

SEXUAL RIGHTS CENTRE

Versus

**OFFICER COMMANDING
BULAWAYO CENTRE DISTRICT N.O**

And

COMMISSIONER-GENERAL OF POLICE N.O

And

MINISTER OF HOME AFFAIRS N.O

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 JUNE & 6 JULY 2017

Court Application

M. Ncube for the applicant
L. Musika for the respondents
C. Dube-Banda amicus curiae

MAKONESE J: This is an application brought in terms of section 85 (1) (a) (c) and (d) as read with section 171 (1) (c) of the Constitution of Zimbabwe (Amendment No. 20), 2013. The applicant is a human rights organisation representing the interests of those whose objective it is to promote and encourage openness and tolerance, to address stigma and discrimination affecting vulnerable marginalized, women, children and men. Its stated mandate as enshrined in its constitution is to ensure that the vulnerable and marginalized persons are made aware of their rights under the law and are able to access and defend these rights.

In its application, applicant seeks the following relief:

“It is ordered that:

1. The prohibition of the applicant’s march by 1st respondent was in violation of the applicant’s rights to march as provided for in terms of sections 58 and 59 of the Constitution of Zimbabwe (No. 20) Act, 2013.

2. It is declared that 1st respondent's decision to refuse the commemorative march by applicant's members was unlawful as it breached the Constitution Amendment (No 20) Act, 2013 and the provisions of the Public Order and Security Act.
3. The decision of the 1st respondent in refusing to sanction the commemorative march organised by the SRC be and is hereby set aside.
4. The respondent or any person acting on their behalf be and are hereby directed not to interfere with the applicant's commemorations in future.
5. The respondents, jointly and severally, one paying the other to be absolved, be ordered to pay the costs of suit of this application."

This application is opposed broadly on the grounds that applicant's right to hold a peaceful march should be limited, and refused in the interests of morality. Before dealing with the extensive legal issues that arise in this application it is necessary to set out a brief background regarding the origins of this commemorative march on the International Day to End Violence Against Sex Workers. It is also necessary to explore the legal issues that relate to the right to demonstrate as provided under sections 58 and 59 of the Constitution.

Background

The International Day to End Violence Against Sex Workers is observed annually on December 17 by sex workers, their advocates, friends, families and allies in cities around the world. Originally conceived as a memorial and vigil for the victims of the Green River killer in Seattle, Washington in the United States, it has evolved into an annual event. It calls attention to hate crimes committed against sex workers worldwide, as well as the need to remove the social stigma and discrimination that have contributed to violence against sex workers. Sex worker activists also state that custom and prohibitionist laws perpetuate such violence.

On 11 December 2015, the applicant, the Sexual Rights Centre, a national human rights organisation based in Bulawayo addressed a letter to the Officer Commanding Police, Bulawayo Province requesting clearance to conduct a peaceful march on 17 December 2015 in commemoration of the International Day to End Violence Against Sex Workers. Applicants intimated in the same letter that as an organisation working closely with sex workers and in the light of recent violent attacks on sex workers, they sought to raise awareness on violence against women, especially those working as sex workers. The 1st respondent flatly declined to sanction

the peaceful march in a letter dated 14 December 2015. In the brief response 1st respondent stated that:

“I regret to inform you that this office cannot sanction the event due to the following reason:

Sex workers (prostitution) is illegal in the country hence the commemoration will not be sanctioned.”

The refusal to sanction the peaceful march by 1st respondent triggered a swift and sharp response from the applicant, responding in writing, raising *inter alia*, the following issues:

“We wish to draw your attention to the following issues:

- (a) there is no law that gives your office power to prohibit a procession in the manner you did. As the regulating authority, all your actions must be guided by the Public Order and Security Act, in particular sections 26 and 27, i.e. your concern should be on issues only related to public order.*
- (b) in addition, it is incorrect to say that prostitution is illegal. There was a specific provision related to criminalization of sex work (prostitution) as provided in the Criminal Law (Codification & Reform) Act, in particular, sections 81 to 87. It is inconceivable that those participating in the procession will violate any of the provisions, ranging from soliciting to allowing their children to become prostitutes ... ”*

According to the applicants, the respondents refused them permission to demonstrate on the grounds that sex work is illegal in this country. Sex work or prostitution *per se* is not a crime in Zimbabwe. In my view, the police erred in purporting to refuse to sanction the demonstration or peaceful march for the reasons they gave. The police clearly acted outside the law in purporting to limit the applicant’s rights in violation of the provisions of section 58 (1) and 59 of the Constitution. The Criminal Law (Codification and Reform) Act (Chapter 9:23) sets out the crimes that are committed that relate to soliciting, procuring for prostitution, coercing or inducing persons for sexual acts, detaining persons for purposes of sexual conduct, allowing young persons to engage in prostitution. The offences are listed in sections 81 to 87. The police were under the mistaken impression that they could prohibit the proposed demonstration, albeit, for the wrong reasons. This does not mean, however that the police should fold their arms in the

face of a demonstration that may have the potential to violate the laws of the country or in furtherance of public immorality.

The police may indeed approach the courts to seek an order for the prohibition of the proposed demonstration. This is a basic and elementary requirement of the law. What the police should not do is to take the law into their own hands. The police cannot lawfully prohibit or seek to limit the exercise of a fundamental right provided under the Constitution.

Jurisdiction to hear the matter

It is my view that this court does have jurisdiction to hear and determine this application. Section 85 of the Constitution provides as follows:-

- “s85 (1) Any of the following persons namely-
- (a) any person acting in their own interests;
 - (b) any person acting on behalf of another person 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 interests;
 - (e) any association acting in the interests of its members,
is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this chapter has been, is being or is likely to be infringed, and the court may grant appropriate relief, indulging a declaration of rights and an award of compensation.”

In section 171 of the Constitution it is provided that:

- “1. The High Court –
- (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe.
 - (b) ...
 - (c) May decide constitutional matters except those that only the Constitutional Court may decide ...”

This court is clearly clothed with jurisdiction to entertain and determine this application.

Whether the applicant is entitled to the relief sought

According to the official website of the World Health Organisation, sex work is defined as the provision of sexual services for money or goods. Sex workers are men, women and transgendered people who receive money or goods in exchange of sexual services. Meriam Webster, defines a sex worker as a person whose work involves sexually explicit behaviour. Sexually explicit conduct is described as:

“actual or stimulated sexual intercourse, including genital – genital, oral – genital, and – genital, or oral – oral whether between persons of the same or opposite sex. Having defined what sex workers trade in and engage in, it is essential to point out from the outset that section 59 of the Constitution confers a right on every person to engage in peaceful protests. Sex workers are persons who enjoy the basic freedoms provided under this section. The applicant clearly articulates that it represents the interests of sex workers. The issue that only arises for serious consideration, is to what extent these rights and freedoms are to be exercised. This is what is usually referred as limitation of rights. In section 86 of the Constitution it is provided as follows:

86. (1) The fundamental rights and freedoms set out in this chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons (my emphasis)
- (2) The fundamental rights and freedoms set out in this chapter may be limited only 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 based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors.
- (a) the nature of the right or freedom concerned;
- (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public “health, regional or town planning or the general public interests.” (emphasis mine)

It is my view that a law that limits a right infringes the enjoyment of that right. The infringement will not be unconstitutional if it occurs for a reason that is acceptable as a justification for the infringement of such right in an open and democratic society based on human dignity, equality and freedom. Where the limitation can be justified in accordance with the criteria set out in section 86 (1) and (2) it will be constitutionally valid. The limitation must serve a purpose that most people would regard as compellingly important. In terms of the

limitation clause, rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the values that animate the constitutional project.

The Supreme Court of Zimbabwe *Re: Munhuweso & Ors* 1994 (1) ZLR 49 (S),

The court held that:

“Historically, the use of public assembly and procession has proved itself indespicable as a technique for the propagation of unpopular minority views, from the demonstration of the suffragettes in the United Kingdom to the Civil Rights movement in the United States. Important issues were brought to the public attention through these movements in a manner which could not be ignored.”

The inquiry therefore is whether the infringement can be justified as a permissible limitation of the right. The “burden of justification” to prove that the limitation is justifiable in terms of section 86 (1) and (2) of the Constitution is on the respondents. Even if the respondents, as in this case, make no attempt to discharge the burden of justification, the court must nonetheless consider the possibility that a limitation of the right is justifiable. This is the approach adopted by the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equity v Minister of Justice* 1999 (1) SA 6 (CC). Despite the fact that the Minister of Justice had indicated that he would abide by the decision of the court and did not attempt to defend the laws that were in question, the court *meromuto* and at considerable length considered whether a limitation argument could be made in favour of the laws of South Africa. I propose to adopt that approach in this matter and consider whether there is any justifiable ground to limit the right enshrined in section 58 (1) and 59 of the Constitution.

The question whether an infringement of a right is a legitimate limitation of that right is a matter of evidence. Appropriate evidence must be placed before the court to justify the limitation in accordance with the criteria laid down in section 86 of the Constitution. The court cannot make that determination in the abstract. In the case before me the court will have to consider the case only the basis of the applicant’s version. The aim of the proposed peaceful marches are to promote and encourage openness and tolerance to address stigma and discrimination affecting vulnerable and marginalized women, children and men. Applicant notes

that may sex workers in Zimbabwe and around the world are victims of abuse, harassment, stigma and violence. In order to create awareness about their vulnerability, highlight the ongoing attack on sex workers, and condemning violence against women, applicant decided to convene a march on the 17th December 2015 to commemorate the International Day to End Violence Against Sex Workers. The march was organised by the Sexual Rights Centre in Bulawayo.

The police refused to sanction the proposed march on the basis that “sex workers is (sic) illegal in the country hence the commemoration will not be sanctioned”. Applicant’s case is that participating in a march that advocates for the rights and protection of sex workers against abuse and violence is not a crime and is not unlawful. The march does not harm anyone and is not intended to offend public morals. To the contrary, it is argued by the applicants, that the march seeks peacefully to create awareness that abuse and violence are the lived reality of many sex workers. The purpose of the march is to promote and advocate for the safety of sex workers. The stated purpose of the march is to promote and advocate for the safety of sex workers, who must be afforded all the usual rights to engage in peaceful protests as enshrined in the Constitution.

Public morality

The fundamental rights and freedoms may be limited when it is necessary in the interests of public morality. What is public morality? What is sex work or prostitution? I have already defined sex work as the provision of sexual services for a fee. Sex workers are women, men and transgendered people who receive money or goods in exchange for sexual services, and who consciously define those activities as income generating even if they do not consider sex work as their occupation. Prostitution is the act of having sex in exchange for money, the use of a skill or ability in a way that some consider inappropriate. The undeniable fact is that these services are sought for mostly by adult males or females. Sex workers operate on the basis of mutual consent, usually between two consenting adults. The existence of sex workers is a reality not only in this country but worldwide. The question that arises is do sex workers deserve equal protection under the law? The conservative approach is that sexual work is an immoral

occupation. Morality means those principles concerning the distinction between right and wrong or good and bad behaviour.

In a modern state, where democracy, openness and the rule of law thrives, all persons of whatever description deserve equal treatment under the law. The refusal by the police to sanction the march was not based on the possibility that the procession would cause damage, violence or cause public disturbance, which are the criteria upon which demonstrations may be prohibited in terms of the law. The basis for the refusal was not sound at law.

I come to the conclusion that the limitation of a fundamental right based on public morality must be examined carefully to ascertain to what extent the inroad is permissible in our constitutional scheme. In our society violence against women and the abuse of young and vulnerable children is a matter of public concern. It seems to me odd that violence against women and young children is roundly condemned by the majority of activists and yet the same or similar violence against prostitutes is not given much attention. Those that commit any acts of violence against women face the full wrath of the law, and yet violence against sex workers, most of whom are women is not given the same prominence and protection under the law. The Constitution under section 56 (1) explicitly provides that:

“All persons are equal before the law and have the right to equal protection and benefit of the law.

Under section 56 (3) it is provided thus:

“Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.”

Disposition

Only a law of general application can validly limit a right in the Bill of Rights. This is the rule of law requirement. This is the minimum requirement for the limitation of a right. The

first requirement is that the limitation must be authorized by law, and the law must be of general application. The practical effect of the phrase “authorized by law” is illustrated in the South African case of *August v Electoral Commission* 1999 (3) SA 1 (CC). In this matter the South African Constitutional Court considered the validity of the Independent Electoral Commission’s failure to take steps to allow prisoners to register and vote in the 1999 general election. The court held that in view of the fact that Parliament, being the only organ with the power to disenfranchise prisoners of their right to vote in terms of the law of general application, had not sought to limit this right, neither the Independent Electoral Commission nor the court has the power to assume this role. In the absence of a disqualifying legislative provision, it was not possible for the respondents to seek to justify the limitation of prisoners’ rights in terms of s.36 of the South African Constitution as there was no law of general application upon which they could rely on. As a result, the court held that prisoners retained their constitutional right to vote and the Independent Electoral Commission was obliged to make all necessary and reasonable arrangements to enable them to vote.

In the instant case the limitation of applicants’ right is authorized by the Constitution of Zimbabwe under section 86 (2) (b). In my view, the limitation based on public morality passes the threshold of the phrase “authorized by law”. The second component of the rule of law relates to the character or quality of the law that authorizes a particular action. The law must be of general application. This requirement has two components to it, “form and substance”. As to form, the law must be clear, accessible by those affected and their rights and obligations must be ascertainable. In relation to substance, the law must apply impersonally, it must apply to all and it must not be arbitrary in its application.

Prostitutes and prostitution are associated with immorality. Conduct associated with prostitution is illegal. Soliciting, living off or facilitating prostitution and procuring for the purpose of prostitution is criminalized under sections 81, 82 and 83 of the Criminal Code. Section 86 (2) (b) of the Constitution on “public morality” as read with sections 61, 82 and 83 of the Criminal Code is sufficiently clear, accessible and precise and it applies equally to all and is not arbitrary in its application.

I would readily accept that it has been established that the rights protected by section 58 (1) and 59 have been limited, however, in my view the limitation constitutes a legitimate limitation of rights. The nature of the right is a fundamental right, however the right is non-derogable. To allow prostitutes to parade to all and sundry and invite participants to their trade is immoral. Whilst prostitution *per se* is not a crime, it is the moral turpitude of prostitution that is an issue in this matter. The fact that prostitution is not a crime does not render a demonstration or march in furtherance of the objectives of prostitution not morally reprehensible. In *S v Jordan & Ors* 200 (1) SA (T) 801, the court dismissed the argument that if prostitution is not a crime then no activity involving prostitution may constitute an offence. In that matter the appellants, brothel owners, a brothel employee and a prostitute or sex worker were convicted in the Magistrates' Court of contravening the Sexual Offences Act 1957. They appealed to the High Court, arguing that the relevant provisions were unconstitutional. The High Court found that the section of the Act which criminalises carnal intercourse for reward (the prostitution provision) was unconstitutional but dismissed the appeal in respect of the sections of the Act which criminalise keeping or managing brothel (the brothel provisions). The appellants appealed to the Constitutional Court of South Africa arguing that the brothel provisions should be found to be unconstitutional. They also argued that the High Court order invalidating the prostitution provision should be confirmed. The Constitutional Court unanimously upheld the High Court's finding that the brothel provisions were valid. All the judges concluded that the prostitution provisions do not infringe the rights on human dignity and economic activity and that it does limit the right to privacy, but that such limitation is justifiable. The judges differed on the question whether the prostitution provision constituted unfair gender discrimination.

I now turn to consider the business of prostitution and trade in sexual activities and the moral values that underpin our constitutional order. The court does not operate in a vacuum and has to be sensitive to the acceptable moral standards of the society it operates in. It cannot be said that the sex industry is something that can be glorified or celebrated even in an open and democratic society. Even if, thousands, if not more sexual workers ply their trade for the purpose of providing sustenance for their families, societal values and expectations do not promote prostitution as a legitimate means of earning a living. It is not a trade the young

generation are encouraged to emulate. It is a trade devoid of moral values and is demeaning. The mere fact that a price tag is placed in relation to sexual services lowers and demeans those that engage in it. The normative values in our jurisdiction do not sit well with the promotion and glorification of the sex trade and what it represents.

By engaging in commercial sex work prostitutes accept the risks involved in the trade. Those engaged in the commercial sex trade knowingly lower their moral standing in the eyes of society. By using their bodies as commodities in the market place, sex workers undermine their moral standing to the extent that the dignity of prostitutes is diminished. The diminution arises from the character of prostitution itself. Further, the moral depravity of prostitution is associated with social ills, and is degrading to women. The nature of the trade is associated with violent abuse of prostitutes by “clients” and encourages the international trafficking in women and leads to child prostitution. The risk of disease and the spread of sexually transmitted infections, and the exposure to HIV and AIDS is a reality sex workers have to live and contend with. There is a close relationship between drug and substance abuse and prostitution to the extent that in most cities around the globe there are what are known as “red light districts” where sex workers, drug peddlers and such others persons usually operate from. In seeking to raise awareness relating to violence committed against sex workers, the applicants may, inadvertently promote and encourage prostitution. Violence against women of whatever class or description is heavily protected in our jurisdiction. There are sufficient safeguards in our law against those that commit acts of violence against women, including sex workers. The assault, murder, rape and physical abuse of women, children and men is punishable without discrimination on the basis of the class or sexual orientation of the victim. In my view, the furtherance of sex work by holding commemorative marches such as the one proposed by applicants further stigmatizes sex workers. It places them in a class. A class that commercializes the sale of sexual services for a fee. If this court allows prostitutes to parade, promote and glorify their trade, other groups of likeminded persons will be encouraged to promote perverse acts. A court of law cannot sanction such an absurdity. This court must ultimately assess and consider the impact and consequences of the decision that it makes. I am of the view that the enjoyment of the fundamental rights under

section 58 and 59 of the Constitution must recede and give way to the values of decency, human dignity and morality.

Before I conclude I must express my gratitude and appreciation to the invaluable assistance rendered by *MrDube-Banda*, who prepared and filed extensive submissions, as *amicuscuriae*. His submissions assisted in bringing out the issues that are central to the determination of this case. *Mr M. Ncube* who represents the applicant equally filed detailed and helpful submissions on the matter and he must be applauded for his submissions.

In conclusion, therefore, for the reasons I have already laid out in this judgment I am persuaded that that this court cannot ignore the moral consensus of the society. If the law is out of touch with the moral consensus of society, the law is brought into contempt and results in an absurdity. Morality broadly refers to the morality actually accepted and shared by a given social group. The law must reflect and express the moral wishes of that community.

It is my finding therefore, that there ought to be a limitation of the fundamental right to demonstrate based on public morality as provided for under section 86 (2) (b) of the Constitution.

For the foregoing reasons, I hereby dismiss the application with costs.

Phulu & Ncube, applicant's legal practitioners
Prosecutor General's Office, respondents' legal practitioners