BLESSED MHLANGA
versus
MAGISTRATE NDUNA N.O.
and
PROSECUTOR GENERAL
and
MINISTER OF JUSTICE & PARLIAMENTARY AFFAIRS (*sic*)

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 September 2021

Date of written judgment: 20 October 2021

Opposed application

R. Mabwe, with her *R. Magundani*, for the applicant
D. Machingauta, for the first and third respondents
K. H. Kunaka, for the second respondent

MAFUSIRE J

[1] The applicant seeks several orders. The first is a mandatory interdict. He wants the respondents to avail for public access the complete record of proceedings in the magistrate's court in the matter of *State v Hopewell Chin'ono*, CRB 6801/20, particularly those proceedings held *in camera*. Verbatim, the first part of the draft order reads:

> "1. The Respondents be and are hereby directed to avail the complete record of the proceedings in the matter *State vs Hopewell Chin'ono CRB 6801/20* for access by the public in particular the record of the proceedings that were held in camera."

[2] Straightaway questions arise. Why does the applicant want that record? Who is he? Does he have a right to the record? Why does he want the public to have access to it? Does he speak for the public? In terms of what mandate? Who are the respondents against whom he seeks this order? Are they the correct custodians of that record? Have

they denied him access? Has he asked? And so on. The applicant thinks he has answered these questions.

[3] The applicant is a journalist. That is common cause. In fact, there is no dispute of fact in this whole matter. The facts are these. In July 2020 the applicant, in the practice of his profession, and in the course of his duties, was covering and disseminating information on and about the arrest and detention of, and the bail application by a fellow journalist, one Hopewell Chin'ono ["***Chin'ono***"]. Chin'ono was being charged in the magistrates' court with incitement to participate in a certain gathering with intent to promote public violence, breach of peace or bigotry. The details are not important.

[4] Chin'ono was denied bail. The first respondent was the presiding magistrate. Chin'ono appealed. The appeal was dismissed. Again the details are not important. In August 2020 Chin'ono made a fresh bail application at the magistrate's court. This was on the basis of alleged changed circumstances. Again the first respondent was presiding. It is what happened in those proceedings that forms the foundation of this application. The applicant was in the public gallery. In terms of the Constitution and a coterie of other laws, court proceedings are open to the public except in certain circumstances.

[5] As part of the evidence on changed circumstances, Chin'ono would lead evidence on the conditions under which prisoners or detainees or inmates lived. It was intended to show how the prison authorities were allegedly in breach of not only the several guidelines and protocols established by the World Health Organisation [WHO] to combat the spread of the covid-19 world pandemic, but also the measures adopted and incepted by central Government in line with those WHO guidelines.

[6] Prisons did not want Chin'ono's evidence on that aspect to be disclosed in public. They thought that it would touch on matters concerning prisons security. So the public prosecutor applied that such evidence be given *in camera*. Chin'ono's defence team objected. The objection was overruled. The first respondent held that such evidence would compromise prisons security. He reasoned that Chin'ono's evidence would not be diminished in its value in the determination of the bail application if he gave it *in camera*. Following that ruling, the first respondent directed that members of the public,

the press and any legal practitioners other than those comprising Chin'ono's defence team should leave the court room. The public complied. The applicant was there.

[7] In this application, the applicant argues that the information that the first respondent ordered that it be redacted from the public is, in fact, in the public interest. The public has a right to know the conditions under which prisoners live. Also, it is his constitutional duty and right, by virtue of his profession, to disseminate such information to members of the public. The court must have sight of such information. Such information is necessary for the protection of the right to health, the right to life, the right to a fair hearing, the right of access to information and the freedom of the media. The Freedom of Information Act [*Chapter 10:33*] imposes a duty on public entities to disclose information in the interest of public accountability. Section 61 of the Constitution guarantees to every person the right to receive and communicate ideas and other information. Section 62 grants to every citizen or permanent resident and every person including the media, the right of access to any information held by the State in the interests of public accountability.

[8] The applicant concludes that the conduct of the first respondent in excluding the public from Chin'ono's bail application on the day in question violated several of his rights. As a result, the second part of his draft order seeks a *declaratur*. Verbatim, it reads:

> "2. It is declared that:
>
> i. The conduct of the Respondents, by holding in-camera proceedings and subsequently redacting from the public record evidence of Covid 19 protocols at Harare remand prisons in the matter *State vs Hopewell Chin'ono CRB 680/20* was unlawful and in violation of Sections 5 and 6 of the Freedom of Information Act Chapter 10:03 as read with Section 61 and 62 of the Constitution of Zimbabwe.
>
> ii. ……."

[9] The applicant further argues that s 61 and s 62 of the Constitution protect the freedom of expression and the freedom of the media. Section 3 of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*] ["***the Courts and Adjudicating Authorities Act***"] empowers a court or an adjudicating authority, either on its own, or on the application of a party to the proceedings, to exclude all persons, or class of

persons, from proceedings. The applicant argues that this provision is in conflict with s 69 of the Constitution. Section 69 of the Constitution guarantees an accused person's right to a fair and public trial. So by reason of this alleged conflict, the second part of the applicant's draft order seeks a declaration of constitutional invalidity in respect of s 3 of the Courts and Adjudicating Authorities Act. Verbatim, the draft order reads:

> "2. It is declared that:
>
> i. ……..
>
> ii. Section 3 of the Courts and Adjudicating Authority [*sic*] (Publicity Restrictions) Act, Chapter 7:04 to the extent that it limits the right to a fair hearing is inconsistent with Section 69 of the Constitution and therefore unconstitutional."

[10] In the draft order, the applicant sought costs against the respondents jointly and severally. That prompted the first respondent to file a notice of opposition, solely to deal with the aspect of costs. He averred that whilst he accepts that he is now *functus officio* and would ordinarily not be involved in any proceedings in which his decision was challenged, in this particular case, he has had to be involved because the order of costs is sought against him in his personal capacity. He submits that this is wrong. Judicial officers should not adjudicate over cases at the risk of costs being ordered against them in their personal capacities for anything done in the lawful discharge of their constitutional duties. At the hearing, Ms *Mabwe*, for the applicant, readily conceded the impropriety of seeking costs against the first respondent. She abandoned the applicant's claim in this regard.

[11] The second respondent is the Prosecutor General. He has opposed all the orders sought by the applicant. He avers that he is not the custodian of the record of proceedings. Therefore, he cannot be asked to produce it. On the other claims, he supports the judgment of the first respondent in excluding members of the public from Chin'ono's second bail application. He says this was in the interests of the security of prisons. He argues that none of the rights the applicant purports to vindicate are absolute. In appropriate situations, and in terms of s 86 of the Constitution, any such rights may be abrogated or limited.

[12] In my judgment, the relief sought in terms of Para 1 of the applicant's draft order [i.e. to avail the record of proceedings] cannot be granted. It is incompetent for a number of reasons, most of them elementary really. None of the parties the applicants has brought to court as respondents is the custodian of the record in question. The claim is misdirected. Ms *Mabwe* was in much difficulty on this particular point. It may be debatable whether the first respondent can properly be ordered to avail the record. I will deal with that shortly. But as against the second and the third respondents, the order sought is plainly incompetent. None of them keeps court records. In fact, the third respondent does not exist. There is no Ministry known by the name cited. But even if it was meant to refer to the Minister of Justice, ***Legal*** and Parliamentary Affairs, which is not the name cited, still he is not the custodian of court records. Nor the second respondent. The justification given for citing the second respondent has been that he is the one, through the public prosecutor for that day, that moved for the order to have the proceedings in question held *in camera*. This is strange. The order was not made by the second respondent. It was made by the first. Therefore, any order against either the second or third respondent in this regard would be a *brutum fulmen*.

[13] Regarding the question whether the first respondent may be the right person against whom an order to produce a record of proceedings in the magistrate's court can properly be made, regard must be had to s 6(2) of the Courts and Adjudicating Authorities Act. This provision lists such persons or officials as are reposed with the power to allow access to the records of proceedings in the various courts. In the case of proceedings of the Supreme Court or the High Court, it is the registrars of these courts. In the case of proceedings of the magistrate's court, it is ***a*** magistrate. It is not specified which magistrate. Certainly the provision does not say it is the magistrate that presided over those proceedings. This is in contrast to the provision relating to the proceedings of any other court or adjudicating authority. In regards to these, the power to allow access to the record of proceedings is given to the person presiding over, or constituting such court or adjudicating authority.

[14] In including the first respondent among the list of those respondents against whom the order to avail the record of proceedings should be made, the applicant makes no

reference at all to s 6 of the Court and Adjudicating Authorities Act. In his papers, and in argument, the sole reason given for citing the first respondent is simply that he was the person that issued the order the applicant objects to. But the applicant is now *functus officio*. He keeps no such records. The applicant is adamant that he is not before this court on appeal or review. But the whole tenor of his argument in the papers is like he is in court on appeal or review. He argues that the first respondent was wrong to issue the order in question because he violated a number of constitutional rights reposed by the Constitution in a person like himself. In effect, he wants the first respondent's order set aside, albeit not in so many words. But Paras 1 and 2.i. of the draft order are a complete give away. How does this court go past the order of the first respondent outside a review or an appeal? In particular, how does this court, outside review or appeal proceedings, declare that the **conduct** of the respondents [*sic*] in "… *holding in-camera proceedings and subsequently redacting from the public record evidence of Covid 19 protocols … was unlawful* …?"

[15] This whole application is just a disguised appeal or review. It is incompetent. The applicant, despite his protestations to the contrary, cannot bring such proceedings. He was not a party to those proceedings. Even if he was, he is way out of time. For these reasons, the order sought in Para 1 of the draft order cannot be granted. They are partly the same reasons why the declaratory orders in the rest of the draft order cannot be granted also. But there are other reasons.

[16] The applicant argues that he did not have to be part of Chin'ono's bail application proceedings in order to have standing to bring this application. He argues that as long as he can show that he is that person as referred to in s 61and s 62 of the Constitution, as read with s 7 of the Freedom of Information Act, and that if he can also show that those rights as are enshrined in those provisions were breached by the first respondent's order, then he is entitled to approach the court at any time, and in his own right. If that be his stance, it is has been difficult to appreciate why he has linked his application to Chin'ono's bail proceedings. It is not enough to simply allege that he was part of the people who were ordered out of the court room.

[17] Relevant portions of s 61 of the Constitution read:

> "**61 Freedom of expression and freedom of the media**
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> (1) Every person has the right to freedom of expression, which includes—
>
> [a] freedom to seek, receive and communicate ideas and other information;
>
> [b] ……
>
> etc."

[18] Relevant portions of s 62 of the Constitution read:

> "**62 Access to information**
>
> (1) Every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interest of public accountability.
>
> (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right."

[19] Relevant provisions of the Freedom of Information Act read:

> "**5 Duty to disclose information**
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> Subject to this Act, every public entity, public commercial entity or holder of a statutory office shall have a written information disclosure policy through which it discloses information in the interests of public accountability or that is required for the exercise or protection of a right.
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> 6 ……
>
> **7 Requests for access to information**
>
> (1) Any person who wishes to request access to information from any public entity, public commercial entity or the holder of a statutory office in accordance with the rights under this Act may apply in writing in a prescribed manner to an information officer of the public entity, public commercial entity or holder of a statutory office concerned.
>
> (2) ……..
>
> (3) ……"

[20] Section 25(1) of the Freedom of Information Act aforesaid provides for the protection of information in bail and other legal proceedings in certain situations. These include

situations where disclosure could, in terms of subsection (1)(b)(iii)(D), *inter alia*, facilitate the commission of a contravention of the law, including escape from custody. Then sub-section (2) goes on to say:

> "(2) Information may not be refused in terms of subsection (1)(b)(iii)(D) insofar as it consists of information about the general conditions of detention of persons in custody."

[21] There is a raft of other statutes, laws and international legal instruments that provide for the right to a public trial and of access to the record of proceedings. These include s 5 of the Magistrates Court Act [*Chapter 7:10*]; the International Covenant on Civil and Political Rights; the European Convention on Human Rights, and the African Charter on Human and People's Rights.

[22] As mentioned before, in the draft order, the applicant wants a declaration of invalidity of s 3 of the Courts and Adjudication Authorities Act for being inconsistent with s 69 of the Constitution to the extent that it limits the right to a fair hearing. In paraphrase, the impugned s 3 empowers a court, at any stage of the proceedings, either *mero motu*, or on the application of a party, to make an order, if necessary or expedient to do so, excluding from the proceedings, all persons or such class of persons as the court may specify, except for the parties themselves or their legal representatives. A whole list of guidelines are given on how the court may go about deciding whether or not to issue an exclusion order. Among others, the court must be satisfied that the exclusion order is necessary or expedient to do so in the interests of defence, public safety, public order or the economic interests of the State.

[23] Section 69 of the Constitution reads:

> "**69 Right to a fair hearing**
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> (1) Every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court.
>
> (2) In the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.
>
> (3) Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute."

[24] Regarding the rights of access to the courts; the right to a fair and public trial; the right of access to information held by the State or its agencies; the power of a court to exclude the public, or a section thereof, from attending certain court proceedings, or more precisely, the power to order that certain proceedings be held *in camera*; the power of the State or public agency to suppress the disclosure of certain information, and so on and so forth, my brief synthesis of the relevant constitutional and other statutory provisions is this. Court proceedings are public. This is designed to guarantee fairness. The public, including the press, have the right to information held by the State or any of its agencies. This is designed to guarantee public accountability. However, except for the rights specified in s 86(3) of the Constitution, the enjoyment of all other rights as given by the Constitution and other statutes may be proscribed in terms of a law of general application in accordance with certain parameters. In particular, the courts and other adjudicating authorities have the power, *inter alia*, to exclude the public, or a section thereof, from attending certain proceedings for a variety of reasons.

[25] In the present case, the parties, particularly the applicants, have entered into a lengthy discourse on the nature of the rights accorded the public and on such limitations as are imposed by s 86 of the Constitution. They have gone into a lengthy sermon as to whether the rights the applicant seeks to vindicate are such rights the enjoyment of which may be limited in terms of s 86(2) of the Constitution, namely whether the extent of that limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

[26] I shall not be drawn into a discussion of these rights and the limitations on them. The application is convoluted. Demonstrably, the applicant has conflated issues. He says the purpose of seeking the record in question is so that he can see and read for himself what Chin'ono said in evidence on that day. The grand purpose is so that he, in the exercise of his rights as a journalist, can disseminate that information to the public. He says the public is entitled to it. It needs to know what conditions obtain in our prisons. It is for the sake of the health and safety of the public. He says he needs the information to check whether the guidelines by WHO are being observed in the prisons. Disclosure of Chin'ono's evidence on that day will ensure public accountability by the prisons.

Prisons security is not one of the grounds upon which the public may be refused access to a record of proceedings.

[27] I refrain from entering the parties' debate over such rights and duties because the applicant's case is flawed in some other fundamental respects. All rights are given for a purpose. So are the duties. If the applicant genuinely wants to know what Chin'ono said in evidence on that day, he can simply ask him. The order by the first respondent did not block or gag Chin'ono from disclosing his evidence outside court. If the applicant wants to know what conditions obtain in prisons, he can simply bring an application against the prisons authorities at any time without linking his cause or aligning his rights to Chin'ono's bail matter in August 2020. At the hearing, Ms *Mabwe* argued that this would not help the applicant's cause. She said the applicant wants to know the conditions in prisons *as at that time* and as told by Chin'ono. This sounds absurd. Why not ask Chin'ono what he said?

[28] As to the conditions obtaining in the prisons, the applicant can proceed directly against the prisons authorities themselves at any time. He wants to tell the world what obtains in the Zimbabwean prisons. But prisons have not been cited. They are not before the court. Their interest in the matter is plain and obvious. There is a serious misjoinder there. That is another reason why the relief sought in Para 1 of the draft order cannot be granted. There are still others.

[29] To be able to access a record of proceedings, one has to ask. The applicant relies on the Freedom of Information Act. But as shown above, s 7 of that Act directs that any person wishing to request access to information from any public entity applies in writing in a prescribed manner to an information officer of the public entity. The applicant does not say he applied for the record and was denied access. Despite making reference to this Act, he purports to be vindicating a right of access stemming directly from s 62 of the Constitution. But s 62(4) of the Constitution provides that legislation must be enacted to give effect to this right. That legislation is plainly this Freedom of Information Act. But the applicant does not base his application on any breach of it. He bases it on the order of the first respondent. That is conflating issues. As said already, that order cannot

competently be set aside outside an appeal or review process. Thus, the relief sought in Para 2.1 of the draft order cannot be granted. That leaves Para 2.ii. namely, the declaration of constitutional invalidity.

[30] No proper ground has been laid out why s 3 of the Courts and Adjudicating Authorities Act should be struck down. Just because the first respondent excluded the public from hearing Chin'ono's evidence on the day in question cannot be a valid ground. I must explain.

[31] It is true that in moving the first respondent to exclude the public from Chin'ono's evidence on the day in question, the State relied on s 3 of the Courts and Adjudicating Authorities Act. But in his judgment, the first respondent did not rely on that provision. He relied on s 86 of the Constitution and said that it provided for the limitation of fundamental rights. In issuing the exclusion order, he said that it was necessary to protect the security of the prisons. He also relied on international legal instruments such as the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, the Constitution of the Republic of South Africa, the African Charter on Human and People's Rights, among others, and said that they all provide some form of limitations on the enjoyment of certain rights and freedoms.

[32] Whether the decision by the first respondent was right or wrong cannot be decided in these proceedings. As said repeatedly, these proceedings are neither an appeal nor a review. If, as he insists, the applicant must approach the court to vindicate any rights he believes are reposed in him by the Constitution, he must do so at least in some capacity. He has not come to court as an appellant on appeal or an applicant on review. Nowhere in his papers does he refer to s 85 of the Constitution. This is the provision that grants to a cluster of persons the right of direct access to the courts for the enforcement of fundamental human rights and freedoms. These are:

(a) any person acting in their own interests;

(b) any person acting on behalf of another who cannot act for themselves;

(c) any person acting as a member, or in the interests, of a group or class of persons;

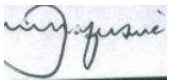
(d) any person acting in the public interest;

(e) any association acting in the interest of its members.

[33] But even assuming that the applicant has approached the court in one or other of the capacities as set out in s 85 above, which he has not, he cannot competently call for the striking down of the impugned provisions because none of the interested parties is before the court. The applicant has not cited the Parliament of Zimbabwe which is the body that promulgated that law. He has not cited the President of the Republic who assented to that law. He has not cited the Attorney-General who is the chief law office for Government. And as mentioned earlier, the Minister of Justice, Legal and Parliamentary Affairs who is the head of Government business in Parliament has been improperly cited. This serious misjoinder betrays the dominant nature of the proceedings. They are an appeal or review in disguise.

[34] In the circumstance the applicant cannot succeed. It is hereby dismissed with costs.

20 October 2021



Scanlen & Holderness, legal practitioners for the applicant
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National Prosecution Authority, legal practitioners for the second respondent