

MOVEMENT FOR DEMOCRATIC CHANGE (MDC-T)
versus
OFFICER COMMANDING BULAWAYO
CENTRAL DISTRICT POLICE N.O
and
THE COMMISSIONER GENERAL, ZIMBABWE POLICE N.O
and
THE MINISTER OF HOME AFFAIRS N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 15 JULY 2016

Urgent Chamber Application

K. Ngwenya for the applicant
Ms R. Hove for the respondents

MATHONSI J: Chapter 4 of the current constitution of Zimbabwe embodies the declaration of rights. Part 1 sets out the application and interpretation of the chapter and in terms of s44 the state and every person and every institution and agency of government at every level must respect, protect, promote and fulfill the rights and freedoms set out in chapter 4. It is a chapter which, in terms of s45, binds the state and all executive, legislative and judicial institutions and agencies of government at every level. Section 46 requires courts of law to give full effect to the rights and freedoms enshrined in chapter 4.

Part 2 of Chapter 4 of the Constitution of Zimbabwe contains the fundamental human rights and freedoms that are protected by the supreme law and must be respected, protected and promoted by the state and every institution or agency of government. In fact the constitutional imperatives of those fundamental rights could not have been more clearer and unambiguous.

One of the fundamental freedoms is the freedom to demonstrate set out in s59 of the constitution which provides:

“Every person has the right to demonstrate and to present petitions, but these rights must be exercised peacefully.”

Therefore the only qualification for the enjoyment of the freedom to demonstrate is that it must be exercised peacefully.

The applicant is a political party and the main opposition party in the country. It says that its Bulawayo Province Women Assembly has organized a demonstration to be undertaken by women on 16 July 2016 in Bulawayo. They would like to engage in a peaceful march in the Central Business District to register their displeasure against hunger and poverty that is gripping them. In that regard, its Organising Secretary notified the officer commanding Bulawayo Central District of the intended activity by letter dated 11 July 2016 which reads:

“RE: LETTER OF NOTIFICATION

Bulawayo Women are notifying of their intention to hold a peaceful march against hunger and poverty on Saturday 16th July 2016 starting at 1000 hours to 1300 hours. Starting point City Hall Turn Right into Leopold Takawira, Turn Right into R. G Mugabe St, Turn Right into 9th Avenue, Turn Right into JMN Nkomo St, Turn Right into Leopold Takawira and back to the CITY HALL. Marshals will be strategically placed around the demonstrators to ensure that there is order and keep to the designated routes and prevent interference from the public.

Yours sincerely

Florence Nyika
Organising Secretary
MDC –T Bulawayo Province.”

The first respondent quickly responded to that notification by letter of 12 July 2016 which reads in pertinent part thus:

“REF: NOTIFICATION TO HOLD A PEACEFUL DEMONSTRATION ON 16/07/16

This office acknowledges receipt of your correspondence dated 11/07/16 which you intend to hold a demonstration (sic) from Bulawayo City Hall into CBD and back on 16/07/16 from 1000-1300 hours. I regret to inform you that the march/demonstration cannot be sanctioned due to the following reasons:

- The situation on the ground is volatile following violent protests and looting which we recently experienced as a result of demonstration which occurred on the 06th of July 2016.
- Cars were stoned, shops vandalized and looted grinding business to a halt and the police is still seized with the challenges of bringing the culprits to book.

- There is no guarantee for security as most of our officers have been consumed by the situation mentioned above.

Thanking you in advance for your usual co-operation.

Regulating Authority
Bulawayo Central District.”

The refusal to sanction the march has prompted the applicant to approach this court on an urgent basis seeking interim relief in the following:

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the 1st respondent’s decision contained in a letter dated 12 July 2016 addressed to the applicant prohibiting the applicant’s planned peaceful march is unconstitutional.
2. That the respondents, jointly and severally one paying the other to be absolved pay costs of this application.

INTERIM RELIEF GRANTED

That pending confirmation or discharge of this provisional order applicant be and is hereby granted the following relief:

1. That the 1st respondent or anyone acting through him or his instruction is and are hereby ordered not to interfere with the applicant’s planned peaceful march on Saturday 16th July 2016 as per the route described in the notification letter attached to this application marked “A”.
2. That the respondents or anyone acting through them be and are hereby interdicted from interrupting, disturbing and/or discouraging applicant’s supporters and members from participating in the peaceful march of Saturday 16th July 2016.”

In her founding affidavit, the organizer of the event Florence Nyika, states that the march against hunger and poverty involves women who have been affected by the deteriorating socio-economic and political conditions in the country. They would like to express themselves peacefully to the authorities as the government appears lackadaisical in its approach to those issues.

Although the first respondent does not have the power and authority to ban a demonstration, he suffers the misconception of thinking that the Public Order and Security Act

[Chapter 11:17] clothes him with such powers. In addition, no sound reason has been advanced by the first respondent for refusing to sanction the march as whatever problems the police may have encountered with previous demonstrations have nothing to do with the applicant whose gatherings and marches in the past have always been peaceful and well managed. This is particularly so as the first respondent does not even allege that the march being organized will not be peaceful.

The respondents have opposed the application. In his opposing affidavit Fungai Dengu who is the first respondent took the point that the convener did not give adequate notice to the regulating authority in terms of s25(1) of the Public Order and Security Act [Chapter 11:17] and failed to attend a consultative meeting which was called in terms of s26(3) of that Act. After the banning of the march the convener should have appealed to a magistrate in terms of s27B of the Act.

On the merits Dengu asserts that he has power to prohibit the demonstration in terms of the Act and does not have to cite any section of the Act to do so. There is a possibility that those who are perpetrating violence at the moment, which he did not particularise, may hijack the planned demonstration and carry out violent activities as “the situation on the ground has not returned to normal.” He did not elaborate.

It would seem like we are having to plough through ground that has been traversed before. As long as the re-alignment of laws to the new constitution continues to be undertaken at a snail’s pace we will continue to have misconceptions being exhibited in the opposing papers of the respondent. It however does not detract from the premise that the constitution is the supreme law of the land. In terms of s2(1) of the constitution:

“This constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”

The moment the constitution came into effect its provisions relating to the protection of freedoms contained in chapter 4 overrode any other law tending to stifle the enjoyment of those freedoms. I have already set out above the freedom to demonstrate expressed in s59 of the constitution which is one of the freedoms all state agencies are enjoined to promote and protect.

The respondents are relying on the provisions of an Act of Parliament ostensibly giving the regulating authority power to prohibit a public demonstration. It is an Act of Parliament

which is subservient to the constitution and cannot possibly override the constitutional provision according the applicant the freedom to demonstrate only qualified to the extent that it should be peaceful.

The allegations that the demonstration may turn violent are speculative. In any event, life is always fraught with dangers and risks. A person who believes that in order to prevent such dangers and risks you to have to ban certain conduct, might as well stop living. It is the duty of the police to monitor the enjoyment of rights and freedoms by citizens and when they observe a violation of the law, to then act. You cannot prohibit citizens from enjoying their freedoms because you want your job to be easy.

I am satisfied that the applicant has made out a case for the relief sought. I will only add that the police should provide adequate security and escort during the demonstration.

In the result, I grant provisional order in terms of the amended draft order.

T. J. Mabhikwa and partners, applicant's legal practitioners
Civil Division, Attorney General's Office, respondents' legal practitioners