trial court will make an appropriate finding.

This issue is therefore one to be determined by the trial court, after hearing evidence. It is neither for the High Court to take on itself to determine, nor for this Court to do so on appeal. It is a question of interpretation, and depends mainly on the evidence that will be led at the trial. Until then, this Court is not in a position to interfere. This is a court of appeal. The appellant can only come on appeal against the determination of the magistrate's court once the matter has been determined in a manner that she considers to be incorrect.

I find that the High Court was correct in declining to grant the *declarator*, as the application to it had no merit. In any event, there is no point in issuing a *declarator* concerning private meetings because that is common cause. To do so would be simply to repeat to the police what they already know. The police, in their request for remand, said the appellant organised a public, not a private, gathering.

The appeal to this Court has no merit either and that is why we ordered it dismissed with costs.

MALABA JA: I agree.

BERE AJA: I agree.

Job Sibanda & Associates, appellant's legal practitioners

T Hara & Partners, respondents' legal practitioners